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# Is the Constitution Laissez-Faire?

## THE FRAMERS, ORIGINAL MEANING, AND THE MARKET

*Stephen M. Feldman*<sup>†</sup>

### INTRODUCTION

Did the Constitution create a laissez-faire government-market system? This question is crucial to constitutional jurisprudence today. Conservatives often assert that originalism is the best (or only) method of legitimate constitutional interpretation. Originalism supposedly requires judges to uphold either the original public meaning of the Constitution or the Framers' intentions.<sup>1</sup> On the Roberts Court, Justices Scalia and Thomas are avowed originalists, though the other conservative Justices are not averse to invoking originalist arguments or joining originalist opinions.<sup>2</sup> Empirical studies show that the Roberts Court, because of its conservatives, is the most pro-business Court since World War II.<sup>3</sup> Both of these judicial

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<sup>†</sup> Jerry W. House/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming. This article is derived from papers I presented at the 2013 and 2014 Yale Law School Freedom of Expression Scholars Conferences, the 2013 University of Virginia Constitutional History Conference, and the 2014 Law and Society Conference. I thank the workshop participants at these conferences for their suggestions and am especially grateful to Vincent Blasi, Mel Urofsky, and Thomas Healy for their detailed comments on my papers. I also appreciate the comments received from Alex Tsesis, Mark Tushnet, Richard Delgado, and Evan Zoldan.

<sup>1</sup> Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611-12, 620 (1999); John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007). Focusing on the original public meaning is referred to as "new originalism," while focusing on the Framers' intentions is "old originalism." Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 285 (2014). In many cases, though, including in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Justices do not clearly identify which form of originalism is being followed.

<sup>2</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576-626 (2008) (relying on originalism to interpret the Second Amendment); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating for originalism).

<sup>3</sup> See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (quantitative study of all postwar business-related cases); see also MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 187-214 (2013) (evaluating evidence of the Roberts Court's pro-business bias); Corey Ciocchetti, *The Constitution, the Roberts Court, and Business: The Significant Business Impact of the 2011-2012 Supreme Court Term*, 4 WM. & MARY BUS. L. REV. 385 (2013) (emphasizing

characteristics—originalism and a pro-business orientation—were on display in *Citizens United v. FEC*.<sup>4</sup> In a five-to-four decision, the conservative bloc invalidated statutory limits on corporate (and union) spending for political campaign advertisements.<sup>5</sup> The majority opinion concluded with an originalist flourish: “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.”<sup>6</sup> *Citizens United* is not unique. In case after case, the conservative Justices act like market fundamentalists, protecting corporations and the marketplace from government regulation even in free-expression cases like *Citizens United*.<sup>7</sup>

Numerous scholars support the Court’s constitutional approach. Renowned libertarian Richard Epstein recently published an exhaustive defense of “the original classical liberal constitutional order,” as he describes it.<sup>8</sup> Following a “guarded originalist view,” Epstein argues that “classical liberal theory” animated the drafting of the Constitution.<sup>9</sup> That is, according to Epstein, the Framers drew on classical liberal theorists such as John Locke and Adam Smith and thus made a normative commitment to “the twin pillars of private property and limited government.”<sup>10</sup> When Epstein says “limited government,” though, he means minimal government, because government, to him, is no more than “a necessary evil.”<sup>11</sup> Epstein maintains that the

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how the Roberts Court strongly supported business in the 2011-2012 Term). For general rankings of the Supreme Court Justices based on political ideology, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 106-16 (2013), which includes comparisons with the Martin-Quinn scores (accounting for changes over time), and the Segal-Cover scores (quantifying Court nominees’ perceived political ideologies at the time of appointment). See *Martin Quinn-Scores*, U.C. BERKELEY L., <http://mqscores.berkeley.edu/> [<http://perma.cc/2BTK-8DFC>] (last visited Dec. 16, 2015); *Segal-Cover Scores*, STONY BROOK U., <http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf> [<http://perma.cc/DU5R-YLZ9>] (last visited Dec. 16, 2015) (data drawn from Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557-65 (1989), updated in LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005)).

<sup>4</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 353.

<sup>7</sup> *E.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1426 (2013) (limiting class actions against corporations); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (invalidating restriction on corporate use of health data); *Citizens United*, 558 U.S. 310 (invalidating restrictions on corporate campaign expenditures); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (limiting punitive damage awards against corporations); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007) (restricting sexual discrimination lawsuits against corporations); see FRED BLOCK & MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM* 3 (2014) (explaining market fundamentalism).

<sup>8</sup> RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 6 (2014).

<sup>9</sup> *Id.* at 45.

<sup>10</sup> *Id.* at ix; see *id.* at 3, 7, 582 (invoking Locke and Smith).

<sup>11</sup> *Id.* at 6.

“Constitution embraces a theory of laissez-faire,” under which the government can perform functions such as maintaining peace and defending against foreign enemies, but little else.<sup>12</sup> The predominant purpose of the constitutional system, Epstein insists, is to protect “competitive markets”<sup>13</sup> and the individual’s right “to enter and exit” those markets.<sup>14</sup> Economic competition is the “highest good,”<sup>15</sup> and “unregulated market forces” engender “desirable social equilibrium.”<sup>16</sup>

The conservative Justices and scholars like Epstein are wrong. Although one may try to construct a philosophical argument that would justify a laissez-faire or libertarian political-economic system,<sup>17</sup> history does not suggest that our Constitution created such a system. To the contrary, an examination of the historical evidence reveals that the crux of the Framers’ constitutional scheme was balance: balance between a private sphere and a public sphere—that is, between economic markets and government action.<sup>18</sup>

This article explores that historical evidence. Part I explains the political context of the Constitutional Convention and ties that context to the Framers’ twin goals of protecting liberty and pursuing the common good. It considers the operation of the state governments during the 1780s and how the flaws in

<sup>12</sup> *Id.* at 582. Government should not intrude into individual decisions as to “what property to own, food to buy, jobs to offer or accept, or wages to pay or receive.” *Id.* at 25.

<sup>13</sup> *Id.* at 37.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 43.

<sup>16</sup> *Id.* at 38. Randy Barnett is another constitutional law scholar who maintains that the Framers enshrined a libertarian approach in the Constitution. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004); RANDY BARNETT, *THE STRUCTURE OF LIBERTY* (1998).

<sup>17</sup> *E.g.*, ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (presenting a philosophical defense of libertarianism).

<sup>18</sup> Throughout this article, I will, for the most part, use the terms “Framer” and “delegate” interchangeably to refer to those present at the Constitutional Convention. Although 55 delegates participated at some point during the Convention, only 39 would sign. Several delegates left early because they did not like the Convention’s general direction (toward a new Constitution). Of the delegates who contributed heavily to the discussions, only Edmund Randolph and George Mason of Virginia and Elbridge Gerry of Massachusetts refused to sign. RICHARD BEEMAN, *PLAIN, HONEST MEN* 359-68 (2009). Additional helpful sources on the founding include the following: BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); PAULINE MAIER, *RATIFICATION* (2010); FORREST McDONALD, *NOVUS ORDO SECLORUM* (1985); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT* (1975); *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* (Ben: Perley Poore ed., 2d ed. 1878) [hereinafter POORE]; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) [hereinafter CREATION]; GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991) [hereinafter RADICALISM]. For the most complete record of the Constitutional Convention, see *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1966 reprint of 1937 rev. ed.) [hereinafter FARRAND].

state governments tempered the Framers' republican idealism with a more pragmatic approach to politics. Part II, emphasizing one side of the Framers' balance, focuses on their commitment to the principles of republican-democratic government. Part III, emphasizing the other side of the balance, discusses the Framers' strong concern with protecting property rights in light of their contemporaneous understanding of the market.<sup>19</sup> Discussions of slavery at the Constitutional Convention are particularly revealing in this regard. Part IV examines the Framers' goal of maintaining a balance between government power and individual rights—between public and private spheres. To elaborate on how the Framers understood the relationship between the government and the marketplace, a discussion of Alexander Hamilton's *Report on Manufactures* is useful.<sup>20</sup> And given how the laissez-faire view of the Constitution has led to decisions such as *Citizens United*, Part V focuses on the freedoms of speech and press,<sup>21</sup> including the Framers' understanding of free expression and the subsequent adoption of the First Amendment. In conclusion, this article asks whether we should praise or blame the Framers for their treatment of government-market relations.

Two caveats are in order at the outset. First, as should be evident in this article, I believe that originalist evidence—historical materials that illuminate the Founders' intentions and original public meanings—can and should inform constitutional interpretation. But contrary to the claims of many originalists, those historical materials cannot provide fixed and objective constitutional meanings.<sup>22</sup> Second, no evidence suggests that the Constitution's original public meaning differed from the Framers'

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<sup>19</sup> Helpful sources discussing economic development in general (or in the United States) include the following: JOHN KENNETH GALBRAITH, *A HISTORY OF ECONOMICS* (1987); ROBERT HEILBRONER & WILLIAM MILBERG, *THE MAKING OF ECONOMIC SOCIETY* (10th ed. 1998); ROBERT HEILBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA: 1600 TO PRESENT* (4th ed. 1999); RONALD E. SEAVOY, *AN ECONOMIC HISTORY OF THE UNITED STATES FROM 1607 TO THE PRESENT* (2006). More general histories that contain helpful discussions of economic developments include the following: LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005); KERMIT L. HALL, *THE MAGIC MIRROR* (1989); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

<sup>20</sup> Alexander Hamilton, *Report on Manufactures*, 3 ANNALS OF CONG. 971 (Joseph Gales ed., 1834) (Communicated to the House of Representatives, Dec. 5, 1791).

<sup>21</sup> See STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA* 50-51 (2008) [hereinafter *FREE EXPRESSION*] (describing in detail the interrelated historical developments of free expression and democracy).

<sup>22</sup> Feldman, *supra* note 1. Lawrence Solum refers approvingly to “the fixation thesis” as a key originalist point. Lawrence B. Solum, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 4 (2011); e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004). For a more complex conceptualization of originalism, see JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

intentions vis-à-vis government-market relations. Thus, insofar as there might sometimes be a distinction between old originalism (emphasizing Framers' intent) and new originalism (emphasizing public meaning), it is irrelevant with regard to the crucial issue of laissez-faire economics.<sup>23</sup> As this article explains, the United States had not yet developed a capitalist economy at the time of the framing and ratification. Thus, unless the majority of Americans were economic visionaries who foretold a capitalist future, the Framers' understanding of the economic marketplace would have been at least as advanced as that of their contemporaries. In other words, the original public meaning of government-market relations, as understood from the perspective of the American majority, would not have been any more advanced than the Framers' understanding of government-market relations.

## I. EXPERIENCE DEFEATS IDEALISM

### A. *The Corruption of State Governments in the 1780s*

American state governments of the 1780s were built on two interrelated premises. First, Americans believed themselves to be especially virtuous and fully committed to liberty, equality, and republican government.<sup>24</sup> They were, in other words, an exceptional people.<sup>25</sup> Second, if the people were virtuous, and the state legislatures represented the people, then government should inevitably pursue the common good. The early state constitutions embodied this republican enthusiasm.

The experiences of the 1780s, however, led many political elites—men like James Wilson, Alexander Hamilton, and James Madison—to question these premises. From their perspective, demagogues had won far too many state elections. And all too often, democratic majorities and their officials had used government power to satisfy their own interests, thus contravening the common good and frequently threatening the property rights of others.<sup>26</sup> That was the lesson of Shays' Rebellion in Massachusetts, where indebted landowners sought government refuge for money

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<sup>23</sup> See Feldman, *supra* note 1, at 285-86 (distinguishing old originalism from new originalism).

<sup>24</sup> In the civic republican tradition, virtue can be understood "as a quality of the personality." POCKOCK, *supra* note 18, at 484.

<sup>25</sup> See SACVAN BERCOVITCH, *THE PURITAN ORIGINS OF THE AMERICAN SELF* (1975) (tracing the tradition of American exceptionalism to the Puritans).

<sup>26</sup> CREATION, *supra* note 18, at 409-13; see, e.g., James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), in 3 FARRAND, *supra* note 18, at 138, 141-42, appendix A (lamenting "licentiousness" of citizens and government problems). I have modified some quoted passages from the Convention notes purely for stylistic purposes. For instance, I spell out abbreviations.

owed.<sup>27</sup> After a state militia had put down the armed rebellion, the debtors nonetheless elected enough new legislators that the Massachusetts assembly enacted many of the debtors' desired reforms. John Jay wrote to George Washington: "Private rage for property suppresses public considerations, and personal rather than national interests have become the great objects of attention. Representative bodies will ever be faithful copies of their originals, and generally exhibit a checkered assemblage of virtue and vice, of abilities and weakness."<sup>28</sup>

State government corruption appeared to threaten both republican government, on the one hand, and liberty and property rights, on the other. When individuals and factions pursued their own interests rather than the common good, then the government could take property arbitrarily. Debtor relief laws, such as those at stake in Shays' dispute, appeared to victimize creditors.<sup>29</sup> Moreover, the state and national governments still carried heavy debts from the Revolutionary War. As the ineffective governments could not pay their debts, public securities lost value and public credit vanished.<sup>30</sup> In short, property and other forms of wealth were no longer secure. Without wise or virtuous government support and protection, the economy would fail alongside the government.<sup>31</sup> From the Framers' viewpoint, history proved that every society eventually decayed. If the delegates to the Constitutional Convention failed to restructure American government, then the United States would prematurely die—or at least, the delegates feared as much. Early at the Constitutional Convention, Edmund Randolph emphasized "the difficulty of the crisis, and the necessity of preventing the fulfillment of the

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<sup>27</sup> GEORGE R. MINOT, *THE HISTORY OF THE INSURRECTIONS, IN MASSACHUSETTS, IN THE YEAR 1786, AND THE REBELLION CONSEQUENT THEREON (1788)*; LEONARD L. RICHARDS, *SHAYS'S REBELLION* (2002); DAVID P. SZATMARY, *SHAYS' REBELLION* (1980).

<sup>28</sup> Letter from John Jay to George Washington (June 27, 1786), *reprinted in* 1 *GREAT ISSUES IN AMERICAN HISTORY* 80, 81 (Richard Hofstadter ed., 1958) [hereinafter *GREAT ISSUES*]; *see* BEEMAN, *supra* note 18, at 16-18 (describing perceptions of Shays' Rebellion); CREATION, *supra* note 18, at 410-13 (discussing Shays' Rebellion).

<sup>29</sup> McDONALD, *supra* note 18, at 177-79; NEDELSKY, *supra* note 18, at 30; CREATION, *supra* note 18, at 403-25.

<sup>30</sup> McDONALD, *supra* note 18, at 94-96, 138-42; NEDELSKY, *supra* note 18, at 125-26. Continuing disagreement about the best means for handling state and national debts would provoke political divisions in the early 1790s. JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC* 34-38 (1993).

<sup>31</sup> *See* THE FEDERALIST No. 44 (James Madison) (tying limits on state government powers to economic concerns) (note: all citations to *The Federalist Papers* are to the Project Gutenberg e-text of *The Federalist Papers*, located at <http://www.gutenberg.org/cache/epub/18/pg18-images.html> [<http://perma.cc/AV8A-2DFK>]).

prophecies of the American downfall.”<sup>32</sup> The nation had reached a crucial juncture.<sup>33</sup>

### B. *The Framers’ Pragmatic Response to Experience*

In April 1787, a month before the Constitutional Convention would begin in Philadelphia, Madison wrote a memorandum, *Vices of the Political System of the United States*, which explained, point by point, the problems that had arisen under the Articles of Confederation—with its provisions creating a weak national government and relatively strong state governments.<sup>34</sup> Over and over, Madison emphasized what had been “found by experience” or “proved” by “fact and experience” in the operation of the state governments—experiences that he contrasted with the utopian ideals of “Republican Theory.”<sup>35</sup> The drafters of the Articles, because of their “inexperience,” reliance on civic republican ideals, and “enthusiastic virtue,” had placed “mistaken confidence” in the “good faith [and] honor” of state legislatures.<sup>36</sup> But through the 1780s, state legislatures had produced “vicious legislation” and “injustice.”<sup>37</sup> Too many citizens and elected state officials had pursued “base and selfish measures,” even though they often “masked [such measures with] pretexts of public good.”<sup>38</sup> Madison, for instance, specifically criticized Rhode Island for printing paper money without considering the common good.<sup>39</sup>

Madison also largely composed the so-called Virginia Plan, which would provide the initial framework for further discussions at the Constitutional Convention.<sup>40</sup> When Randolph—a more polished speaker than Madison—introduced the Plan at the outset of the Convention, he emphasized the events of the 1780s,

<sup>32</sup> 1 FARRAND, *supra* note 18, at 18 (May 29, 1787).

<sup>33</sup> See *id.* at 255 (June 16, 1787) (Randolph); *id.* at 282-83, 291 (June 18, 1787) (Hamilton); BEEMAN, *supra* note 18, at 3-21 (explaining the Framers’ perception of a national crisis); STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 61-65 (2000) (discussing Framers’ premodern or cyclical view of history); GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 38 (1970) (discussing Founders who feared decay); CREATION, *supra* note 18, at 413-25 (describing sense of crisis).

<sup>34</sup> JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), reprinted in JAMES MADISON: WRITINGS 69 (1999) [hereinafter MADISON, WRITINGS]; see BEEMAN, *supra* note 18, at 27-29.

<sup>35</sup> MADISON, WRITINGS, *supra* note 34, at 71, 76-77.

<sup>36</sup> *Id.* at 72.

<sup>37</sup> *Id.* at 75.

<sup>38</sup> *Id.* at 76.

<sup>39</sup> *Id.* at 77.

<sup>40</sup> JAMES MADISON, THE VIRGINIA PLAN (1787), reprinted in MADISON, WRITINGS, *supra* note 34, at 89.

particularly how “[n]one of the [state] constitutions have provided sufficient checks” against the democratic excesses of insufficiently virtuous citizens.<sup>41</sup> Then, throughout the rest of the Convention, the delegates repeatedly referred to their experiences in the 1780s. John Dickinson went so far as to proclaim that “[e]xperience must be our only guide,”<sup>42</sup> while Elbridge Gerry admitted that “experience” had demonstrated that he had “been too republican heretofore.”<sup>43</sup> In other words, the delegates were especially wary, as Dickinson put it, of “those multitudes without property & without principle” who might threaten property rights through the democratic process.<sup>44</sup> To be sure, Benjamin Franklin and Gouverneur Morris recognized that the wealthy as well as the poor could form factions bent on government corruption. “[T]he possession of property increased the desire of more property,” Franklin said, and “[s]ome of the greatest rogues he was ever acquainted with, were the richest rogues,” noted Morris.<sup>45</sup> But the unequivocal weight of the delegates’ sentiment was that the poor were the more likely threat.<sup>46</sup>

In sum, the events of the early to mid-1780s played a crucial role in the constitutional framing. Political leaders, including future delegates to the Constitutional Convention, were disabused of their idealism. The people were not so uniformly virtuous that they would not seek to use government for their own advantages. At the Convention, Hamilton emphasized that utopian conceptions of human nature that depicted people as pristinely virtuous were dangerous. “We must take man as we find him,” Hamilton said.<sup>47</sup> “A reliance on pure patriotism had been the source of many of our errors.”<sup>48</sup> Hamilton, Madison, and the other Framers had become hardheaded realists, pragmatic about politics.<sup>49</sup>

Because of their experience with state governments, the Framers realized the constitutional system needed to protect

<sup>41</sup> 1 FARRAND, *supra* note 18, at 27 (May 29, 1787); *see* BEEMAN, *supra* note 18, at 86-90. Gouverneur Morris stated: “Every man of observation had seen in the democratic branches of the State Legislatures, precipitation,” or in other words, rash or impetuous action. 1 FARRAND, *supra* note 18, at 512 (July 2, 1787).

<sup>42</sup> 2 FARRAND, *supra* note 18, at 278 (Aug. 13, 1787).

<sup>43</sup> 1 *id.* at 48 (May 31, 1787); *see also id.* at 101 (June 4, 1787) (statement of George Mason).

<sup>44</sup> 2 *id.* at 202 (Aug. 7, 1787); *see also id.* at 248 (Aug. 10, 1787) (statement of Charles Pinckney); BEEMAN, *supra* note 18, at 281 (explaining the Framers’ fear).

<sup>45</sup> 2 FARRAND, *supra* note 18, at 249 (Aug. 10, 1787); 1 *id.* at 512 (July 2, 1787) (Morris).

<sup>46</sup> *E.g.*, 1 *id.* at 153-55 (June 7, 1787) (discussing protection of property in relation to the election of legislators); *see* BEEMAN, *supra* note 18, at 281.

<sup>47</sup> 1 FARRAND, *supra* note 18, at 376 (June 22, 1787) (Hamilton).

<sup>48</sup> *Id.*

<sup>49</sup> PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION* 170, 566 (1969).

against efforts to use the government for corrupt purposes.<sup>50</sup> But while the Framers were no longer utopian idealists, they had not become cynics. They did not repudiate the goal of republican government. Madison explained that if the goal of principled government for the common good was jettisoned, if the people and their elected officials could not act virtuously, then “nothing less than the chains of despotism” would be possible.<sup>51</sup> Consequently, the Framers began with a more realistic depiction of human nature—of the citizen-self—and then attempted to build a government based on that foundation. The next Part explores the fruits of their efforts, particularly with regard to republican government and the public sphere.

## II. REPUBLICAN-DEMOCRATIC GOVERNMENT AND THE PUBLIC SPHERE

### A. *The Common Good and the Problem of Factions*

Despite their experience with the states, the Framers unequivocally conceived of American government as republican-democratic.<sup>52</sup> 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.”<sup>53</sup> The Preamble to the Constitution memorialized the government goal of the common good: “We the People” were to “promote the general Welfare.”<sup>54</sup> When citizens or officials used government institutions to pursue their own interests, then the government was corrupt. Groups of like-minded citizens who corrupted the government were deemed factions, whether constituted by a majority or a minority of citizens. In the

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<sup>50</sup> See G. Edward White, *The Political Economy of the Original Constitution*, 35 HARV. J.L. & PUB. POL’Y 61, 69-71, 82 (2012) (emphasizing the numerous constitutional provisions intended to protect private rights).

<sup>51</sup> THE FEDERALIST No. 55 (James Madison) (Project Gutenberg ed., 2004); see MCDONALD, *supra* note 18, 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) (Project Gutenberg ed., 2004).

<sup>52</sup> The Founders themselves did not agree on a precise definition of republican government. STOURZH, *supra* note 33, at 44-45. My definition of republican democracy overlaps but is not identical to some technical definitions of civic republicanism. See RICHARD C. SINOPOLI, THE FOUNDATIONS OF AMERICAN CITIZENSHIP 9-12 (1992) (discussing definitional problems related to civic republicanism).

<sup>53</sup> CREATION, *supra* note 18, at 59; e.g., VIRGINIA BILL OF RIGHTS (1776), *reprinted in* 2 POORE, *supra* note 18, at 1908 (emphasizing government for “the common benefit”). For a detailed discussion of the Constitutional Convention, see BEEMAN, *supra* note 18.

<sup>54</sup> U.S. CONST. pmb1.

*Federalist Number 10*, James Madison described a faction as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>55</sup> But how could a democratic majority constitute a faction? It was possible only because the Framers understood the common good to be objective or, in other words, “out there.”<sup>56</sup> From the Framers’ standpoint, the people’s “true interest[s]” determined the common good, whether or not the people recognized those interests.<sup>57</sup> Thus, one could not merely add together the private interests of the majority of citizens to calculate the common good. In a letter to James Monroe, Madison explained that when a government establishes “the interest of the majority [as] the political standard of right and wrong . . . it is only re-establishing, under another name and a more specious form, force as the measure of right.”<sup>58</sup> By definition, then, a government pursuing “partial interests”<sup>59</sup> or “private passions”<sup>60</sup> rather than the common good was corrupt.

### B. *Selecting Leaders from the Virtuous Elite*

The crucial question for the Framers was how to structure the Constitution and government institutions to engender government for the common good. To a great degree, the Framers found the answer in their conception of the citizen-self. As Alexander Hamilton explained at the Constitutional Convention: “The science of policy is the knowledge of human nature.”<sup>61</sup> The individual citizen-self—the Framers’ self, so to speak—could reason and act virtuously. Virtue was not inherited through bloodlines; there would be no hereditary aristocracy in America.<sup>62</sup> Instead, virtue could be cultivated and learned.<sup>63</sup> Yet

<sup>55</sup> THE FEDERALIST No. 10 (James Madison) (Project Gutenberg ed., 2004); see JAMES MADISON, IN VIRGINIA CONVENTION (June 5, 1788), *reprinted in* THE COMPLETE MADISON: HIS BASIC WRITINGS 46-47 (Saul K. Padover ed., 1953) [hereinafter COMPLETE MADISON] (arguing that majority factions have produced unjust laws).

<sup>56</sup> MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 120 (1987).

<sup>57</sup> 1 FARRAND, *supra* note 18, at 422 (June 26, 1787) (James Madison); THE FEDERALIST No. 1 (Alexander Hamilton); THE FEDERALIST No. 2 (John Jay); THE FEDERALIST No. 6 (Alexander Hamilton); THE FEDERALIST No. 10 (James Madison).

<sup>58</sup> Letter from James Madison, to James Monroe (Oct. 5, 1786), *reprinted in* COMPLETE MADISON, *supra* note 55, at 45.

<sup>59</sup> THE FEDERALIST No. 37 (James Madison) (Project Gutenberg ed., 2004).

<sup>60</sup> THE FEDERALIST No. 6 (Alexander Hamilton) (Project Gutenberg ed., 2004).

<sup>61</sup> 1 FARRAND, *supra* note 18, at 378 (June 22, 1787).

<sup>62</sup> U.S. CONST., art. I, § 9, cl. 8 (“No Title of Nobility shall be granted . . . .”); THE FEDERALIST No. 39 (James Madison).

the Framers had concluded from experience that in many, if not most, circumstances, the average person acts in accordance with passion and interest. The Framers, however, were not only pragmatic realists in their view of human nature—they were also unapologetic elitists. Specifically, the Framers believed in the existence of a *virtuous* elite—which included the Framers themselves—who would pursue the common good in the public sphere even while pursuing their own interests in the private sphere.<sup>64</sup>

So from what portion of society would the virtuous elite come? Unsurprisingly, given that most of them were “men of considerable wealth,” many Framers believed that the virtuous elite would arise mostly from among the wealthiest men.<sup>65</sup> Alexander Hamilton perceived that many people were disinclined to become involved in public affairs in the first place.<sup>66</sup> Indeed, the Framers had good reason to be skeptical of the average American’s knowledge and education regarding national political affairs. The typical American newspaper in 1787 was only four pages long, with more than half of that devoted to classified advertising. Because of the limited communication and transportation technologies, the papers printed little national news, and what national news the papers contained was necessarily dated. Thus, the average American largely lacked access to extensive information about national politics and issues.<sup>67</sup>

Regardless, the Framers insisted that virtue and reason should and could overcome passion and interest in public affairs. Government should and could be conducted in accord with civic republican principles.<sup>68</sup> Given their elitist attitudes, the Framers hoped that voters would elect “speculative men”<sup>69</sup> to be the “guardians”<sup>70</sup> of “the mass of the citizens.”<sup>71</sup> But the Framers did

<sup>63</sup> See, e.g., THE FEDERALIST No. 36 (Alexander Hamilton) (emphasizing that “strong minds” could come from “every walk of life”).

<sup>64</sup> 1 FARRAND, *supra* note 18, at 154 (June 7, 1787) (Gerry), 422 (June 26, 1787) (Madison); see NEDELSKY, *supra* note 18, at 158 (explaining that even the virtuous elite could not be expected to rise constantly “above self-interest”).

<sup>65</sup> BEEMAN, *supra* note 18, at 67; see also *id.* at 114, 280-81 (discussing wealth and virtue); NEDELSKY, *supra* note 18, at 142-44 (discussing Madison’s views about the wealthy).

<sup>66</sup> STOURZH, *supra* note 33, at 82-83.

<sup>67</sup> BEEMAN, *supra* note 18, at 130-31.

<sup>68</sup> McDONALD, *supra* note 18, at 189-209; NEDELSKY, *supra* note 18, at 37; POCOCK, *supra* note 18, at 513-26; CREATION, *supra* note 18, at 391-468; POCOCK, *supra* note 18, at 466 (“In the civic humanist ethos, then, the individual knew himself to be rational and virtuous.”).

<sup>69</sup> THE FEDERALIST No. 17 (Alexander Hamilton) (Project Gutenberg ed., 2004).

<sup>70</sup> THE FEDERALIST No. 71 (Alexander Hamilton) (Project Gutenberg ed., 2004).

<sup>71</sup> THE FEDERALIST No. 17 (Alexander Hamilton); see WHITE, *supra* note 56, at 125-27 (discussing the elitism of the Framers).

not leave the functioning of the government to mere hope. Rather, they attempted to structure the constitutional system to produce a government most likely to pursue the common good. “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.”<sup>72</sup>

C. *Structuring the Constitution to Overcome Factions and Pursue the Common Good*

But how could the Framers ensure pursuit of the common good when they refused to limit the primary cause of factionalism, the liberty to pursue one’s own passions and interests? The answer, they believed, was to structure government institutions to control the “effects” of factionalism.<sup>73</sup> The constitutional controls over factionalism would operate at three levels. At the first level, the Framers designed the Constitution to promote the election to government positions of a virtuous elite, who would then voluntarily pursue the common good. Consequently, Madison championed a large over a small republic—the nation over the state. In a large republic (the nation), the electorate supposedly would be difficult to fool or trick into electing a self-interested demagogue. As Madison explained, “it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried.”<sup>74</sup> From this perspective, representative government was better than direct democracy because “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.”<sup>75</sup>

Yet the Framers knew that even in a large republic, sometimes the people would mistakenly elect an official lacking virtue. Moreover, passion or interest would occasionally tempt even the virtuous to ignore the common good. Thus, at the second level, the Framers structured the system to induce

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<sup>72</sup> THE FEDERALIST No. 57 (James Madison) (Project Gutenberg ed., 2004).

<sup>73</sup> THE FEDERALIST No. 10 (James Madison) (Project Gutenberg ed., 2004).

<sup>74</sup> *Id.*; see also THE FEDERALIST No. 3 (John Jay) (Project Gutenberg ed., 2004) (emphasizing that the “best men” would be elected to national offices because the people would have “the widest field for choice”). Here, Publius was influenced by Hume, who argued that factionalism was more likely in smaller republics. See David Hume, *Of Parties in General*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 54-56 (Oxford Univ. Press ed., 1963).

<sup>75</sup> THE FEDERALIST No. 10 (James Madison) (Project Gutenberg ed., 2004).

elected officials to pursue the common good despite temptations and inclinations to act otherwise. Once again, the size of the republic would help in this regard. With a larger population, the number of “opposite and rival interests” would multiply and challenge each other.<sup>76</sup> In other words, the Framers designed the Constitution to take advantage of human nature, particularly the inclination to pursue passions and interests. At the national level, Madison explained, “[a]mbition . . . [would] be made to counteract ambition.”<sup>77</sup> Faction would fight faction. With diverse passions and interests battling against each other, government officials would realize that, often, they could act only for the common good—or not act at all.<sup>78</sup>

Even so, the Framers knew that some officials would persist in trying to act for partial or private interests. Thus, at the third level, the Framers designed government institutions to prevent such officials from successfully using government power in contravention of the common good. Various structural mechanisms—including federalism, separation of powers, bicameralism, and checks and balances—dispersed power among a multitude of government departments and officials, each of which would have its own interests.<sup>79</sup> “[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.”<sup>80</sup> In other words, the Constitution dispersed power among so many institutions, departments, and officials that the self-interested grasping of one would inevitably be met by the self-interested grasping of another. The Framers built gridlock and government paralysis into the system.<sup>81</sup>

The Framers intended these three levels of structural constitutional controls on factionalism to *both* promote the virtuous pursuit of the common good *and* protect individual

<sup>76</sup> THE FEDERALIST No. 51 (James Madison) (Project Gutenberg ed., 2004).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (“In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . .”). Hume similarly argued that passions could counter passions. See ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 26-30 (1977) (discussing Hume’s influence on the Framers).

<sup>79</sup> See, e.g., THE FEDERALIST No. 51 (James Madison) (discussing the advantages of a bicameral legislature and an executive veto on legislative actions).

<sup>80</sup> *Id.*

<sup>81</sup> Also, Congress was supposedly limited to exercising its specifically enumerated powers rather than a general or police power. U.S. CONST. art. I, § 8; see THE FEDERALIST No. 84 (Alexander Hamilton) (arguing that the scheme of enumerated powers limited congressional power so that there was no need for a Bill of Rights).

rights and liberties.<sup>82</sup> The Framers pragmatically designed the Constitution to fit their experience-based conception of the citizen-self, of human nature. Significantly, then, the Framers' citizen-self was Janus-faced: virtue and reason animating one face, but passion and interest, especially economic interest, animating the other. To a great degree, passion and interest were to have free rein in the private sphere. Yet in the public sphere, the Founders designed the Constitution to produce results in accord with virtue and reason as often as possible. The constitutional design, in other words, would enable the citizen-self to act virtuously in the public sphere while reveling in passions and interests in the private sphere. And even when virtue was in short supply in the public sphere, the Constitution was designed to channel self-interest toward pursuit of the common good.

### III. PROPERTY AND THE PRIVATE SPHERE

#### A. *The Importance of Property and the Fear of Democratic Excess*

If individuals enjoyed liberty and property, according to the Framers, then they would inevitably pursue their own passions and interests in the private sphere—with wealth or property being the most important interest. Indeed, 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. Factionalism was foreordained, yet the Framers unequivocally sought to protect liberty and property.<sup>83</sup>

The Framers manifested their desire to protect property in particular by repeatedly emphasizing that the Constitution needed to limit democratic excesses. To be clear, all of the Framers viewed themselves as supporters of republican government, but most of them were simultaneously suspicious of democracy.<sup>84</sup> Almost all delegates to the Convention believed that the people should directly elect “the larger branch” of the

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<sup>82</sup> THE FEDERALIST No. 10 (James Madison); THE FEDERALIST No. 14 (James Madison); see also ROGERS M. SMITH, CIVIC IDEALS 470-71 (1997) (“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 . . .”).

<sup>83</sup> Joyce Appleby argued that the Constitution weakened the state governments yet constrained the national government, and in doing so, it enhanced the private realm's protection of liberty and property. See Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 804 (1987).

<sup>84</sup> BEEMAN, *supra* note 18, at 122-23.

national legislature.<sup>85</sup> At least one legislative house should arise directly from the people, the ultimate sovereigns. As Madison put it, “the popular election of one branch of the national Legislature [i]s essential to every plan of free Government.”<sup>86</sup> Beyond that point, however, few Framers supported direct democracy. With the notable exception of James Wilson, who wanted both branches and a national executive to be directly elected, most delegates wanted an upper legislative house—as well as an executive—chosen through some other means (for instance, by electors, elected by the people for life terms).<sup>87</sup> “[T]he general object was to provide a cure for the evils under which the [United States] laboured,” explained Randolph.<sup>88</sup> “[I]n tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for this tendency of our Governments: and that a good Senate seemed most likely to answer the purpose.”<sup>89</sup> Indeed, Madison argued strenuously that the national government should be able to veto state laws because he distrusted the democratic excesses—the unchecked factionalism—of the state legislatures.<sup>90</sup>

Thus, the Framers wanted to prevent factions—even if they were democratic majorities—from using the government to undermine property and other individual rights. To be sure, property rights were enigmatic in their effects. As experience had shown, private property was a given in American society. The ownership or desire to own property could motivate people to act in positive ways in the private sphere.<sup>91</sup> Moreover, for many, ownership of property or other wealth seemed necessary for civic virtue. All but one of the state constitutions in effect in 1787 required private ownership of property or similar economic wealth before an individual could fully participate in the polity.<sup>92</sup> In Maryland, for instance, suffrage was extended only to those “freemen . . . having a freehold of fifty acres of

<sup>85</sup> 1 FARRAND, *supra* note 18, at 48 (May 31, 1787) (Mason).

<sup>86</sup> *Id.* at 49 (May 31, 1787) (Madison).

<sup>87</sup> *See id.* at 52 (May 31, 1787); *id.* at 68 (June 1, 1787) (statements of Wilson); *see also* BEEMAN, *supra* note 18, at 168-69 (discussing Hamilton’s plan for choosing an upper house).

<sup>88</sup> 1 FARRAND, *supra* note 18, at 51 (May 31, 1787).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 164-65 (June 8, 1787); BEEMAN, *supra* note 18, at 228.

<sup>91</sup> *See* THE FEDERALIST No. 10 (James Madison) (emphasizing the need to protect private interests); THE FEDERALIST No. 44 (James Madison) (tying limits on state government powers to economic concerns).

<sup>92</sup> BERNARD CRICK, DEMOCRACY: A VERY SHORT INTRODUCTION 44-45 (2002). On state constitutions and property or wealth requirements, *see* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 315-27 (2001); ALEXANDER KEYSSAR, THE RIGHT TO VOTE 8-24, 340-41 (2000).

land . . . [or] having property in this State above the value of thirty pounds current money.”<sup>93</sup> Private ownership of property or other wealth supposedly established one’s independence, necessary for the disinterestedness of civic virtue.<sup>94</sup> Moreover, wealth gave one a sufficient “stake in society,” or concern for the common good, which justified the power to vote and to hold office.<sup>95</sup> Yet, simultaneously, the Framers realized all too well that desire or greed for property was often the root source of factionalism and corruption.<sup>96</sup> So property was key—as both a positive and negative force—but how, precisely, did the Framers conceive of property?

*B. The Framers’ Conception of Property Rights: Mercantilism or Capitalism?*

The concept of property was in flux in the late eighteenth century. In accord with the common law, states defined property as it had developed under feudalism and mercantilism.<sup>97</sup> In the 1760s, William Blackstone had thus defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>98</sup> This definition had developed in an agrarian world not conducive to capitalist development. In the founding era, America clearly was not feudal, but it was, at least in part, mercantile.

Mercantilism developed from the sixteenth to the eighteenth centuries with the rise of nation-states. It entailed close ties between the state and merchants. In general, a state would grant a monopoly to a merchant or a company—an early form of corporation—in order to allow the merchant to develop a particular market, often in a new or developing colony.<sup>99</sup> The Dutch East India Company, the British East India Company, and

<sup>93</sup> MD. CONST. of 1776, art. II, *reprinted in* 1 POORE, *supra* note 18, at 817, 821.

<sup>94</sup> White, *supra* note 50, at 83.

<sup>95</sup> KEYSSAR, *supra* note 92, at 5, 9.

<sup>96</sup> Several years after the framing, James Sullivan perfectly captured the dual nature—the costs and benefits—of property:

This propensity [to acquire wealth], has a manifest tendency to the advancement of the public interest; and will produce the prosperity of the community, where it is exerted; unless the publick mind is so corrupted, as to embrace wealth, in preference to virtue, by making property a qualification to the publick confidence, superior to those of integrity, industry, learning, and ability.

JAMES SULLIVAN, *THE PATH TO RICHES* 3 (1809).

<sup>97</sup> HORWITZ, *supra* note 19, at 32.

<sup>98</sup> WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (1st ed. 1766).

<sup>99</sup> GALBRAITH, *supra* note 19, at 39-42.

the Hudson Bay Company are renowned examples of mercantilist enterprises.<sup>100</sup> Mercantilist endeavors primarily sought to enhance the mother country's treasure (gold and silver) and military power.<sup>101</sup> Thus, while mercantilism relied on an economic market, it was not based on a competitive free market. Rather, in a mercantilist system, the state and economy were closely intertwined, working together for common purposes through the creation of monopolies and the implementation of protectionist policies. In such a system, property rights were inherently limited. The North American colonies were, for the most part, founded as mercantilist outposts for the benefit of the mother country. They were expected to export only those resources and products not produced in England and to serve as an import market for English-produced goods. In the decades before American independence, England was to a great degree still treating the colonies as parts of its mercantilist empire.<sup>102</sup>

For years, though, Americans had been chafing against and resisting their subservient position in the English mercantilist system. And while, from an economic standpoint, the Americans were not in fact faring badly under the system, the American Revolution arose in part from a desire to escape the strictures of English control.<sup>103</sup> Moreover, the Americans were not alone in protesting English mercantilism in 1776. In that same year, Adam Smith published *The Wealth of Nations*, which advocated for a competitive free-market economy that would benefit society more than the mercantilist system.<sup>104</sup> Smith's writings influenced numerous Framers, especially Alexander Hamilton, but it is important not to overstate Smith's sway.<sup>105</sup> For instance, Publius did not cite Smith even once in the *Federalist*. Smith wrote in part because of his observations of the developing Industrial Revolution in England, but the Industrial Revolution would not fully sweep into the United States for nearly another century.<sup>106</sup> Smith's concept of a competitive free-market system driven by a desire

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<sup>100</sup> *Id.* at 42; HEILBRONER & SINGER, *supra* note 19, at 22-27. The full name of the Hudson Bay Company was "Gentlemen Adventurers, Trading into Hudson's Bay." GALBRAITH, *supra* note 19, at 39-42.

<sup>101</sup> GALBRAITH, *supra* note 19, at 39-40; HEILBRONER & SINGER, *supra* note 19, at 26-27.

<sup>102</sup> HEILBRONER & SINGER, *supra* note 19, at 26-27, 48-49.

<sup>103</sup> GALBRAITH, *supra* note 19, at 31; HEILBRONER & SINGER, *supra* note 19, at 71.

<sup>104</sup> See generally ADAM SMITH, *THE WEALTH OF NATIONS* (1776). See also GALBRAITH, *supra* note 19, at 31; HEILBRONER & SINGER, *supra* note 19, at 21; McDONALD, *supra* note 18, at 125.

<sup>105</sup> McDONALD, *supra* note 18, at 97-98, 108-42.

<sup>106</sup> See HEILBRONER & MILBERG, *supra* note 19, at 60-69 (discussing England's Industrial Revolution).

for profit would eventually be known as capitalism, yet he used neither this term nor the term “laissez-faire.”<sup>107</sup> In fact, neither term would enter the English lexicon until the early decades of the nineteenth century.<sup>108</sup> Smith, it should be reiterated, was not describing an already completed transition in England from mercantilism to capitalism; rather, he was advocating in favor of this change. Thus, during the founding era, the mercantilist concept of property still controlled: “[O]wnership did not include the absolute right to buy or sell one’s property in a free market; that was not a part of the scheme of things in eighteenth-century England and America.”<sup>109</sup>

Most important, then, when placed in the proper context of the late eighteenth century, the Framers and other contemporary Americans could not have understood the economy as laissez-faire or even as a true capitalist system. Capitalism had not yet fully emerged in England, much less in the United States.<sup>110</sup> After the Revolution, numerous state governments purposefully created quasi-mercantilist systems that lasted into the early nineteenth century.<sup>111</sup> Even so, the Framers, or at least some of the Framers, had a partial vision of a competitive free-market economy.<sup>112</sup> Indeed, perhaps the Framers’ most remarkable feat was their pragmatic (Machiavellian) synthesis of civic republican thought, Lockean philosophy, and Smith’s incipient capitalism into a coherent political-economic system. They understood, for instance, that a type of private-sphere of social virtue was emerging in the 1780s. This nascent notion of virtue, distinct from the civic virtue associated with civic republican government yet consistent with Smith’s writings, suggested that the individual pursuit of self-interest in the private sphere could itself further the common good, though at

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<sup>107</sup> SMITH, *supra* note 104.

<sup>108</sup> See *Laissez-Faire Definition and Capitalism Definition*, ONLINE OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/105152> [<http://perma.cc/RR82-M9Z3>] (last visited Dec. 16, 2015) and <http://www.oed.com/view/Entry/27454> [<http://perma.cc/8ZT8-AT9R>] (last visited Dec. 16, 2015), respectively (showing English use of “laissez-faire” in 1825 and “capitalism” in 1833); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 143 (2001 ed.) (arguing that laissez-faire ideology emerged in the 1830s).

<sup>109</sup> McDONALD, *supra* note 18, at 14.

<sup>110</sup> HEILBRONER & MILBERG, *supra* note 19, at 55; see HORWITZ, *supra* note 19, at xiii-xiv (agreeing that the late eighteenth and early nineteenth centuries were not laissez-faire).

<sup>111</sup> HORWITZ, *supra* note 19, at 33; McDONALD, *supra* note 18, at 18, 101-06.

<sup>112</sup> Hamilton, Wilson, and Gouverneur Morris hoped the American economy would develop similarly to that of England, though in 1787, “the concept of an ‘economy’ as an entity having a life of its own was just emerging.” McDONALD, *supra* note 18, at 4.

that time, a benevolent and decent Protestant civility still had to temper that self-interest.<sup>113</sup>

In other words, the experiences of the 1780s had a flip side. The decade revealed that many Americans, enjoying unprecedented liberty, would pursue their own passions and interests with determined vigor. On the one side, as the Philadelphia delegates emphasized, this self-interest threatened republican government. But on the other side, this same self-interest could generate great personal and social benefits when brought to bear in commercial endeavors. By 1800, a Columbia professor complained, “From one end of the continent to the other, the universal roar is Commerce! Commerce! at all events, Commerce!”<sup>114</sup> But other Americans were celebrating rather than complaining.<sup>115</sup> Thus, despite the persistence of mercantilism, with its close linkage between the state and the economy, the Framers had glimpsed the benefits of conceptually separating a private sphere from a public sphere. The public sphere would still be governed by republican-democratic principles, while the private sphere would be constituted in part by a still-evolving economic marketplace.

### C. *Slavery as a Refutation of a Laissez-Faire Constitution?*

The Framers’ incomplete adoption of capitalism is nowhere clearer than in their discussions and acceptance of slavery as a legal institution.<sup>116</sup> In 1787, slaves constituted approximately 20% of the American population, though the percentage was much higher in the southern states.<sup>117</sup> In fact, 90% of the nation’s slaves lived in the five states below the Mason-Dixon line.<sup>118</sup> At that time, South Carolina and Georgia were most dependent on slave labor because their economies

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<sup>113</sup> JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s, at 14-15 (1984); RADICALISM, *supra* note 18, at 215-19, 230; *see also* SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850, at 14-15 (2004) (discussing struggles over the meaning of virtue and the common good); Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629, 662 (1982) (emphasizing the changing notions of virtue).

<sup>114</sup> RADICALISM, *supra* note 18, at 326 (quoting Samuel Mitchill).

<sup>115</sup> *E.g.*, SAMUEL BLODGET, ECONOMICA 12 (1806) (emphasizing social cohesion engendered by commerce); *see* RADICALISM, *supra* note 18, at 325-47 (describing emerging celebration of commerce).

<sup>116</sup> Helpful sources focusing on slavery include the following: DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW (2d ed. 1980); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS (3d ed. 2014); Staughton Lynd, *Slavery and the Founding Fathers, in BLACK HISTORY: A REAPPRAISAL* 115-31 (Melvin Drimmer ed., 1968).

<sup>117</sup> BEEMAN, *supra* note 18, at 310-11.

<sup>118</sup> GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 164-65 (2009) [hereinafter EMPIRE].

were based on the labor-intensive crops of rice and indigo, but even Virginia had one-third of its wealth tied up in slavery.<sup>119</sup> Yet the Framers did not anticipate how important slavery would soon become. In 1793, Eli Whitney invented the cotton gin and transformed the cotton industry.<sup>120</sup> In short order, cotton became an incredibly profitable crop that was highly reliant on slave labor.<sup>121</sup> Slave-supported cotton production would dominate the southern economy, though it also bolstered the northern textile industry. But when the Framers met in Philadelphia, no one knew about the future and King Cotton. Several northern states had already begun moving toward emancipation, and many Americans thought states in the upper South would soon follow in that direction.<sup>122</sup>

Even so, of the 55 delegates who participated in at least part of the Convention, 25 owned slaves.<sup>123</sup> The first explicit mention of slavery at the Convention arose in the context of legislative representation, particularly in the lower house of Congress. The Virginia Plan ambivalently proposed that “the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.”<sup>124</sup> The delegates turned to this proposal on May 30, 1787, and it immediately proved controversial. Rufus King of Massachusetts pointed out that calculating “quotas of contribution” would be problematic because the quotas would “be continually varying.”<sup>125</sup> To be sure, “quotas of contribution” was an ambiguous concept, but most delegates understood that it suggested state representation would be apportioned in accord with a state’s wealth.<sup>126</sup> Yet the method for determining wealth remained unclear. In particular, would slaves be counted as relevant property for ascertaining quotas of contribution? Given the difficulties surrounding the issue of legislative representation, the delegates postponed discussion for another day.

The Convention returned to the problem on June 11. John Rutledge of South Carolina moved that state representation—that is, “the proportion of [state] suffrage in the 1st branch”—

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<sup>119</sup> BEEMAN, *supra* note 18, at 315; EMPIRE, *supra* note 118, at 165.

<sup>120</sup> HALL, *supra* note 19, at 130; SEAVOY, *supra* note 19, at 111.

<sup>121</sup> HALL, *supra* note 19, at 130; SEAVOY, *supra* note 19, at 111.

<sup>122</sup> EMPIRE, *supra* note 118, at 519-24; *see* BELL, *supra* note 112, at 8 (listing the years in which northern states abolished slavery); FINKELMAN, *supra* note 116, at ix (detailing when states eliminated slavery).

<sup>123</sup> BEEMAN, *supra* note 18, at 309-11.

<sup>124</sup> 1 FARRAND, *supra* note 18, at 20 (May 29, 1787) (footnote omitted).

<sup>125</sup> *Id.* at 199 (June 11, 1787).

<sup>126</sup> BEEMAN, *supra* note 18, at 106-07.

should be based on “the quotas of contribution.”<sup>127</sup> Pierce Butler of South Carolina seconded the motion and “add[ed] that money was power.”<sup>128</sup> He explained, “States ought to have weight in the Gov[ernment]—in proportion to their wealth.”<sup>129</sup> Rutledge and Butler unquestionably wanted to protect the interests of southern slaveholding states.<sup>130</sup> King again objected that the determination of state wealth would be problematic.<sup>131</sup> Wilson then moved to delete the reference to quotas of contribution but offered an alternative, which he hoped the southerners would accept as a compromise. Indeed, the South Carolinian Pinckney seconded Wilson’s motion.<sup>132</sup> Wilson proposed that representation be

in proportion to the whole number of white & other free Citizens & inhabitants of every age[,] sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each State.<sup>133</sup>

Gerry, from Massachusetts, immediately protested that, if “property [were] not the rule of representation[, w]hy then should the blacks, who were property in the South, be in the rule of representation more than the cattle & horses of the North.”<sup>134</sup> No one responded to Gerry. Instead, they voted to approve Wilson’s motion.

This exchange concerning legislative representation was crucial in multiple ways. The delegates had begun by considering two opposed methods of proportional representation: one based on wealth (quotas of contribution) and one based on population (number of free inhabitants). Significantly, the delegates chose to repudiate representation—and hence, government power—based explicitly on wealth. This decision, in and of itself, suggested the importance of separating the public (government) sphere from the private (economic) sphere. The delegates opted instead to base representation on population, but rather than equating population solely with the number of free inhabitants, they chose to count each slave as three-fifths of a person. This approach would significantly increase southern representation and legislative power. Moreover, this decision emblemized the delegates’ attitudes towards slavery. After Gerry protested the

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<sup>127</sup> 1 FARRAND, *supra* note 18, at 196 (June 11, 1787).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> BEEMAN, *supra* note 18, at 152-53.

<sup>131</sup> 1 FARRAND, *supra* note 18, at 197 (June 11, 1787).

<sup>132</sup> *Id.* at 201 (June 11, 1787); BEEMAN, *supra* note 18, at 153.

<sup>133</sup> 1 FARRAND, *supra* note 18, at 201 (June 11, 1787).

<sup>134</sup> *Id.*

three-fifths clause, no one declared that slavery was immoral—at least at that point. No one declared that slavery should be abolished. Rather, the delegates treated slavery as a political and economic issue in which, for the most part, southerners and northerners had differing interests.<sup>135</sup>

The Three-Fifths Clause still left an ambiguity.<sup>136</sup> Were slaves counted because they were part of the population—even if not free—or were they counted as property, thus reintroducing an implicit element of wealth into the calculation of proportional representation? The delegates never completely clarified this murkiness.<sup>137</sup> The three-fifths formula had originated in a failed 1783 Continental Congress proposal for calculating the wealth of particular states.<sup>138</sup> Moreover, the delegates' subsequent statements and actions regarding slavery underscored their commitment to protecting property. When, approximately one month later, the delegates revisited the issue of whether slaves should be counted as three-fifths of a person for purposes of proportional representation, Butler argued that three-fifths was not enough. He explained that “equal representation ought to be allowed for [slaves] in a Government which was instituted principally for the protection of property, and was itself to be supported by property.”<sup>139</sup> Wilson objected: “[H]e could not agree that property was the sole or the primary object of Government & Society. The cultivation & improvement of the human mind was the most noble object.”<sup>140</sup> Wilson was an outlier in viewing cultivation of the human mind as the Constitution's primary goal, though not all delegates agreed with Butler that property was the primary object.<sup>141</sup> When it came to slavery, however, the overwhelming sentiment was that slaves were property. In the words of Charles Cotesworth Pinckney, “Property in slaves should not be exposed to danger.”<sup>142</sup>

While many delegates worried about protecting the property interests of slave owners, none of the delegates protested that slavery would contravene the most fundamental principles of a capitalist economy. Capitalism is based on the drive for profit in a competitive free market.<sup>143</sup> Slavery is the

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<sup>135</sup> BELL, *supra* note 116, at 22; FINKELMAN, *supra* note 116, at 34.

<sup>136</sup> BEEMAN, *supra* note 18, at 153-55.

<sup>137</sup> Madison subsequently acknowledged this ambiguity. THE FEDERALIST No. 54 (James Madison).

<sup>138</sup> 1 FARRAND, *supra* note 18, at 580-81 (July 11, 1787).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> McDONALD, *supra* note 18, at 3-4, 268.

<sup>142</sup> 1 FARRAND, *supra* note 18, at 594 (July 12, 1787).

<sup>143</sup> HEILBRONER & SINGER, *supra* note 19, at 9-12.

antithesis of a free market; it is coerced labor.<sup>144</sup> George Mason of Virginia came closest to acknowledging a tension between slavery and a free market when he stated, “Slavery discourages arts & manufactures. The poor despise labor when performed by slaves.”<sup>145</sup> After Mason’s observation, though, no one elaborated on or pursued his concern.

Although slavery would contravene a modern competitive free market revolving around contractual agreements, slavery appeared consistent with a premodern economy. At the time of the American founding, England was developing a theory of contract based on marketplace values, but no American state would adopt this innovation until the early nineteenth century—well after the ratification of the Constitution.<sup>146</sup> In late eighteenth-century America, notions of fairness and equity limited the assignment and enforceability of contracts.<sup>147</sup> Contract law, in fact, emerged as a separate common law realm in the United States only after the turn of the nineteenth century.<sup>148</sup> Under the American common law of the late eighteenth and early nineteenth centuries, duties of care arose because of established status relationships.<sup>149</sup> The common law, for example, attached a specific duty of care to many occupations.<sup>150</sup> Innkeepers owed a particular duty of care to protect lodgers, while ferrymen owed a duty of safe transportation to travelers.<sup>151</sup> In civil liability (tort) cases—structured around common law writs or forms of action, such as trespass or trespass on the case—judges (or juries) would be unlikely to conclude that a defendant was negligent but might find that the defendant neglected to fulfill a duty in accord with his distinct status.<sup>152</sup> For example, in the 1786 case of *Purviance v. Angus*, involving the liability of a ship’s captain for damaged goods, the court explained the captain’s duties: “Reasonable care, attention, prudence, and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, he is responsible in a civil action.”<sup>153</sup> Slave and master constituted a status relationship within this premodern worldview.<sup>154</sup>

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<sup>144</sup> *Id.* at 132.

<sup>145</sup> 2 FARRAND, *supra* note 18, at 370 (Aug. 22, 1787).

<sup>146</sup> HORWITZ, *supra* note 19, at 180-81; McDONALD, *supra* note 18, at 113-14.

<sup>147</sup> McDONALD, *supra* note 18, at 113.

<sup>148</sup> HALL, *supra* note 19, at 119-23.

<sup>149</sup> ALAN CALNAN, A REVISIONIST HISTORY OF TORT LAW 279 (2005).

<sup>150</sup> *Id.* at 235.

<sup>151</sup> *Id.*

<sup>152</sup> G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671, 685 (1977).

<sup>153</sup> *Purviance v. Angus*, 1 Dall. 180, 185 (Pa. Ct. Err. & App. 1786).

<sup>154</sup> FRIEDMAN, *supra* note 19, at 225-26; HALL, *supra* note 19, at 131.

A scarce few delegates condemned slavery as immoral. When discussing whether Congress should have the power to regulate or prohibit the slave trade, Roger Sherman of Connecticut denounced the slave trade as “iniquitous.”<sup>155</sup> Luther Martin of Maryland stated that the slave trade “was inconsistent with the principles of the revolution and dishonorable to the American character.”<sup>156</sup> Gouverneur Morris uttered perhaps the strongest condemnation of slavery. On August 8, 1787, he declared: “It was a nefarious institution—It was the curse of heaven on the States where it prevailed . . . . [If the northern states accepted it, they would] sacrifice of every principle of right, of every impulse of humanity.”<sup>157</sup> Morris moved to count only “free” inhabitants, not slaves, in determining representation.<sup>158</sup> Jonathan Dayton of New Jersey seconded the motion.<sup>159</sup> Sherman, who had just denounced the iniquity of slavery, explained that he “did not regard the admission of the Negroes into the ratio of representation, as liable to such insuperable objections.”<sup>160</sup> Pinkney thought “the fisheries & the Western frontier as more burdensome to the U.S. than the slaves.”<sup>161</sup> The state delegations then defeated Morris’s motion by a near-unanimous vote, with only one exception.<sup>162</sup>

Almost two weeks later, Mason offered the most surprising moral denunciation of slavery, given that he owned 300 slaves.<sup>163</sup> He managed, though, to weave his moral judgment together with pragmatism and racism. “[The existence of slavery] prevent[s] the immigration of Whites, who really enrich and strengthen a country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a country.”<sup>164</sup> Such condemnatory statements demonstrate that at least some of the Framers understood the immoral ramifications of their ultimate acceptance of slavery. Yet one cannot help but be struck by the usual reactions to these moral denunciations—silence, or at most, quick dismissal. These statements never provoked any extended debate on the morality of slavery. Rutledge spoke for many delegates when he declared, “Religion & humanity had

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<sup>155</sup> 2 FARRAND, *supra* note 18, at 220 (Aug. 8, 1787).

<sup>156</sup> *Id.* at 364 (Aug. 21, 1787).

<sup>157</sup> *Id.* at 221-22 (Aug. 8, 1787).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 223 (Aug. 8, 1787).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Only New Jersey voted in favor of the motion. *Id.*

<sup>163</sup> BEEMAN, *supra* note 18, at 321-23.

<sup>164</sup> 2 FARRAND, *supra* note 18, at 370 (Aug. 22, 1787).

nothing to do with this question—Interest alone is the governing principle with Nations.”<sup>165</sup>

Whereas the Framers’ pragmatism served them well in many ways, it led them to acquiesce far too readily to slavery.<sup>166</sup> Wilson, for instance, puzzled over slavery as a logical conundrum. “Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? [T]hen why is not other property admitted into the computation?”<sup>167</sup> Yet Wilson immediately bypassed this logical problem for practical purposes. “These were difficulties however which . . . [Wilson] thought must be overruled by the necessity of compromise.”<sup>168</sup> Unquestionably, one reason for such pragmatic acquiescence to slavery was unabashed racism.<sup>169</sup> Even Gouverneur Morris, who strongly condemned slavery as immoral, objected “against admitting the blacks into the census . . . [for purposes of proportional representation, because] the people of . . . [Pennsylvania] would revolt at the idea of being put on a footing with slaves. They would reject any plan that was to have such an effect.”<sup>170</sup> Wilson agreed that “the tendency of the blending of the blacks with the whites . . . [would] give disgust to the people of [Pennsylvania].”<sup>171</sup> Neither Morris nor Wilson criticized this racist attitude. In fact, during this era, racism was so thick that even free blacks were saddled with legal and social disabilities.<sup>172</sup>

Meanwhile, the delegates from South Carolina, North Carolina, and Georgia all threatened to abandon the proposed constitution if it did not protect slavery.<sup>173</sup> The northern delegates’ desire for a union of all 13 states, combined with widespread racism, left little doubt about the likely result: the northern delegates would readily accept constitutional protections for slavery.

In the end, the Constitution, as ratified, included numerous provisions that either explicitly or implicitly protected slavery; indeed, the northern delegates agreed to several such

<sup>165</sup> *Id.* at 364.

<sup>166</sup> Lynd, *supra* note 116, at 131.

<sup>167</sup> 1 FARRAND, *supra* note 18, at 587 (July 11, 1787); *see also* BELL, *supra* note 116, at 11 (explaining “analytical contortions” common within the law of slavery).

<sup>168</sup> 1 FARRAND, *supra* note 18, at 587 (July 11, 1787).

<sup>169</sup> Lynd, *supra* note 116, at 129.

<sup>170</sup> 1 FARRAND, *supra* note 18, at 583 (July 11, 1787).

<sup>171</sup> *Id.* at 587.

<sup>172</sup> BELL, *supra* note 116, at 9-10.

<sup>173</sup> *E.g.*, 2 FARRAND, *supra* note 18, at 364 (Aug. 21, 1787) (Charles Pinckney stated, “South Carolina can never receive the plan if it prohibits the slave trade.”); BEEMAN, *supra* note 18, at 323-24.

provisions without securing any southern concessions.<sup>174</sup> One clause, for instance, apportioned congressional representation and direct taxes by counting slaves as three-fifths of a person.<sup>175</sup> Another clause prohibited Congress from banning the slave trade before the year 1808.<sup>176</sup> The Fugitive Slave Clause mandated that an escaped slave did not become free upon entering a free state; to the contrary, the escaped slave was to be “delivered up on Claim” of the slave owner.<sup>177</sup> Although historians have subsequently disagreed about the extent of the protection afforded to slavery, the southern delegates to the Constitutional Convention were satisfied. Charles Cotesworth Pinckney reported back to the South Carolina legislature: “In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad.”<sup>178</sup>

In the end, while the Constitution’s codification of the institution of slavery underscores the Framers’ concern with property rights, it also demonstrates that the delegates in Philadelphia were not unabashed free-market capitalists. The numerous steps taken to protect the South’s peculiar institution undermined the development of a free market for labor, a fundamental prerequisite of a laissez-faire economic system. Thus, the constitutional protection of slavery as a legal institution highlights that, at the end of the eighteenth century, capitalism was still not a fully developed concept in the American ethos.

#### IV. BALANCING THE PUBLIC AND PRIVATE

##### A. *The Dichotomous Citizen-Self*

The Framers, as a whole, were strongly concerned with the protection of property rights, including property interests in slaves. But most Framers did not view the protection of property as the be-all and end-all of the Constitution. Instead,

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<sup>174</sup> BEEMAN, *supra* note 18, at 332-33; FINKELMAN, *supra* note 116, at 34-35. Even the provisions explicitly protecting slavery did not use the words “slave” or “slavery.” BEEMAN, *supra* note 18, at 335-36; FINKELMAN, *supra* note 116, at 6.

<sup>175</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>176</sup> *Id.* art. I, § 9, cl. 1.

<sup>177</sup> *Id.* art. IV, § 2, cl. 3. For more complete lists of the constitutional provisions, see BELL, *supra* note 116, at 22; FINKELMAN, *supra* note 116, at 6-9.

<sup>178</sup> FINKELMAN, *supra* note 116, at 103 (quoting Pinckney), at 9-10 (describing southern attitudes toward protection of slavery). During the ratification debates in the northern states, the proposed constitutional protections of slavery generated contentious debate. See FINKELMAN, *supra* note 116, at 35-36; MAIER, *supra* note 18, at 175-76, 351-52 (giving examples). For a discussion of the historiography of slavery, see generally PETER J. PARISH, *SLAVERY: HISTORY AND HISTORIANS* (1989).

for most Framers, both the public and private spheres were important, and as such, they sought to achieve a balance between the two.<sup>179</sup> In the *Federalist Number 10*, Madison wrote: “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.”<sup>180</sup> A constitutional system that unduly favored either the public or the private could not long survive. If the private interests and passions of the people were ignored, the government system would be divorced from reality and would inevitably collapse. Yet a government that merely catered to the private passions and interests of the people could not truly be called a republic and would soon spiral into oblivion. Ultimately, then, the Framers hoped that the constitutional structures would promote the virtuous pursuit of the common good in the public sphere while simultaneously protecting individual rights and liberties in the private sphere.<sup>181</sup> The Framers wanted balance, yet they knew it would not be easily achieved. To attain the proper balance, they needed to construct an integrated system consisting of a liberal society—emphasizing individual liberty—and a republican government—pursuing the common good.<sup>182</sup> If they failed to construct such an integrated system with balance between the public and private spheres, then the entire political-economic society would likely crumble.

Enlightenment thinkers typically conceived of the self (or individual) as living in a world divided into dichotomous realms.<sup>183</sup> The spiritual was separate from the material. The mind was separate from the body. Numerous philosophers, from Descartes to Locke to Hume, who died in 1776, to Kant, who was the Founders’ contemporary, conceptualized the self by dealing with these characteristically modernist

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<sup>179</sup> See, e.g., MAIER, *supra* note 19, at 80-82 (emphasizing the Founders’ interest in both private economic activity and the public’s well-being).

<sup>180</sup> THE FEDERALIST No. 10 (James Madison) (emphasis added); see also THE FEDERALIST No. 14 (James Madison) (arguing that the new government would be “in favour of private rights and public happiness”).

<sup>181</sup> See THE FEDERALIST No. 10 (James Madison) (“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. 14 (James Madison) (arguing that the new government would be “in favour of private rights and public happiness”); SMITH, *supra* note 82, at 470-71 (“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 . . .”).

<sup>182</sup> See NEDELSKY, *supra* note 18, at 174 (explaining the Framers as “blending the[] discourses” of liberalism and republicanism).

<sup>183</sup> PHILIP CUSHMAN, CONSTRUCTING THE SELF, CONSTRUCTING AMERICA 381 (1995).

dichotomies.<sup>184</sup> Given such a vision of the self vis-à-vis the world, the Framers could readily imagine a citizen-self who acted as a virtuous citizen in the public sphere (at least some of the time) but also acted as a self-interested commercial and economic striver in the private sphere.

The existence (or conception) of this dichotomous citizen-self had numerous ramifications. The Framers' citizen-self was to remain well balanced, standing with one foot in the public sphere and one foot in the private sphere.<sup>185</sup> As such, the Framers' self served as a connection, a bridge, between the two spheres. The citizen-self enjoyed liberty in both spheres, though the meaning of liberty differed in each. In the public sphere, liberty denoted individual freedom to participate in republican government. In the private sphere, liberty denoted individual freedom to satisfy one's passions and interests, or at least to try to do so.<sup>186</sup> The self could use reason, too, in both the public and private spheres. In the public sphere, reason could identify substantive content. That is, the citizen-self reasoned—or rationally deliberated with other citizens—to discern the substance of the common good.<sup>187</sup> In the private sphere, however, reason was primarily instrumental. The self sought to satisfy a goal arising from passions and interests. Thus, the private-sphere self used reason to calculate logically the most advantageous means for achieving that goal.<sup>188</sup> Yet the Framers realized that such calculations were often imprecise. From their standpoint, individuals were swayed as much by their passions and prejudices as by a rational assessment of their own opportunities.<sup>189</sup>

<sup>184</sup> Much of modern philosophy has been devoted to attempting to bridge various gaps in this dichotomous world. See generally RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

<sup>185</sup> NEDELSKY, *supra* note 18, at 12 ("Madison's political thought was characterized by an often agonized effort to find a working balance between the rights of property and republican principles.")

<sup>186</sup> See CREATION, *supra* note 18, at 24-25, 410-11, 609 (distinguishing forms of liberty); McDONALD, *supra* note 18, at 4, 9-55 (emphasizing the ambiguity of terms such as liberty).

<sup>187</sup> See, e.g., THE FEDERALIST No. 1 (Alexander Hamilton) (calling on Americans "to deliberate" about the merits of the proposed Constitution).

<sup>188</sup> See POCOCK, *supra* note 18, at 464-65, 522-23 (discussing public and private rationalities).

<sup>189</sup> Alexander Hamilton, *Letter to Robert Morris* (1780), in 3 THE WORKS OF ALEXANDER HAMILTON 319-33 (Henry Cabot Lodge ed., 1904) (cautioning not to overestimate the ability of individuals to calculate rationally); NEDELSKY, *supra* note 18, at 76 (quoting Gouverneur Morris as questioning individual rationality).

## B. *Overlap Between the Private and Public Spheres*

With the citizen-self as a bridge, the public and private spheres were conceptually (or intellectually) separable, but they were not distinct. In practice, they often overlapped or bled into each other. For example, religion (primarily Protestantism) supposedly would be a matter for the private sphere under the national Constitution—implicitly so in the original document and explicitly so after the adoption of the Bill of Rights in 1791.<sup>190</sup> The Free Exercise Clause of the First Amendment protects freedom of conscience, a Protestant prerequisite for individual religious salvation. The Establishment Clause, meanwhile, prohibits the institution of a national church, partly because such a church would too closely resemble the Church of England.<sup>191</sup> Yet religious establishments were allowed to continue at the state level and did so for several years.<sup>192</sup> Unquestionably, then, in those states that maintained establishments, the people officially recognized religion in the public sphere. With or without such state establishments, however, de facto Protestantism continued unabated throughout the nation. And de facto Protestantism, whether emanating from the private sphere or otherwise, strongly influenced the public sphere: the Protestant self of the private sphere was also a citizen of the public sphere. Unsurprisingly, then, conceptions of virtue and the common good often reflected Protestant values and interests.<sup>193</sup> The First Congress did not hesitate to appoint Protestant chaplains for both houses<sup>194</sup> and to ask the President to declare “a day of Thanksgiving and Prayer.”<sup>195</sup>

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<sup>190</sup> U.S. CONST. amend. I (containing the Establishment and Free Exercise Clauses); see also THE FEDERALIST No. 51 (James Madison) (reasoning that the “multiplicity of sects” would protect “religious rights”).

<sup>191</sup> See STEPHEN M. FELDMAN, PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 148-49, 155 (1997) [hereinafter CRITICAL HISTORY] (discussing influence of the Church of England on American thinking about establishment); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 690 (2002) (same).

<sup>192</sup> ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE 118 (2005) (noting that Massachusetts eliminated the final state establishment in 1833).

<sup>193</sup> See CRITICAL HISTORY, *supra* note 191, at 158-68 (discussing the framing, the Bill of Rights, and de facto Protestantism); ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING 130-31, 151-61 (1990) (emphasizing the importance of Protestantism to Founders); SMITH, *supra* note 82, at 125 (arguing that the Constitution “assumes a predominantly Christian nation”).

<sup>194</sup> THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 218 (1986); ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 484-85 (1950).

<sup>195</sup> Annals of Congress (Sept. 25, 1789), reprinted in 1 STOKES, *supra* note 194, at 486.

Thus, while the Framers sought balance between the public and private, they did not view the two spheres as completely separate or exactly equal. Constitutional provisions such as the Commerce Clause anticipated that the government would sometimes be explicitly involved in private sphere affairs.<sup>196</sup> More precisely, the Framers believed that the government could diminish or infringe individual rights and liberties if the government acted in pursuit of the common good (and otherwise acted consistently with the Constitution).<sup>197</sup> In this sense, the balance was skewed in favor of the public over the private. Wilson stated that “no government, either single or confederated, can exist, unless private and individual rights are subservient to the public and general happiness of the nation.”<sup>198</sup> The Fifth Amendment in the Bill of Rights—“nor shall private property be taken for public use, without just compensation”—illustrates this key point.<sup>199</sup> On the one hand, the Constitution unequivocally protects private property, but on the other hand, the government can still take private property for public use—that is, to promote the common good.<sup>200</sup> To be sure, under the Fifth Amendment, the government is required to pay just compensation for a taking. But the government is otherwise permitted to regulate property and the economic marketplace—anything short of an actual taking—without paying compensation, so long as the regulation is for the common good. In the *Federalist Number 10*, Madison unequivocally stated that the government must have the power to regulate individuals with diverse economic interests in the private sphere:

Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and

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<sup>196</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>197</sup> Nedelsky argues that the Framers created a system where ordinary people consent to their governance without truly governing themselves. NEDELSKY, *supra* note 18, at 149.

<sup>198</sup> James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), in 3 FARRAND, *supra* note 18, at 141, app. 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).

<sup>199</sup> U.S. CONST. amend. V.

<sup>200</sup> 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, *Speech In First Congress* (Apr. 9, 1789), reprinted in COMPLETE MADISON, *supra* note 55, at 276; James Madison, *In Congress* (1789), reprinted in COMPLETE MADISON, *supra* note 55, at 272; James Madison, *Letter to Clarkson Crolius* (Dec. 1819), reprinted in COMPLETE MADISON, *supra* note 55, at 270; James Madison, *Letter to D. Lynch, Jr.* (June 27, 1817), reprinted in COMPLETE MADISON, *supra* note 55, at 271.

views. *The regulation of these various and interfering interests forms the principal task of modern legislation . . .*<sup>201</sup>

C. *Hamilton's Report on Manufactures: Interference and Aid Are Indispensable*

The Framers with the best-developed vision of a competitive free-market economy bustling with industry and commerce was undoubtedly Hamilton.<sup>202</sup> His understanding of the relationship between the public and private spheres is, therefore, especially illuminating. At that time, in the late eighteenth century, England was deep into its Industrial Revolution and had traveled far along the transitional road from mercantilism to capitalism. Hamilton strongly admired the British political-economic system and sought to create an American system that would move in a roughly similar direction.<sup>203</sup>

In his position as the first Secretary of the Treasury, in President George Washington's administration, Hamilton attempted to implement his vision of an economic system in accord with the recently ratified Constitution. From Hamilton's perspective, the nation faced an impending financial catastrophe largely because the state and national governments still carried heavy debts from the Revolutionary War. During the 1780s, the ineffective state and national governments could not meet those debts, so public securities lost value and public credit vanished.<sup>204</sup> Consequently, the Framers' desire to protect property rights while simultaneously strengthening the national government required that the nation be on firm financial footing. To achieve these goals, Hamilton conceived a "grand design" for a "utopian financial system."<sup>205</sup> Hamilton laid out this plan in three reports to Congress: *Report on Public Credit* (January 9, 1790), *Report on*

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<sup>201</sup> THE FEDERALIST No. 10 (James Madison) (Project Gutenberg ed., 2004) (emphasis added). The Constitution did not embody a "free market" approach to economic activity. White, *supra* note 50, at 84 ("If anything, the document assumes . . . a promotional or regulatory relationship between the state and markets.").

<sup>202</sup> See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 93, 113-16 (1993) (describing Hamilton's plan); HEILBRONER & SINGER, *supra* note 19, at 85 (arguing Hamilton was ahead of his times); DAVID F. PRINDLE, *THE PARADOX OF DEMOCRATIC CAPITALISM* 29-30 (2006) (arguing that Hamilton favored capitalism over democracy); SHARP, *supra* note 30, at 34-43 (describing Hamilton's plan); EMPIRE, *supra* note 118, at 98 (describing Hamilton's plan for a national bank as "bold and novel").

<sup>203</sup> 1 FARRAND, *supra* note 18, at 282-89 (June 18, 1787); McDONALD, *supra* note 18, at 115; SHARP, *supra* note 30, at 33, 43.

<sup>204</sup> McDONALD, *supra* note 18, at 94-96, 138-42; NEDELSKY, *supra* note 18, at 125-26.

<sup>205</sup> ELKINS & MCKITRICK, *supra* note 202, at 93; see EMPIRE, *supra* note 118, at 95-139 (describing the Federalist program of the 1790s).

a *National Bank* (December 13, 1790), and *Report on Manufactures* (December 5, 1791).<sup>206</sup>

Hamilton's *Report on Manufactures*, in particular, illuminates his view of the American political-economic system. In this *Report*, Hamilton argued that the national government should actively encourage the development of manufacturing in the United States.<sup>207</sup> He articulated the main objections to such government support and then responded to each objection. For instance, Hamilton acknowledged that some Americans viewed manufacturing as being opposed to agriculture.<sup>208</sup> Thus, any support for manufacturing was necessarily antagonistic to agriculture. Moreover, many political leaders thought this conflict between manufacturing and agriculture reflected the regional interests of the North and South, respectively.<sup>209</sup> In fact, though Hamilton did not mention him by name, Jefferson was known to believe that the strength of the nation lay in its agrarianism.<sup>210</sup> Jefferson, it should be noted, was the first Secretary of State and owned the Virginia plantation, Monticello, worked by between 100 to 140 slaves.<sup>211</sup>

Jefferson's antagonism to Hamilton's financial plan and Hamilton's response require elaboration. Two streams of thought, one British and one French, helped shape Jefferson's outlook. In the early eighteenth century, the British Country theorists, including John Trenchard and Thomas Gordon, argued that the enhanced power of England's central government, tied to commercial interests, had corrupted the republican British government.<sup>212</sup>

Meanwhile, in the latter part of the eighteenth century, the French Physiocrats advocated for minor reforms in an effort to preserve the ancient French regime (that would subsequently collapse in the French Revolution).<sup>213</sup> The Physiocrats opposed industrialization and instead argued that the natural development of an agrarian economy led to prosperity; all moral

<sup>206</sup> See EMPIRE, *supra* note 118, at 95-103 (describing Hamilton's program).

<sup>207</sup> Alexander Hamilton, *Report on Manufactures*, 3 ANNALS OF CONG. 971 (Joseph Gales ed., 1834) (Communicated to the House of Representatives, Dec. 5, 1791).

<sup>208</sup> *Id.* at 1005-06.

<sup>209</sup> *Id.*

<sup>210</sup> Thomas Jefferson, *Notes on the State of Virginia* (1787), reprinted in THOMAS JEFFERSON: WRITINGS 123 (Library of America, 1984); SEAVOY, *supra* note 19, at 84-85.

<sup>211</sup> FINKELMAN, *supra* note 116, at 193-94; HENRY WIENCEK, MASTER OF THE MOUNTAIN 13 (2012).

<sup>212</sup> THE ENGLISH LIBERTARIAN HERITAGE (David L. Jacobson ed., 1965 ed.) (writings of Trenchard and Gordon); see BAILYN, *supra* note 18, at 34-35 (mentioning civic humanist writers such as John Milton and James Harrington); POCOCK, *supra* note 18, at 406-08, 486-87 (distinguishing Court and Country ideologies).

<sup>213</sup> GALBRAITH, *supra* note 19, at 50.

and economic values were based on the land and agriculture.<sup>214</sup> From Jefferson's perspective, the Country ideology demonstrated that Hamilton's desire to strengthen the national government, in conjunction with commercial development, would corrupt the American republic.<sup>215</sup> And the Physiocrats' writings suggested to Jefferson that the American political-economic system's strength grew from the existence of independent and self-sufficient agrarian households.<sup>216</sup> Even before the conflict with Hamilton had emerged, Jefferson had written that "[t]hose who labour in the earth are the chosen people of God," while manufacturers displayed "subservience and venality."<sup>217</sup> In case his views were not clear enough, Jefferson added, "The mobs of great [manufacturing] cities add just so much to the support of pure government, as sores do to the strength of the human body."<sup>218</sup> And several years later, soon after Jefferson became president, he wrote to his friend and former Physiocrat, Pierre Samuel du Pont de Nemours, to praise "the agricultural inhabitants" of the United States and to distinguish them sharply "from those of the cities."<sup>219</sup>

Hamilton responded to the Jeffersonian position not by attacking agriculture, but by explaining that such an opposition between manufacturing and agriculture was false. Government support for manufacturing would inevitably benefit agriculture and the national economy as a whole.<sup>220</sup> In other words, Hamilton maintained that support for manufacturing would promote the common good. His contention that manufacturing and agriculture were compatible had an obvious political slant: deflection of southern hostility toward northern manufacturing. And to a degree, all of Hamilton's arguments in his *Report* were politically oriented. He wanted to persuade Congress to enact measures that would promote manufacturing—with manufacturing being but one component of his complex program to put the young nation's finances in order.<sup>221</sup>

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<sup>214</sup> *Id.* at 46-56; LAWRENCE S. KAPLAN, THOMAS JEFFERSON: WESTWARD THE COURSE OF EMPIRE 51-52 (1999); McDONALD, *supra* note 18, at 98, 106-07.

<sup>215</sup> ELKINS & MCKITRICK, *supra* note 202, at 13-19 (paralleling the Jefferson-Hamilton dispute with the earlier English Country-Court dispute); EMPIRE, *supra* note 118, at 287 (discussing influence of Country ideology on Jefferson).

<sup>216</sup> ELKINS & MCKITRICK, *supra* note 202, at 199-201; HEILBRONER & SINGER, *supra* note 19, at 79-81; KAPLAN, *supra* note 214, at 51-52; McDONALD, *supra* note 18, at 107-08.

<sup>217</sup> Jefferson, *supra* note 210, at 290.

<sup>218</sup> *Id.* at 291.

<sup>219</sup> Thomas Jefferson, *To P.S. Dupont de Nemours* (Jan. 18, 1802), reprinted in JEFFERSON, *supra* note 210, at 1099.

<sup>220</sup> Alexander Hamilton, *Report on Manufactures*, 3 ANNALS OF CONG. 971, 973, 1006 (Joseph Gales ed., 1834).

<sup>221</sup> ELKINS & MCKITRICK, *supra* note 202, at 110-14.

Naturally, then, Hamilton's next argument was politically pointed, but it also related specifically to the constitutional plan for the public and private spheres. One primary objection to Hamilton's proposal for government support of manufacturing was that, quite simply, the government should not intrude on the free operation of the economic marketplace. In other words, the objection was that *laissez-faire* was better than government regulation or interference. Hamilton stated the *laissez-faire* objection as follows:

To endeavor, by the extraordinary patronage of Government, to accelerate the growth of manufactures, is, in fact, to endeavor, by force and art, to transfer the natural current of industry from a more to a less beneficial channel. Whatever has such a tendency, must necessarily be unwise: indeed it can hardly ever be wise in a Government, to attempt to give a direction to the industry of its citizens. This, under the quick-sighted guidance of private interest, will, if left to itself, infallibly find its own way to the most profitable employment; and it is by such employment that the public prosperity will be most effectually promoted. To leave industry to itself, therefore, is, in almost every case, the soundest as well as the simplest policy.<sup>222</sup>

Hamilton, in this passage, of course did not explicitly use the term "*laissez-faire*," but he was unquestionably articulating the *laissez-faire* position against government control.<sup>223</sup> He would reiterate it later in the *Report*: "[I]ndustry, if left to itself, will naturally find its way to the most useful and profitable employment," Hamilton wrote, "whence it is inferred, that manufactures, without the aid of Government, will grow up as soon and as fast as the natural state of things and the interest of the community may require."<sup>224</sup>

As one would expect from Hamilton, he answered the *laissez-faire* objection with a sophisticated and powerful response. He argued, in effect, that the economic marketplace is riddled with imperfections. Any individual who might contemplate the start of a new manufacturing business would be confronted with numerous obstacles, totally apart from supply and demand. Such an individual would be discouraged by considerations, such as

the strong influence of habit and the spirit of imitation, the fear of want of success in untried enterprises, the intrinsic difficulties incident to first essays towards a competition with those who have previously attained to perfection in the business to be attempted, the bounties, premiums, and other artificial encouragements, with which

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<sup>222</sup> Hamilton, *supra* note 207, at 972.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 988.

foreign nations second the exertions of their own citizens in the branches, in which they are to be rivalled.<sup>225</sup>

To counter such market imperfections, Hamilton maintained that government “interference and aid . . . are indispensable.”<sup>226</sup>

To be sure, Hamilton acknowledged that the laissez-faire objection was reasonable in the abstract, but abstractness was also the root of its weakness. The laissez-faire position arose from “the pursuit of maxims too widely opposite.”<sup>227</sup> In other words, it was an argument based on utopian ideals, but Hamilton, being a pragmatic realist, explained that such ideals rarely applied in their pristine form to the real world. “Most general theories . . . admit of numerous exceptions; and there are few, if any, of the political kind, which do not blend a considerable portion of error with the truths they inculcate.”<sup>228</sup> Instead of following utopian ideals, Hamilton recommended a more balanced approach that weighed the various factors in the particular circumstances. Thus, in assessing the arguments, Congress should evaluate “the considerations which plead in favor of manufactures, and which appear to recommend the special and positive encouragement of them in certain cases, and under certain reasonable limitations.”<sup>229</sup> Finally, as numerous historians have observed, the ultimate political goal of Hamilton’s entire financial plan was clear: he wanted to persuade the wealthy to support—not control—the national government.<sup>230</sup> As Lance Banning put it, Hamilton “never meant for monied men to use the government.”<sup>231</sup> In fact, if anything, Hamilton “intended the reverse.”<sup>232</sup> Hamilton did not intend to have the wealthy control the government for their own benefit.

#### D. *The Framers’ Vision: Achieving the Balance*

As Hamilton’s rhetoric in the *Report on Manufactures* suggests, it is important not to overstate the clarity of the

<sup>225</sup> *Id.*; see also *id.* at 989 (reiterating obstacles in briefer terms).

<sup>226</sup> *Id.* at 989.

<sup>227</sup> *Id.* at 973.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* Stephen Holmes explains that Smith followed David Hume (who strongly influenced the Framers) in denouncing “the false ‘love of simplicity.’” Stephen Holmes, *The Secret History of Self-Interest*, in BEYOND SELF-INTEREST 267, 269 (Jane J. Mansbridge ed., 1990) (quoting Hume). Hume (and Smith), in other words, rejected a “[m]otivational reductionism” that would focus solely on self-interest. *Id.* at 275.

<sup>230</sup> LANCE BANNING, THE JEFFERSONIAN PERSUASION 139 (1978); Richard Hofstadter, *Federalists and Republicans*, in 1 GREAT ISSUES, *supra* note 28, at 141; PRINDLE, *supra* note 202, at 32; EMPIRE, *supra* note 118, at 97.

<sup>231</sup> BANNING, *supra* note 230, at 139.

<sup>232</sup> *Id.*

Framers' vision. There were many ambiguities in their vision, partly because of the changing contemporaneous notions of government and the market and partly because the Constitution was drafted and ratified in a political crucible. In fact, it is worth mentioning one of the largest ambiguities, because some commentators might mistakenly claim that it suggests the constitutionalization of a fully capitalist, competitive free market. The Contract Clause states: "No State shall . . . pass any . . . Law impairing the Obligation of contracts . . ." <sup>233</sup> Toward the end of the Convention, Rufus King moved to add a contract clause. <sup>234</sup> After a brief, generally negative discussion, the motion was dropped. <sup>235</sup> Even so, the Committee of Style (consisting of five delegates) subsequently added a contract clause on their own, without any authorization from the other delegates. <sup>236</sup> No documentation clarifies the thoughts of the committee members regarding the inclusion or meaning of this clause. <sup>237</sup> During the ratification debates, the Contract Clause was most commonly understood as "simply a catchall extension of the bans on paper money and legal-tender laws." <sup>238</sup> That is, most viewed it as a relatively unimportant reassertion that the state governments would not be able to undermine private debts or disrupt credit and finances. At the Virginia Ratification Convention, however, Patrick Henry and George Mason worried that the clause would cost the state money by forcing it to redeem old continental debts. <sup>239</sup> No one suggested that the clause would protect profit-driven exchanges in a competitive free market—or in other words, capitalism. After all, American common law had not yet identified a separate realm of contract law based on marketplace values. <sup>240</sup>

Keeping in mind the ambiguities of the Framers' overall vision, as well as more specific ambiguities (such as the Contract Clause), it is nonetheless reasonable to conclude that the Framers created a political-economic system to balance the public and private spheres. The government was republican-democratic, and the economy was a hybrid of a dissipating mercantilism and an incipient capitalism. For the sake of stylistic simplicity, I will refer to the Framers' system as democratic-capitalist, but the imprecision of this shorthand label should be evident. The government system was not fully democratic. In most states,

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<sup>233</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>234</sup> 2 FARRAND, *supra* note 18, at 439 (Aug. 28, 1787).

<sup>235</sup> *Id.* at 439-40.

<sup>236</sup> *Id.* at 597 (Report of the Committee of Style).

<sup>237</sup> MCDONALD, *supra* note 18, at 270-73.

<sup>238</sup> *Id.* at 274.

<sup>239</sup> MAIER, *supra* note 18, at 285; MCDONALD, *supra* note 18, at 274.

<sup>240</sup> HORWITZ, *supra* note 19, at 180-81; MCDONALD, *supra* note 18, at 113-14.

white, Protestant men possessing some degree of wealth could vote, but large swathes of the population, including women, racial minorities, some religious minorities, and the poor, were excluded from directly participating in government.<sup>241</sup> Of course, some of the broad proscriptions on suffrage would eventually be eliminated, though there has not been steady and uninterrupted progress toward full suffrage in the United States.<sup>242</sup> Meanwhile, capitalism would continue to develop during the early nineteenth century, but the United States could not be accurately described as capitalist until the eradication of slavery. Over time, then, the government would become more democratic, and the economy would become more capitalist.

In any event, under republican democracy, the pursuit of the common good both empowered and limited the government.<sup>243</sup> This was as true at the state and local levels as at the national level. Government could act in almost any manner—even taking property—so long as it was for the common good, but simultaneously, government could not act unless it was for the common good. In fact, throughout much of the nineteenth century, a “well-regulated” or “well-ordered society,” including a well-regulated marketplace, was understood to evince republican-democratic government.<sup>244</sup> During this era, economic marketplaces were local, for the most part. Rudimentary transportation and communication technologies limited the development of a national marketplace until after the Civil War.<sup>245</sup> Thus, municipal and state governments frequently exercised their police powers to regulate the economy, particularly in the antebellum decades.<sup>246</sup> Such regulations could be purely promotional—intended to generate economic activity—or restrictive, or both.<sup>247</sup> Moreover,

<sup>241</sup> KEYSSAR, *supra* note 92, at 336-41 (state suffrage requirements through 1790).

<sup>242</sup> U.S. CONST. amend. XV (prohibiting denial of the vote based on race (1870)); *id.* amend. XIX (prohibiting denial of the vote based on sex (1920)); KEYSSAR, *supra* note 92, at xxi-xxiv (explaining uneven advances in suffrage).

<sup>243</sup> William Novak devotes his book, *The People's Welfare*, to discussing this simultaneous enhancement and limitation of government power at the state level. See NOVAK, *supra* note 198.

<sup>244</sup> *Id.* at 1-2; see *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85-86 (1851) (emphasizing “well ordered governments”).

<sup>245</sup> FREE EXPRESSION, *supra* note 21, at 167-69; HEILBRONER & MILBERG, *supra* note 19, at 87-88.

<sup>246</sup> NOVAK, *supra* note 198, at 10, 86, 237 (emphasizing local control, especially over economic relations).

<sup>247</sup> *Cf.*, HALL, *supra* note 19, at 87-88 (emphasizing that the nation in its early decades had a mixed rather than laissez-faire economy); White, *supra* note 50, at 84 (“[T]he usual model of economic activity in late eighteenth century America, [was one] in which towns, colonies, and states distributed land grants, exercised eminent domain powers, granted exclusive franchises to promote the building of turnpikes and bridges, and created opportunities for public officeholders to attach private emoluments to their

regulations were rarely, if ever, neutral; instead, some individuals or groups in society would be favored over others.<sup>248</sup>

Given the frequency and effects of economic regulations, individuals sometimes challenged the legality (or constitutionality) of government actions. These judicial challenges often invoked state constitution due process clauses or the analogous law-of-the-land provisions, but they also sometimes relied on common law or natural law principles.<sup>249</sup> Regardless of the specific legal foundation for the challenge, the key to the typical judicial analysis was the categorization of the government purpose: Was it for the common good, which was permissible—or was it merely for the benefit of one private interest over another, which was impermissible? The law could not be allowed to take wealth from one societal group and transfer it to another group for no reason other than that the favored group controlled the government. Chief Justice Stephen Hosmer of Connecticut phrased this judicial approach in typical terms: “If . . . the legislature should enact a law, without any assignable reason [read: the common good], taking from A. his estate, and giving it to B., the injustice would be flagrant, and the act would produce a sensation of universal insecurity.”<sup>250</sup>

Nevertheless, federal and state courts consistently upheld government actions that they deemed to be in the pursuit of the common good, even when those actions allegedly infringed on individual rights and liberties—including the right to property. For instance, in an 1845 case, an entrepreneur sought to sell poultry in Boston that he had acquired in New Hampshire.<sup>251</sup> He ran afoul, however, of strict municipal regulations on the marketplace. Specifically, the city required a seller to show “that all the said articles are the produce of his own farm, or of some

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offices.”). A growing emphasis on individualism was not equivalent to laissez-faire. WALTER LIGHT, *INDUSTRIALIZING AMERICA: THE NINETEENTH CENTURY* 191 (1995).

<sup>248</sup> HALL, *supra* note 19, at 88 (arguing that the question was not whether to regulate but who would benefit from regulation); HORWITZ, *supra* note 19, at xiv-xv (emphasizing that government regulations influenced the distribution of wealth); William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 754, 769-71 (2008) (emphasizing that government exercised infrastructural power, which inevitably influenced the distribution of wealth); see JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 3-12, 18-25 (2012) (showing that there was far more regulation of the economy, even at the federal level, than is ordinarily acknowledged).

<sup>249</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (relying on natural law); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260, 260 (1829) (relying on state law of the land provision).

<sup>250</sup> *Goshen v. Stonington*, 4 Conn. 209, 221 (1822). For additional examples, see *State Bank v. Cooper*, 10 Tenn. (2 Yer.) 599 (1831), *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825), *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798), and *VanHorne v. Dorrance*, 28 F. Cas. 1012 (C.C.D. Pa. 1795).

<sup>251</sup> *Commonwealth v. Rice*, 50 Mass. (9 Met.) 253 (1845).

farm not more than three miles distant from his own dwelling-house.”<sup>252</sup> The seller objected, contending that “the by-law is contrary to common right, in restraint of trade, against public policy, unreasonable and void.”<sup>253</sup> The court upheld the regulations in an opinion by Lemuel Shaw. Shaw reasoned that the city necessarily had the power to “control” its “accommodations” for sales so “as best to promote the welfare of all the citizens.”<sup>254</sup> Shaw concluded, “[W]e think . . . [the regulations] are well calculated to promote the public and general benefit,” notwithstanding the restrictions on the economic marketplace.<sup>255</sup> Chancellor James Kent of New York succinctly summarized this fundamental judicial perspective: “[P]rivate interest must be made subservient to the general interest of the community.”<sup>256</sup> The conclusion from the *Rice* case and others like it is unmistakable; the effort to balance private liberty with the common good of the public led to a system that was not fully democratic and not fully capitalist.

## V. FREE SPEECH AND A FREE PRESS

And what about free expression? In particular, did the adoption of the First Amendment, with its express protections of free speech and a free press, accord greater protection to liberty of expression than to other liberties?<sup>257</sup> Or did the constitutional guarantee of free expression protect property rights and other wealth in some direct manner?

The lack of importance attached to the adoption of a Bill of Rights makes construing the First Amendment’s original meaning difficult. The overwhelming majority of delegates to the

<sup>252</sup> *Id.* at 256.

<sup>253</sup> *Id.* at 258.

<sup>254</sup> *Id.* at 258-59.

<sup>255</sup> *Id.*; see NOVAK, *supra* note 198, at 51-233 (cataloguing examples of government regulations and restrictions upheld as promoting the common good or the people’s welfare). For similar cases, see *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 155 (1855), *In re Vandine*, 23 Mass. (6 Pick.) 187, 190-92 (1828), and *Vanderbilt v. Adams*, 7 Cow. 349, 351-52 (N.Y. 1827).

<sup>256</sup> JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 276 (1827). Although courts have readily upheld numerous government actions, the republican concept of limited government was not specious. *E.g.*, *State Bank v. Cooper*, 10 Tenn. (10 Yer.) 599 (1831) (invalidating a law creating a special court for the Bank of Tennessee); *Pingry v. Washburn*, 1 Aik. 264 (Vt. 1826) (invalidating a turnpike toll law).

<sup>257</sup> For a more extensive discussion of free expression in the early years of nationhood, including the Sedition Act crisis, see generally FREE EXPRESSION, *supra* note 21, at 46-100; LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983). Helpful sources on the adoption of the Bill of Rights can be found in the following collections: THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan ed., 1997) [hereinafter COGAN]; THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS]; 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (Bernard Schwartz ed., 1971) [hereinafter Schwartz, DOCUMENTARY].

Constitutional Convention believed that a Bill of Rights, which would include explicit protections for expression, was unnecessary. Several times, Pinckney suggested considering a free press clause, but the delegates never followed his lead.<sup>258</sup> Toward the end of the Convention, Gerry and Mason sought to add a Bill of Rights, which Mason asserted “might be prepared in a few hours.”<sup>259</sup> Gerry’s motion, seconded by Mason, failed.<sup>260</sup> Sherman expressed the general sentiment, “It is unnecessary—The power of Congress does not extend to the Press.”<sup>261</sup> In other words, for the most part, the Framers believed that the scheme of enumerated powers in Article I would limit congressional power and render a Bill of Rights superfluous.<sup>262</sup> Once the ratification debates had begun, however, the Anti-Federalist opponents of the Constitution seized on the lack of a Bill of Rights as an issue with political traction. Given that many of the state constitutions contained a Bill of Rights, why had the Framers not included one? Were the Framers and the Federalist supporters of ratification seeking to create a centralized national government that would tyrannize the people?<sup>263</sup>

Eventually, under political pressure, Madison and the other Federalists promised to add a Bill of Rights if the states first ratified the Constitution as originally proposed.<sup>264</sup> And in fact, after ratification, Madison was elected to serve in the first House of Representatives, where he promptly introduced a draft Bill of Rights on June 8, 1789.<sup>265</sup> Madison viewed the proposed amendments as fulfilling his political promise but as otherwise being relatively unimportant. When presenting his draft amendments, he explained that the addition of a Bill of Rights

<sup>258</sup> 3 FARRAND, *supra* note 18, at 599 app. D (The Pickney Plan); 2 *id.* at 334, 341 (Aug. 20, 1787), 617 (Sept. 14, 1787).

<sup>259</sup> 2 *id.* at 587-88 (Sept. 12, 1787).

<sup>260</sup> *Id.* at 588 (Sept. 12, 1787).

<sup>261</sup> *Id.* at 618 (Sept. 14, 1787).

<sup>262</sup> See, e.g., James Wilson, *Speech at a Meeting in Philadelphia* (Oct. 6, 1787), reprinted in COGAN, *supra* note 257, at 102 (arguing that Congress’s enumerated powers would not allow infringements on individual liberties such as freedom of the press).

<sup>263</sup> HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981). For examples of Anti-Federalists questioning the lack of protection of freedom of the press, see Centinel, No. 1 (Oct. 1787), reprinted in 5 FOUNDERS, *supra* note 257, at 13, 19-20; Federal Farmer, No. 4 (Oct. 12, 1787), reprinted in 5 FOUNDERS, *supra* note 257, at 54, 59; Centinel, No. 2 (Oct. 24, 1787), reprinted in COGAN, *supra* note 257, at 103, 103-04; Federal Farmer, No. 16 (Jan. 20, 1788), reprinted in 5 FOUNDERS, *supra* note 257, at 79, 85-86.

<sup>264</sup> Letter from James Madison to Alexander Hamilton (June 22, 1788), reprinted in 2 Schwartz, DOCUMENTARY, *supra* note 257, at 848; see James Madison, *Speech in the Virginia Ratifying Convention on Ratification and Amendments* (June 24, 1788), reprinted in MADISON, WRITINGS, *supra* note 34, at 401, 406-07.

<sup>265</sup> Proposal by Madison in House (June 8, 1789), reprinted in COGAN, *supra* note 257, at 83.

would be “neither improper nor altogether useless.”<sup>266</sup> He asked that Congress “devote but one day to this subject, so far as to satisfy the public that we do not disregard their wishes.”<sup>267</sup> The rest of the Federalist-controlled House apparently agreed with Madison’s assessment of the task. After all, from their perspective, the Constitution did not grant Congress power to infringe on individual liberties such as the freedoms of speech and of the press. James Jackson of Georgia first stated that he thought a Bill of Rights was unnecessary but added that “if gentlemen should think it a subject deserving of attention, they will surely not neglect . . . more important business . . . I am against taking up the subject at present.”<sup>268</sup> South Carolinian Aedanus Burke agreed that until “other important subjects are determined, he was against taking this up.”<sup>269</sup> Madison himself explained that he did not wish, at present, “to enter into a full and minute discussion of every part of the subject, but merely to bring it before the House, that our constituents may see we pay a proper attention to a subject they have much at heart.”<sup>270</sup>

Congress finally considered the Bill of Rights on July 21, 1789, six weeks after Madison had introduced the proposed amendments.<sup>271</sup> As the future Bill of Rights wound its way through the congressional process, the most striking aspect of the discussions was the paucity of debate about the proposed rights’ substantive meanings, including free speech and a free press. The bulk of the congressional deliberations revolved instead around the form or felicity of phrasing in the various amendments.<sup>272</sup> Gerry, now a member of the House as well, expressed his disgust with his congressional colleagues who were saying “it is necessary to finish the subject [merely] in order to reconcile a number of our fellow-citizens to the government.”<sup>273</sup> Thus, if one wants to understand the content or substantive meaning of free speech or a free press, one will not find it within the congressional debates.

Furthermore, the ratification debates in the various states were inadequately documented and therefore do not elucidate the meaning of the First Amendment. It is clear, however, that Congress had included the freedoms of speech

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<sup>266</sup> House of Representatives, Amendments to the Constitution (June 8, 1789) (from the Annals of Congress), reprinted in 5 FOUNDERS, *supra* note 257, at 20, 26.

<sup>267</sup> *Id.* at 22.

<sup>268</sup> *Id.* at 20, 21.

<sup>269</sup> *Id.* at 21; *see id.* (Benjamin Goodhue of Massachusetts arguing similarly).

<sup>270</sup> *Id.* at 22.

<sup>271</sup> 2 Schwartz, DOCUMENTARY, *supra* note 257, at 1050.

<sup>272</sup> Anderson, *supra* note 257, at 478.

<sup>273</sup> House of Representatives, Amendments to the Constitution (Aug. 15, 1789) (from the Annals of Congress), reprinted in 5 FOUNDERS, *supra* note 257, at 204.

and press in the *third* of the proposed articles (or amendments) sent to the states for ratification. The states rejected the first two proposed amendments, and thus the third article moved up ordinarily, almost by happenstance, to become the First Amendment.<sup>274</sup> The ultimate position of free expression in the First Amendment, consequently, should not be construed to suggest that Congress thought that the freedoms of speech and press were more important than other liberties.

At that time, state constitutions typically had free press clauses, but only two had explicit free speech clauses.<sup>275</sup> In the states, the constitutional concept of free expression (primarily a free press) largely echoed the common law. The government could not impose a prior restraint—such as requiring a license or permit before publishing—but government could impose subsequent punishment on criminal statements, particularly seditious libel (criticisms of government officials or policies). In a Pennsylvania case decided in 1788, Chief Justice Thomas McKean reasoned that prior restraint is prohibited but that criminal punishment after publication is consistent with “true liberty” if the writing was intended to “delude and defame” rather than to advance the “public good.”<sup>276</sup> Approximately a decade later, in 1797, McKean still understood free expression in similar terms:

The liberty of the press is, indeed, essential to the nature of a free State, but this consists in laying no previous restraints upon public actions, and not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his temerity.<sup>277</sup>

Ambiguity in the American law of free expression centered on the degree to which states should follow Zengerian reforms—modifications of the common law implicitly followed in the 1735 trial of John Peter Zenger.<sup>278</sup> Zengerian reforms were twofold. First, juries rather than judges should decide whether the disputed speech is libelous. Second, truth should be a defense to a charge of seditious libel. (Under the English common law of the eighteenth century, not only was truth not a defense, but it was grounds for aggravation of the crime.)

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<sup>274</sup> Senate Journal (Sept., 1789), reprinted in 2 Schwartz, DOCUMENTARY, *supra* note 257, at 1163-65.

<sup>275</sup> FREE EXPRESSION, *supra* note 21, at 64.

<sup>276</sup> *Respublica v. Oswald*, 1 Dall. 319 (Pa. 1788), reprinted in 5 FOUNDERS, *supra* note 257, at 124, 127.

<sup>277</sup> LEVY, *supra* note 257, at 212-13 (quoting Thomas McKean).

<sup>278</sup> *Id.* at 37-45.

In 1790 and 1791, while the states were debating ratification of the proposed Bill of Rights, James Wilson delivered at the College of Philadelphia (University of Pennsylvania) the seminal lectures on American constitutional law. When he came to free expression, Wilson stated, “The citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning public men, public bodies, and public measures.”<sup>279</sup> He reasoned, therefore, that the law of seditious libel is “wise and salutary when administered properly, and by the proper persons.”<sup>280</sup> What constitutes wise and salutary administration of seditious libel, according to Wilson? Although not all Americans would have agreed, Wilson insisted that Zengerian reforms must be followed in full: truth should always be a defense, and juries should always decide whether the disputed speech was libelous.<sup>281</sup>

Thus, the meaning of the First Amendment protection of free speech and a free press was murky, to say the least. Unquestionably, Americans highly valued free expression; a cultural tradition of dissent and speaking one’s mind reached back to colonial times and the Revolution.<sup>282</sup> Many Americans had declared that free expression was the grand palladium, the bulwark of liberties, thus echoing the British Country theorists, Trenchard and Gordon, who had written in 1720 that “Freedom of Speech is the great Bulwark of Liberty; they prosper and die together.”<sup>283</sup> For example, the Virginia Bill of Rights, adopted nearly one month before the Declaration of Independence, proclaimed “[t]hat the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.”<sup>284</sup> During the ratification debates, Anti-Federalists repeatedly declared that freedom of the press was the “grand” or “sacred palladium” of freedom.<sup>285</sup> In fact, Madison’s first draft of the article that would eventually be ratified as the First

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<sup>279</sup> James Wilson, 2 *THE WORKS OF JAMES WILSON* 287 (James DeWitt Andrews ed., 1896 ed.).

<sup>280</sup> *Id.* at 395.

<sup>281</sup> *Id.* at 395-97.

<sup>282</sup> FREE EXPRESSION, *supra* note 21, at 3-13, 46-60.

<sup>283</sup> *Of Freedom of Speech: That the same is inseparable from Publick Liberty* (Feb. 4, 1720), reprinted in *THE ENGLISH LIBERTARIAN HERITAGE* 38, 42 (David L. Jacobson ed., 1965 ed.) (signed by Thomas Gordon); see, e.g., LEVY, *supra* note 257, at 67 (citing Samuel Adams, *Boston Gazette*, Mar. 14, 1768, emphasizing “the bulwark of the People’s Liberties”).

<sup>284</sup> Virginia Bill of Rights (1776), reprinted in 2 POORE, *supra* note 18, at 1908, 1909.

<sup>285</sup> John Dawson at Virginia Ratification Convention (June 24, 1788), reprinted in COGAN, *supra* note 257, at 101; Patrick Henry at Virginia Ratification Convention (June 14, 1788), reprinted in 2 Schwartz, *DOCUMENTARY*, *supra* note 257, at 800; Cincinnatus, No. 2, to James Wilson (Nov. 8, 1787), reprinted in 5 *FOUNDERS*, *supra* note 257, at 122; Centinel, No. 2 (Oct. 24, 1787), reprinted in COGAN, *supra* note 257, at 103.

Amendment read as follows: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”<sup>286</sup>

Even so, the law of free expression in the states was ambiguous partly because of the uncertain Zengerian reforms. And the congressional debates and subsequent state ratifications of the First Amendment did nothing to clarify the ambiguous meaning of free speech and a free press. No one, it should be added, ever suggested that free speech or a free press directly protected the expenditure of wealth—whether in relation to politics or otherwise. In any event, the ambiguity of the First Amendment would contribute to controversy in the 1790s. The Federalists, recently unified in support of constitutional ratification, split into two opposed “proto-parties,” the Republicans (led by Jefferson and Madison) and the Federalists (led by Hamilton).<sup>287</sup> Jefferson and the Republicans’ opposition to Hamilton’s financial plan for the nation was but one of several contentious issues, albeit an explosive one.<sup>288</sup> Throughout the decade, the conflict between the Republicans and Federalists grew increasingly bitter. In the midst of John Adams’s term as President, the Federalists still controlled both houses of Congress, as well as the executive branch, but they then made a monumental political miscalculation. They enacted the Sedition Act of 1798 and began prosecuting Republican printers and politicians for seditious libel.<sup>289</sup> Free expression suddenly became a concrete and combusive political issue.<sup>290</sup>

From the Federalist perspective, Congress had the power to enact the Sedition Act despite the First Amendment. True, Congress could not abridge free speech or a free press, but in the 1790s, one could have reasonably concluded that seditious libel was not within the realm or category of free expression. In other words, the First Amendment precluded Congress from restricting only certain types of speech and writing, and seditious libel was not among the protected types.<sup>291</sup> The freedoms of speech and of the press were, from this perspective, beside the point: Congress

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<sup>286</sup> Proposal by Madison in House (June 8, 1789), *reprinted in* COGAN, *supra* note 257, at 83.

<sup>287</sup> SHARP, *supra* note 30, at 8-9.

<sup>288</sup> ELKINS & MCKITRICK, *supra* note 202, at 93, 229; SHARP, *supra* note 30, at 33-41.

<sup>289</sup> Sedition Act of 1798, § 2-4, 1 Stat. 596-97.

<sup>290</sup> *See generally* FREE EXPRESSION, *supra* note 21, at 70-100 (discussing Sedition Act crisis).

<sup>291</sup> *See, e.g.*, The Legislature of Rhode Island on the Virginia Resolutions (Feb. 1799), *in* 1 GREAT ISSUES, *supra* note 28, at 184-86 (arguing Congress acted within its power to promote the general welfare).

could criminally punish criticisms of public officials and policies. In fact, the Federalists believed that they had enacted the most liberal seditious libel statute imaginable because the Sedition Act fully incorporated Zengerian reforms.<sup>292</sup>

In terms of the First Amendment's contemporaneous meaning, the Republicans' initial response was significant. They articulated a jurisdictional, or federalism-based, argument: the states, but not the national government, were empowered to punish seditious libel.<sup>293</sup> Congress's enumerated powers, the Republicans emphasized, did not include a power to punish seditious libel. The First Amendment reinforced this congressional impotency. Most importantly, then, the Republicans did not claim that government punishment of seditious libel contravened the meaning of free speech or a free press. To the contrary, they argued that if punishment was merited because of the publishing of libel, then state governments could impose the punishment, regardless of state constitutional guarantees of free expression.<sup>294</sup> So, for instance, one month after the first Sedition Act prosecution, Kentucky protested the Federalists' actions by issuing a legislative resolution that articulated the jurisdictional argument.<sup>295</sup> (Jefferson actually wrote the first draft of the resolution.<sup>296</sup>) If the national government attempted to act beyond its enumerated powers, the resolution stated, its actions were "unauthoritative, void, and of no force."<sup>297</sup> The resolution then focused on free expression: "[N]o power over the . . . freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people."<sup>298</sup> By this reasoning, the Sedition Act was invalid, though the states themselves retained "the right of judging how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom."<sup>299</sup>

Because of the First Amendment's ambiguity, both the Federalists and the Republicans were able to articulate reasonable though opposed arguments. Interestingly, they agreed

<sup>292</sup> The Sedition Act of 1798, 1 Stat. 596-97 (1798).

<sup>293</sup> *E.g.*, 8 ANNALS OF CONG., 2139 (1798) (statement of Virginia Representative John Nicholas).

<sup>294</sup> *Id.* at 2153 (statement of New York Representative Edward Livingston).

<sup>295</sup> Kentucky Resolutions (Nov. 10, 1798; Nov. 14, 1799), *reprinted in* 5 FOUNDERS, *supra* note 257, at 131.

<sup>296</sup> *Id.*; see SHARP, *supra* note 30, at 196-97 (discussing Jefferson's role in writing Kentucky Resolutions).

<sup>297</sup> 5 FOUNDERS, *supra* note 257, at 132.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

on one point: the criminal punishment of seditious libel is consistent with republican-democratic government. They disagreed on whether both the states and the national government (the Federalist position) or only the states (the Republican position) could impose the punishment. Politically, the result of the Sedition Act crisis was that the Republicans swept the elections of 1800. Jefferson became President, and the Republicans gained control of both houses of Congress.<sup>300</sup> With regard to free speech and a free press, the crisis eventually spurred Republican politicians and writers to develop more sophisticated and protective theories of free expression.<sup>301</sup> Nevertheless, when courts articulated the legal doctrine of free expression in the nineteenth century, these expansive theories were largely ignored or forgotten. Thus, just as courts recognized that other individual rights and liberties, including property rights, were subject to government regulation and infringement under republican democracy, courts similarly conceived of rights to free speech and a free press. No rights were sacrosanct. To be sure, state constitutions, as well as the federal Constitution, expressly protected citizens' rights to free expression, but government nonetheless could limit such rights if in pursuit of the common good. As it was often phrased, individuals enjoyed rights to speech and press but were still responsible for abuses of those freedoms.<sup>302</sup> Liberty was not equivalent to license.<sup>303</sup>

Consequently, the lower courts developed free-expression doctrine consistent with these republican-democratic principles. More specifically, courts used a "bad tendency" test to delineate the scope of free expression: the government could not impose prior restraints on expression, but it could impose criminal penalties for speech or writing that had bad tendencies or likely harmful consequences.<sup>304</sup> Such harmful speech and writing

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<sup>300</sup> ELKINS & MCKITRICK, *supra* note 202, at 746-50; SHARP, *supra* note 30, at 226-75.

<sup>301</sup> *E.g.*, JAMES MADISON, *Report on the Alien and Sedition Acts* (Jan. 7, 1800), reprinted in MADISON, WRITINGS, *supra* note 34, at 608; GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS (1799), reprinted in TWO ESSAYS ON THE LIBERTY OF THE PRESS (1970); see FREE EXPRESSION, *supra* note 21, at 89-98 (discussing expanding notions of free expression).

<sup>302</sup> The Pennsylvania Constitution stated that "every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." PA. CONST. of 1838, art. IX, § 7, reprinted in 2 POORE, *supra* note 18, at 1557, 1564. For similar constitutional provisions, see ARK. CONST. of 1836, art. II, § 7, reprinted in 1 POORE, *supra* note 18, at 101-02; DEL. CONST. of 1831, art. I, § 5, reprinted in 1 POORE, *supra* note 18, at 289, 289; and ILL. CONST. of 1848, art. II, § 4, reprinted in 1 POORE, *supra* note 18, at 449, 471.

<sup>303</sup> *E.g.*, *State v. Van Wye*, 37 S.W. 938, 939 (Mo. 1896).

<sup>304</sup> ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 25 (1920); see also MICHAEL KENT CURTIS, FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE" 10-12 (2000) (discussing bad tendency test). The bad tendency test first emerged as a truth-conditional standard. As

contravened the common good. Many courts added that the criminal defendant, to be convicted, must also have intended harmful consequences. Even so, under the doctrine of constructive intent, the courts typically reasoned that a defendant was presumed to have intended the natural and probable consequences of his or her statements. If a defendant's expression was found to have bad tendencies, then the court would infer the defendant's criminal intent.<sup>305</sup> In sum, through at least the late nineteenth century, courts suggested neither that free expression deserved more constitutional protection than other rights or liberties nor that free expression protected wealth or other property rights.

## CONCLUSION

Historical evidence does not support the Roberts Court conservatives or scholars such as Richard Epstein who claim to follow originalist methods while simultaneously insisting that the Constitution creates a laissez-faire political-economic system. The Framers and their contemporaries were not market fundamentalists. They envisioned a political-economic system with a balance between the public and private spheres. They wanted virtuous citizens and government officials to pursue the common good in the public sphere, but they had learned that a government relying on virtue alone would fail. Many citizens would pursue their own passions and interests rather than virtue and reason. To be a self-interested striver in the private economic sphere, the Framers believed, was legitimate and beneficial. Yet they feared that the unrestrained pursuit of self-interest in the public sphere would scuttle the American experiment in republican government and market economics. If the Framers were correct on this point, then the United States today is in great peril. Partly because of the Roberts Court's decisions invalidating campaign finance restrictions, enormous quantities of private-sphere wealth now infect the public sphere.<sup>306</sup> In the 2012 election cycle alone, \$7 billion was spent.<sup>307</sup> The Framers might have aimed for a balance between property

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articulated by Judge James Kent in *People v. Crosswell*, 3 Johns. Cas. 337, 356-58 (N.Y. Sup. Ct. 1804), truth was a defense to a charge of criminal libel, but only if the defendant published for good motives and justifiable ends. If the published material was either false, or true but with bad tendencies, then it was criminally punishable.

<sup>305</sup> *E.g.*, *Castle v. Houston*, 19 Kan. 417, 433-34 (1877); *Perkins v. Mitchell*, 31 Barb. 461, 464-65 (N.Y. Gen. Term. 1860); *Commonwealth v. Morris*, 3 Va. (1 Va. Cas.) 176, 179-80 (1811).

<sup>306</sup> *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>307</sup> *McCutcheon*, 134 S. Ct. at 1457.

rights and government power, but the system has become dramatically skewed and is completely out of balance. As many commentators have observed, the rich persistently use their wealth to influence elections and to shape the government and its policies.<sup>308</sup>

The Framers deserve great praise for their insights into public-private relationships. When they arrived in Philadelphia for the Constitutional Convention, they had observed republican government up close, at the state level, for barely more than a decade. Based on that brief experience, they had largely shed their utopian ideals, which had animated the state constitutions, and had become pragmatic realists. Their insights into human nature and citizens' attitudes toward property and economic wealth, on the one side, and government, on the other, were shrewd, original, and sagacious. Their conceptualization of separate public and private spheres, in relative balance, was a remarkable and long-lasting achievement. The Framers successfully created a political-economic system that allows individuals to enjoy a degree of liberty in a private or economic realm while simultaneously cooperating in the maintenance of a political community that respects, to some extent, both liberty and equality.

Yet the Framers were products of their political and historical times. True, they realistically assessed human motivations and astutely analyzed the events of the 1780s. But the Framers also made mistakes—some terrible ones—at least partly because of their context. One cannot reasonably assess the Framers' deep racism and acceptance of slavery without acknowledging their positions as white, male, relatively wealthy political leaders in late eighteenth-century America. The point here, though, is that the Framers themselves must bear some of the blame for the current situation in the United States. The Framers, mostly men of wealth, feared that the poor could form self-interested factions that would control the government to their own selfish advantage.<sup>309</sup> The poor, for instance, might unjustly seek debt relief—as in Shays' Rebellion—but the wealthy, of course, would have little reason to do so. Most of the Framers generally did not view the wealthy as a likely source of factionalism and government corruption. Instead, they believed that a virtuous

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<sup>308</sup> See generally LARRY M. BARTELS, *UNEQUAL DEMOCRACY* (2008); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* (2010); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* (2013); DARA Z. STROLOVITCH, *AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS* (2007).

<sup>309</sup> BEEMAN, *supra* note 18, at 66-67 (discussing the Framers' wealth).

elite would emerge largely from among the wealthiest men.<sup>310</sup> In other words, the Framers conceptualized separate public and private spheres and sought to construct a system that would protect both spheres. But when they mused about corruption, they primarily envisioned the poor—because of their private-sphere poverty—banding together to seize control of government and then using the government to threaten the property rights of the wealthy. That is, the poor would use political or public-sphere power to illegitimately intrude into the private sphere.

To be sure, the Framers designed a Constitution that, they believed, could overcome self-interest in general, not just the self-interest of the poor. Yet they apparently did not devote sufficient attention to the types of corruption that could originate with the wealthy. Significantly, in this regard, Gouverneur Morris was one Framer who, along with Benjamin Franklin, warned that the rich could be as self-interested as the poor. At the Convention, Morris stated: “The Rich will strive to establish their dominion & enslave the rest [of the people]. They always did. They always will.”<sup>311</sup> Morris, however, did not think highly of most people, rich and poor alike. He worried that the poor—“the ignorant and the dependent”—would likely sell their votes.<sup>312</sup> In fact, Morris proposed that the Senate be composed of wealthy aristocrats chosen for life, even though he believed the rich would use their power to manipulate the people.<sup>313</sup> “We should remember that the people never act from reason alone,” he explained. “The rich will take advantage of . . . [the people’s] passions and make these the instruments for oppressing them.”<sup>314</sup>

But Morris and Franklin were outliers in their emphases on economic, class-based interests, in general, and the powerful self-interest of the wealthy, more specifically. Madison and most of the other Framers did not acknowledge that the wealthy might be just as likely as the poor—maybe even more likely—to seek control of the government for their own advantages. The Framers fretted about the poor banding together into democratic majorities, but they did not fully grasp how private-sphere power—wealth itself—might be used to control government. Overall, then, the Framers failed to construct or insert sufficient

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<sup>310</sup> *Id.* at 114 (noting that Pierce Butler assumed the wealthy would wield political power); NEDELSKY, *supra* note 18, at 142-44 (discussing Madison’s views about the wealthy).

<sup>311</sup> 1 FARRAND, *supra* note 18, at 512 (July 2, 1787); 2 *id.* at 249 (Aug. 10, 1787) (Franklin).

<sup>312</sup> 2 *id.* at 202-03 (Aug. 7, 1787).

<sup>313</sup> 1 *id.* at 512-13 (July 2, 1787).

<sup>314</sup> *Id.* at 514. Morris was “an avowed elitist . . . [who] believed only people like himself should be entrusted with political power.” BEEMAN, *supra* note 18, at 48.

protections to shield government power from private-sphere overreaching—regardless of the source.<sup>315</sup>

Looking at this from a different angle, the American Revolution and the Constitution, as several historians have emphasized, unleashed social and cultural forces that would change America in ways beyond the anticipation of the founding generation.<sup>316</sup> The protection of liberty in the public and private spheres, the protection of property in the private sphere, and the guarantee of republican-democratic government with at least a degree of equality in the public sphere combined to create a dynamic society. In particular, the Founders created a country that would unleash an enormous amount of commercial energy, a private-sphere power that would seemingly continue to grow from decade to decade and from century to century.<sup>317</sup> Thus, the Framers aimed for a balance between the private and public spheres and between property rights and government power, but they unwittingly triggered forces that would ineluctably change the nation.<sup>318</sup> They might have aimed for balance, but they failed to create systemic structures that would maintain it in the long run. Ultimately, from this perspective, the Framers must bear some blame for the current imbalance in and endangerment of our constitutional system.

Apparently, then, the Framers deserve praise and blame, and sometimes both simultaneously. However one might best describe the political-economic system created by the Framers, it has evolved into a type of “democratic capitalism.” In any such system, there are potential tensions or conflicts between the public and private spheres.<sup>319</sup> In a free-market economy, individuals, corporations, and other profit-making enterprises necessarily seek profit. Without profit, an enterprise dies.<sup>320</sup> To remain competitive, an enterprise must constantly seek to

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<sup>315</sup> See NEDELSKY, *supra* note 18, at 65, 142-49, 201-02 (blaming Madison and the Framers for aiming for balance but not adequately protecting republican principles of government).

<sup>316</sup> EMPIRE, *supra* note 118, at 1-4; RADICALISM, *supra* note 18, at 3-8; Appleby, *supra* note 83.

<sup>317</sup> JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 21 (1956) (emphasizing the nineteenth century “release of [creative and economic] energy”).

<sup>318</sup> See NEDELSKY, *supra* note 18, at 1-14 (explaining that the Constitution ultimately gives too much protection to property despite Madison’s desire to achieve a balance).

<sup>319</sup> SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY & CAPITALISM 3-7 (1986); TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY 24 (2014); PRINDLE, *supra* note 202, at x, 2.

<sup>320</sup> Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970; see ROBERT L. KERR, THE CORPORATE FREE-SPEECH MOVEMENT 10 (2008) (emphasizing that “the profit imperative . . . is . . . a fundamental obligation of the corporate charter”); TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT 148-52 (2012) (emphasizing corporate profit motive).

introduce change, to develop new products, to expand markets, to open new markets, and ultimately, to increase profits.<sup>321</sup> Capitalism is driven by an “expansionary logic”—an inherent desire to grow and to multiply profits.<sup>322</sup> The very notion of government appears to contravene that expansionary logic; democratic law making, it would appear, imposes limits that can constrain economic development and profit.<sup>323</sup> In other words, the goals of actors in the respective spheres do not necessarily harmonize. According to an apocryphal quote from Louis Brandeis: “We can have a democratic society or we can have the concentration of great wealth in the hands of a few. We cannot have both.”<sup>324</sup> Possibly, then, in the United States, these tensions between democracy and capitalism have created a weakness, an instability, in the political-economic system. Yet the tensions might engender strength. The tense and uncertain balance between the public and private spheres might have created a flexibility that has enabled the American system to last more than two centuries despite enormous social and cultural changes.<sup>325</sup>

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<sup>321</sup> The economist Joseph Schumpeter referred to this economic drive for innovation and profit as “[c]reative [d]estruction,” partly because the new (such as a new product) often threatens the old (such as a less desirable old product). JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 82-83 (1943).

<sup>322</sup> FRAN TONKISS, *CONTEMPORARY ECONOMIC SOCIOLOGY* 60 (2006).

<sup>323</sup> *Id.* at 60-61; see SCHUMPETER, *supra* note 321, at 131-42 (arguing that aspects of democratic culture undermine capitalism); John Medearis, *Schumpeter, the New Deal, and Democracy*, 91 *AM. POL. SCI. REV.* 819, 820-26 (1997) (arguing that Schumpeter viewed democracy as transformative and as undermining capitalism).

<sup>324</sup> Peter Scott Campbell, *Democracy v. Concentrated Wealth: In Search of a Louis D. Brandeis Quote*, 16 *GREEN BAG* 2d 251 (2013).

<sup>325</sup> A Weberian perspective suggests that systemic tensions can create strength rather than weakness. 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, 242-48 (1991).