

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

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

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

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

The rebellion, however, continued by other means. In a republic, supporters of the Shaysites could exercise their strength in a more peaceful manner, through the vote. Soon they had elected enough new legislators that the Massachusetts assembly enacted many of the desired reforms and protections. In fact, the electoral aftermath of Shays's Rebellion seemed to disturb many national political leaders even more than the threat of armed insurgency. John Jay wrote to Washington: "Private rage for property suppresses public considerations, and personal rather than national interests have become the great objects of attention. Representative bodies will ever be faithful copies of their originals, and generally exhibit a checkered assemblage of virtue and vice, of abilities and weakness."⁴ Washington replied pessimistically, lamenting that he and other Revolutionary leaders "probably had too good an opinion of human nature in forming our confederation.... Perfection falls not to the share of mortals." Washington worried most about the implications of the Massachusetts developments for the future of republican government. "What a triumph for the advocates of despotism to find, that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious!"⁵

The alarm and insecurity expressed by Jay and Washington typified the attitudes of the delegates who arrived in Philadelphia in 1787 for what became the constitutional convention. While Massachusetts had struggled through the most violent unrest, other states also had dealt with political conflicts revolving around debt, property, and control of government. As James Madison wrote, "The late turbulent scenes in

Massachusetts and infamous ones in Rhode Island [involving the state printing of paper money], have done inexpressible injury to the republican character.”⁶ The convention was, in other words, a political reaction to a perceived political crisis. During the Revolutionary years, American leaders had believed in the righteousness of civic republican government. They had been political idealists, conceptualizing the citizen-self—at least the American citizen-self—as predominantly virtuous. Virtue alone, the Revolutionaries had assumed, would sustain the republican state governments.⁷ But when the delegates came to the constitutional convention, a decade of experience, climaxing with Shays’s Rebellion, had deflated their idealism. The United States was not a utopia. From their perspective, many state governments were corrupt, the nation had plunged into dire economic straits, and private property was insecure. If the republic was to survive, the delegates believed, they would need to construct new institutions that would maintain republican government while also bolstering private property and the national economy. Complicating the problem, the delegates represented their respective states, many of which had diverse and conflicting interests. The delegates would need to be politically astute and realistic if they were to achieve their goal: no less than saving the nation.⁸

Fifty-five delegates participated in the convention, but only 39 would sign the proposed Constitution. Several delegates left early because they did not like the general direction of the convention: the drafting of a new Constitution rather than the amending of the Articles of Confederation. Of the delegates who contributed extensively to the discussions, only Edmund Randolph and George Mason of Virginia and Elbridge Gerry of Massachusetts refused to sign.⁹ Thus, throughout this book, I will for the most part use the terms ‘framer’ and ‘delegate’ interchangeably to refer to those at the convention because, with the exceptions just noted, the most important delegates were the ones who signed on as framers. Of course, when a particular delegate expresses a unique viewpoint, not widely shared among the others, I will specify the speaker. Quotations and other primary source materials are drawn predominantly from Madison’s convention notes and *The Federalist*, essays written by Madison, Alexander Hamilton, and Jay in support of ratification. Finally, one should recognize the homogeneity of the delegates: They were all white Protestant men, except for two Roman Catholics, and most were relatively wealthy.¹⁰

THE REVOLUTIONARY BACKGROUND

Civic republican ideology, Lockean philosophy, and Protestant theology influenced Americans during the Revolution as well as a decade later, during the framing and ratification of the Constitution. In the 1760s and 1770s, as Americans grew unhappy with English rule, they found sustenance and justification in the civic republican writings of the British Country (or Opposition) theorists, such as John Trenchard and Thomas Gordon, the authors of the renowned early-eighteenth-century *Cato's Letters*. Although Americans certainly knew other writers from the civic humanist (republican) tradition, Revolutionary-era newspapers repeatedly reprinted *Cato's Letters*. From the civic republican perspective, citizens and government officials were to be virtuous. Civic virtue required individuals to pursue the common good rather than private or partial interests. If citizens or officials sought instead to satisfy their own (private or partial) interests through government institutions, then government was corrupt. And, indeed, the British government during these decades was rife with corruption—at least from the perspective of many Americans. When the moment arrived to declare independence, however, Thomas Jefferson and the American political leaders drew inspiration from John Locke's writings legitimating resistance to unjust rulers. As filtered through the Enlightenment philosophy of Locke, civic virtue appeared to demand that the Americans rebel against British tyranny and corruption of republican government.¹¹

From the American perspective, in other words, the Revolution was not the product of avarice or economic desperation. Compared to the rest of the western (European) world, the Americans—at least, white Protestant American men—were freer and less constrained by feudal hierarchies. They were not an economically oppressed people. Property ownership was far more widespread than in Europe.¹² Therefore, the Declaration of Independence was, first and foremost, a rational justification for rebellion. It began by proclaiming “self-evident” truths, derived from Lockean philosophy, “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”¹³ After articulating these fundamental natural rights, the Americans delineated an exhaustive list of corrupt actions perpetrated by the British government. From the outset, then, America arose as “the empire of reason,” as Joel Barlow would soon phrase it.¹⁴

Of course, while Jefferson and other leaders might have been intimately familiar with the writings of Locke and other Enlightenment philosophers, most Americans were not so well educated. To be sure, some read the newspapers and pamphlets spreading civic republican ideology, but perhaps, equally important, Protestantism united and motivated many ordinary Americans. Approximately 90% of the populace had religious roots in Calvinist Protestantism.¹⁵ Clergy generated revolutionary fervor by invoking millennial themes: "Was it possible that this was 'the Time, in which Christ's Kingdom is to be thus gloriously set up in the World?'" By successfully rebelling, Americans could prove that God had chosen the United States to be a "model of the glorious kingdom of Christ on earth."¹⁶ And clergy were not the only ones appealing to religion. The political leader, Samuel Adams, declared that the nation could be a "Christian Sparta."¹⁷ As the historian Gordon Wood has aptly phrased it, "[r]evolution, republicanism, and regeneration all blended in American thinking."¹⁸

The early state constitutions, many of which were adopted during the Revolution, strongly reflected the commitment to civic republican ideals. These constitutions presumed that the people were virtuous and emphasized that government must be for the common good rather than for partial or private interests. The Massachusetts constitution declared: "Government is instituted for the common good, for the protection, safety, prosperity of the people, and not for the profit, honor, or private interest of any one man, family, or class of men." Other state constitutions would echo these sentiments, often with only stylistic variations. For instance, the 1784 New Hampshire constitution stated that the government was "being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family or class of men."¹⁹ Elected officials were, of course, to be virtuous: "disinterested men, who could have no interest of their own to seek."²⁰ The 1776 Virginia Bill of Rights emphasized that "virtue" was crucial to the preservation of "free government" and "the blessings of liberty." In fact, because of the presumed virtue of the citizens, the state constitutions tended to concentrate power in the legislatures, which would most closely represent the will of the sovereign people. Thus, in typical fashion, the Maryland constitution declared that "the right in the people to participate in the Legislature, is the best security of liberty, and the foundation of all free government."²¹ Moreover, of great significance, the Articles of Confederation displayed

a strong distrust of any centralized government—which would resonate too closely with the British monarchy—and therefore left most government power with the states, as the paragons of virtuous republicanism. Indeed, one can reasonably describe the Articles as little more than “a peace treaty among thirteen separate and sovereign states.”²²

Lockean philosophy also influenced the early state constitutions, most evidently in the universal declarations that the sovereign people were the source of state power. Locke had reasoned that, in a state of nature, each individual enjoys “perfect freedom,” an “uncontrollable liberty to dispose of his person or possessions.” Because life in a state of nature entails fear and uncertainty, however, people voluntarily agree to a social contract. They consent to join civil society for the “mutual preservation of their lives, liberties, and estates.” Subsequently, the people likely would consent, by majority vote, to form a government for the same reasons, to protect their natural rights to life, liberty, and property.²³ The 1776 North Carolina constitution similarly invoked the sovereignty of the people. “[A]ll political power,” it explained, “is vested in and derived from the people only.” Likewise, the Massachusetts constitution proclaimed that “[a]ll power residing originally in the people, and being derived from them, the several magistrates and officers of government ... are the substitutes and agents, and are at all times accountable to them.”²⁴ This ultimate reliance on the reason and power of the individual—the people—typified Enlightenment thought. God no longer appeared to bestow government power on a monarch or other divine representative who then ruled a subordinate people. Instead, government depended upon the consent of the governed. Citizens were the source of sovereign power, and together they pursued the good of the entire political community.²⁵

Meanwhile, these early state constitutions bolstered Protestant practices and beliefs in multiple ways. Most state constitutions protected freedom of conscience (or the free exercise of religion), which was understood to be a distinctly Protestant doctrine. During the Reformation, Jean Calvin emphasized conscience as an irresistible conviction, an inner awareness of one’s own inescapable depravity in relation to the greatness of the truth of Jesus Christ. Freedom of conscience, then, meant a freedom to follow the dictates of one’s conscience to Jesus but did not, in any sense, connote an individual freedom to choose among different religions. Governmental and religious institutions—the state and the church—were not to coerce faith because genuine spiritual faith could not be compelled. Each individual was to remain free so

that his or her conscience could inwardly experience Christ and Christian faith. The 1776 Virginia Bill of Rights illustrated the constitutional protection of this Protestant doctrine. "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other."²⁶

Given this understanding of freedom of conscience, numerous states also expressly maintained Protestant (or more generally Christian) establishments. The government support or establishment of a church seemed consistent with freedom of conscience (free exercise) because, in the American context, both establishment and freedom of conscience harmonized with or bolstered Protestantism. And regardless of the existence (or non-existence) of official establishments, America was *de facto* Protestant. Most Americans, whether they attended church or not, viewed the nation as being an inherently Protestant dominion.²⁷ Unsurprisingly, then, state constitutions and statutes often burdened non-Christians with civil disabilities, such as prohibitions on voting and public office holding. Even in Pennsylvania, which long had no official establishment, the state constitution demanded that state legislators swear to an oath that would exclude many non-Christians, including Jews, Muslims, and atheists.²⁸

The three strands of thought that shaped the Revolution and early state constitutions would continue to exert influence during the framing and ratification years. Civic republican ideology (from the civic humanist tradition), Lockean philosophy (from the Enlightenment movement), and Protestant theology all remained important, though the relative importance of Lockean theory would increase.

EXPERIENCE DEFEATS IDEALISM

American state governments of the 1780s were built on two interrelated premises. First, Americans believed themselves to be especially virtuous, fully committed to liberty, equality, and republican government. They were, in other words, an exceptional people. 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, had 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. That was the lesson of Shays's Rebellion and its electoral aftermath, as indebted landowners sought government refuge for money owed.²⁹

To be clear, 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 property could be taken arbitrarily. Debtor relief laws, such as those at stake in the Shays dispute, appeared to victimize creditors. Moreover, the state and national governments still carried heavy debts from the Revolutionary War. As the ineffective governments could not meet those debts, public securities lost value and public credit vanished. 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. 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 prophecies of the American downfall.”³⁰ The nation had reached a crucial juncture.³¹

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 weak national government and relatively strong state governments. Over and over again, 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.” The drafters of the Articles, because of their “inexperience,” reliance on civic republican ideals, and “enthusiastic virtue,” had mistakenly believed in the “good faith [and] honor” of

state legislatures. But through the 1780s, state legislatures had produced “vicious legislation” and “injustice.” Too many citizens and elected state officials had pursued “base and selfish measures,” even though they often “masked [such measures] by pretexts of public good.” Madison, for instance, specifically criticized Rhode Island for printing paper money without considering the ramifications for the nation and the common good.³²

Madison also largely composed the so-called Virginia Plan, which would provide the initial framework for further discussions at the constitutional convention. When Randolph, a more polished speaker than Madison, introduced the Plan at the outset of the convention, he emphasized the events of the 1780s, particularly how the state constitutions had not adequately protected against the democratic excesses of insufficiently virtuous citizens.³³ 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,” while Elbridge Gerry admitted that “experience” had demonstrated that he had “been too republican heretofore.”³⁴ In other words, the delegates were especially wary, as Dickinson put it, of “those multitudes without property and without principle” who might threaten property rights through the democratic process. 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. “Some of the greatest rogues he was ever acquainted with, were the richest rogues.”³⁵ But the unequivocal weight of the delegates’ sentiment was that the poor were the more likely threat.³⁶

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, depicting people as pristinely virtuous, were dangerous. “We must take man as we find him,” Hamilton said. “A reliance on pure patriotism had been the source of many of our errors.”³⁷ Hamilton, Madison, and the other framers had become hardheaded realists, pragmatic about politics. As such, they realized that the constitutional system needed to protect against likely efforts to use the government for corrupt purposes.³⁸ 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.³⁹

Consequently, the framers began with a more realistic depiction of human nature—of the citizen-self—and then attempted to build a republican government based on that foundation.

THE NATURE OF THE CITIZEN-SELF

From the perspective of the delegates who gathered in convention in Philadelphia in 1787, the people had demonstrated that they were not as exceptionally virtuous as they had seemed in 1776. Yet, the delegates, in general, did not believe that humanity was completely wicked or selfish. Both Madison and Hamilton, for instance, followed the Scottish philosopher David Hume in characterizing people as partly good and partly bad. Men were not “angels,” as Madison phrased it, but neither were they beasts.⁴⁰ “As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust,” Madison explained, “so there are other qualities in human nature which justify a certain portion of esteem and confidence.”⁴¹ The framers, thus, did not follow any reductionist or utopian model of human nature and behavior. They not only perceived human nature to be richly complex, but also recognized the variability of human reactions in different contexts. In particular, the framers believed that men are more likely to reveal their baser sides when acting in concert rather than alone. A type of mob mentality would frequently emerge: “Regard to reputation has a less active influence,” observed Hamilton, “when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one.”⁴² To be sure, this mob-like tendency rendered republican government more problematic because such government requires group decision making within a political community. Nonetheless, the delegates believed that the American people possessed sufficient virtue to sustain republican government. Despite the problems that had arisen in the states during the 1780s, Madison declared those state-level experiments in republicanism to be partial successes. And those successes could be attributed only to “the virtue and intelligence of the people of America.”⁴³ Indeed, the framers understood that their attempt to construct a republican government at the national level “presupposes the existence” of men’s virtue.⁴⁴

The framers attended closely to the motivations of the American citizen-self. From the framers' perspective, a motive resembled a Newtonian force, insofar as it would produce physical action. Thus, although Madison admitted that, to a degree, "the faculties of the mind" remained obscure, the framers repeatedly suggested that three overarching motives drove Americans: passion, interest, and reason.⁴⁵ In *Federalist, Number 10*, for instance, Madison explicitly discussed the importance of "passions," "interests," and "opinions" as human motivations, with opinions arising from one's reason. To be sure, while the framers frequently distinguished among these three motives, they did not define them precisely. Moreover, they were not rigorously consistent, as they used the terms in varying senses.⁴⁶ Regardless, the framers' general notions of passion, interest, and reason can be gleaned from the historical materials, particularly the convention notes and *The Federalist*. By passion, the framers usually referred to emotions such as ambition, hate, and joy. Hamilton did not mince words when, discussing human motives, he reminds the reader not "to forget that men are ambitious, vindictive, and rapacious."⁴⁷ By interest, the framers typically referred to a general and often calm desire for one's own happiness.⁴⁸ Interest entails "self-love,"⁴⁹ while also denoting "an element of reflection and calculation."⁵⁰ Unquestionably, the framers believed that the most common, "durable," and divisive form of interest is economic. "Those who hold and those who are without property," Madison wrote, "have ever formed distinct interests in society." Moreover, the occurrence of diverse economic interests is inevitable. "The diversity in the faculties of men, from which the rights of property originate, is ... an insuperable obstacle to a uniformity of interests. ... From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties."⁵¹

Reason, as used by the framers, entails a combination of experience (empiricism) and logic (rationalism). Like Enlightenment philosophers, such as Locke, Hume, and Montesquieu, the framers drew extensively from experience—from political history, near and distant. Thus, they not only criticized state governments of the 1780s because of the concrete failings of those experiments in civic republicanism, but they also contemplated earlier republics, including Greece and Rome.⁵² Simultaneously, also like Enlightenment philosophers, the framers logically analyzed the successes and failures of those prior republican

governments. Looking to the future, the framers firmly believed that reason should control over passion and interest in government affairs. As Madison maintained, “it is the reason, alone, of the public, that ought to control and regulate the government.”⁵³ When citizens and elected officials exercise reason, when they deliberate rationally together, then the government is likely to identify and pursue the common good. But when, instead, passions and interests predominate, then factions form. And a government that acts to appease a faction’s passions or to satisfy its interests is corrupt.

For the framers, then, reason was the essence of the citizen-self. Reason was the source of human control over the external world as well as over oneself.⁵⁴ Reason was why individuals in a Lockean state of nature would agree to a social contract.⁵⁵ Reason was why “We the People” could presume “to form a more perfect Union [to] promote the general Welfare.”⁵⁶ Reason was why Americans could overcome passion and interest so as to pursue the common good.⁵⁷ But, unfortunately, reason sometimes proved weak or “fallible.”⁵⁸ Experience had shown that, all too often, passion and interest overpower reason, rather than vice versa. As Hamilton lamented, “Has it not ... invariably been found that momentary passions, and immediate interest, have a more active and imperious control over human conduct than general or remote considerations of policy, utility or justice?”⁵⁹ Madison agreed. If all Americans had been philosophers (or good philosophers), he stated, then they would have naturally and flawlessly followed reason along the virtuous path to the common good. “But a nation of philosophers,” Madison concluded ruefully, “is as little to be expected as the philosophical race of kings wished for by Plato.”⁶⁰

Here was the crux of the problem, from the framers’ perspective. Too many citizens followed their passions and interests rather than reason. Factions had frequently seized state governments, pursued their own interests (especially economic interests), and thus tyrannized the people. Proclamations of the common good had become pretexts for corruption. While Revolutionary-era Americans had accepted civic republican ideology—believing optimistically that reason and virtue would consistently overcome passion and interest—the framers had grown more pessimistic. Civic republican government, though arising from the sovereign people, could trample on individual rights and liberties as destructively as a monarchy could do. Given these realizations—“the evidence of known facts,” as Madison phrased it—the framers shifted their political theory in a Lockean direction.⁶¹

Locke had maintained that individuals rationally leave a state of nature for civil society, and from there, create a government because they seek to secure their natural rights to life, liberty, and property. To be sure, then, like Locke, and like the Revolutionary-era Americans before them, the framers emphasized that government rested on the sovereignty of the people. But crucially, the state government problems of the 1780s had led the framers to appreciate more fully two additional and interrelated components of Lockean philosophy.⁶² First, the framers recognized the benefit of conceptually distinguishing two separate spheres or realms: that of civil society and that of government. The people lived simultaneously in both spheres. If the government sphere was the realm of public affairs, then civil society was the realm of private affairs, such as commercial intercourse and the accumulation of wealth. The framers repeatedly distinguished between the public and the private. Neither sphere could be ignored when framing the Constitution. During the Revolutionary era, attention had been focused on the public sphere. Individuals were contemplated as citizens, first and foremost. And as citizens, they were to display virtue by disregarding private concerns and pursuing the common good. Now, the framers understood that such slighting of private concerns was unrealistic. In writing a Constitution, the framers needed to acknowledge the human motivations that originated and operated primarily in the private sphere. As the 1780s had revealed, if people enjoyed liberty, then they would revel in their passions and interests. The strongest and most enduring interest was economic (property and wealth).⁶³

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

government if it requires the suppression of individual rights and liberties, the framers asked rhetorically.⁶⁴

Still, despite absorbing these Lockean lessons, the framers did not relinquish their civic republican principles. Instead, they imaginatively fused Lockean and republican themes. For this reason, the framers can be said to have occupied a “Machiavellian moment,” to use J.G.A. Pocock’s famous phrase. They straddled two paradigmatic visions of human nature and government: the civic humanist (civic republican) and the modern (or Enlightenment).⁶⁵ Locke had traveled far along the modernist path, and yet like the framers, he retained vestiges of republican convictions or principles. For instance, Locke repeatedly stated that government should pursue the “public good” or the “common good.”⁶⁶ More so than Locke, though, the framers fought against the modernist tide. To be sure, they recognized the modernist impulses to pursue profit in the commercial or private world and to pursue one’s own passions and interests in the public world. They understood that factions would inevitably form and seek to control government. But the framers nonetheless struggled to preserve civic republican principles in government. Like prior civic humanists, the framers still believed that virtue and reason could overcome passion and interest in public affairs.⁶⁷

Ultimately, based on the knowledge accumulated from their experiences, Madison and the other framers sought to construct a republican democratic constitutional system that would provide sufficient protection for property and other individual rights. Simultaneously, though, they still sought to encourage government in pursuit of the common good. Thus, if the constitutional framers had an overarching goal, it was to achieve balance: balance between, on the one hand, government power and, on the other hand, individual rights, especially as related to property and wealth. The key to maintaining such a balance lays in the conceptual separation of the two spheres: that of civil society or the private sphere, and that of government or the public sphere.⁶⁸

REPUBLICAN DEMOCRATIC GOVERNMENT AND THE PUBLIC SPHERE

The framers conceived of American government as republican democratic.⁶⁹ Citizens and elected officials were supposed to be virtuous. In the political realm, they were to pursue the common good or public welfare rather than their own partial or private interests.⁷⁰ The Preamble

of the Constitution memorialized the government goal of the common good: “We the People” were to “promote the General Welfare.” 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 *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.”⁷¹ 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.”⁷² From the framers’ standpoint, the people’s “true interests” determined the common good, whether or not the people recognized those interests.⁷³ Thus, the common good could not be calculated merely by adding together the private interests of the majority of citizens. 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.”⁷⁴ By definition, then, a government pursuing “partial interests” or “private passions” rather than the common good was corrupt.⁷⁵

The crucial question for the framers, then, was how to structure the Constitution and government institutions to engender government for the common good. To a great degree, the framers found their 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.”⁷⁶ 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. Instead, virtue could be cultivated and learned. Yet, 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, moreover, were not only pragmatic realists—in their view of human nature—but they were also unapologetic elitists. Specifically, the framers believed in the existence of a *virtuous* elite—including themselves—who would pursue the common good in the public sphere even while pursuing their own interests in the private sphere. Unsurprisingly, given that most of

them were reasonably wealthy, many framers believed the virtuous elite would arise mostly from among the richest men.⁷⁷ Alexander Hamilton perceived that many people were disinclined to become involved in public affairs in the first place. Indeed, from the framers' standpoint, they had good reason to be skeptical of the knowledge and education of the average American 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. The average American largely lacked access to extensive information about national politics and issues.⁷⁸

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. Given their elitist attitudes, the framers hoped that voters would elect "speculative men" to be the "guardians" for "the mass of the citizens."⁷⁹ But the framers did 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."⁸⁰ Yet, how could the framers insure 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, the framers believed, was to structure the government institutions to control the "effects" of factionalism.⁸¹ The constitutional controls over factionalism would operate at three levels.

At the first level, the framers designed the Constitution to promote the election of a virtuous elite as government officials, 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." 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.”⁸²

Yet, the framers knew that, even in a large republic, sometimes the people would mistakenly elect an official lacking in virtue. Furthermore, even the virtuous would occasionally be tempted by passion or interest to ignore the common good. Thus, at the second level, the framers structured the system to induce elected officials to pursue the common good despite temptations and inclinations to do otherwise. Once again, having a larger republic would help in this regard. With a larger population, the number of “opposite and rival interests” would multiply and would challenge each other. 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.” 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.⁸³

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 the government institutions to prevent such officials from successfully using their government powers 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. “[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.” 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. Government sluggishness was built into the system.⁸⁴

The framers intended these three levels of structural constitutional controls on factionalism *both* to promote the virtuous pursuit of the common good *and* to protect individual rights and liberties. 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: one face animated by virtue and reason, but the other face animated by passion and interest, especially economic interest. To a great degree, passion and interest were to enjoy 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.⁸⁵

PROPERTY AND THE PRIVATE SPHERE

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.

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. Almost all delegates to the convention believed that the people should directly elect "the larger branch" of the national legislature.⁸⁶ 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 [is] essential to every plan of free Government."⁸⁷ 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.⁸⁸ "[T]he general object was to provide a cure for the evils under which the U.S. laboured," explained Randolph. "[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 against this tendency of our

Governments: and that a good Senate seemed most likely to answer the purpose.”⁸⁹ 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.⁹⁰

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. Moreover, for many, ownership of property or other wealth seemed to be necessary for civic virtue. Under all but one of the state constitutions in effect in 1787, private ownership of property or similar economic wealth was a prerequisite to an individual’s full participation in the polity. In Maryland, for instance, suffrage was extended only to those “freemen ... having a freehold of fifty acres of land [or] having property in this State above the value of thirty pounds current money.”⁹¹ Private ownership of property or other wealth supposedly established one’s independence, necessary for the disinterestedness of civic virtue. Moreover, wealth gave one a sufficient “stake in society” or concern for the common good so as to justify the power to vote and to hold office.⁹² Yet, simultaneously, the framers realized all too well that desire or greed for property was often the root source of factionalism and corruption.⁹³

Crucially, 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. In the 1760s, William Blackstone had 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.”⁹⁴ 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 as nation-states arose. 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 times in a new or incipient colony. The Dutch East India Company, the British East India Company, and the Hudson Bay Company are renowned examples of mercantilist enterprises.

The primary purpose of a mercantilist endeavor was to enhance the treasure (gold and silver) and military power of the mother country. 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 intertwined closely, 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 being 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.⁹⁵

For years, though, Americans had been chafing and resisting against 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. Moreover, the Americans were not the only ones to protest against English mercantilism in 1776. In that year, Adam Smith published *The Wealth of Nations*, which advocated that a competitive free-market economy would benefit society more than the mercantilist system. Smith's writings influenced numerous framers, especially Alexander Hamilton, but one must be careful not to overstate Smith's sway. For instance, Publius (the pseudonym of Madison, Hamilton, and John Jay) 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.⁹⁶ Smith's concept of a competitive free-market system driven by a desire for profit would eventually be known as capitalism, yet he used neither this term nor the term *laissez faire*. In fact, neither term would enter the English lexicon until the early decades of the nineteenth century. 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; "ownership 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."⁹⁷

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 being truly capitalist, much less *laissez faire*.⁹⁸ Capitalism had not yet fully emerged in England; it had developed even less in the United States. After the Revolution, numerous state governments purposefully created quasi-mercantilist systems that lasted into the early-nineteenth century. Even so, the framers, or at least some of the framers, had a partial vision of a competitive free-market.⁹⁹ Indeed, perhaps the most remarkable feat of the framers 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 or social virtue was beginning to emerge 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 that time, such self-interest still had to be tempered by a benevolent and decent Protestant civility.¹⁰⁰ In other words, the experiences of the 1780s had a flip side. The decade had 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!"¹⁰¹ But other Americans were celebrating rather than complaining.¹⁰² 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.

The framers' multiple discussions and ultimate acceptance of slavery as a legal institution illustrated both their desire to protect property and their incomplete adoption of capitalism—as well as their racism.¹⁰³ In 1787, slaves constituted approximately 20% of the American population, with the percentage much higher in the southern states. In fact, 90% of the nation's slaves lived in the five states below the Mason–Dixon line.

At that time, South Carolina and Georgia were most dependent on slave labor because their economies were based on the labor-intensive crops of rice and indigo, but even Virginia had one-third of its wealth tied up in slavery. The framers did not anticipate how important slavery would soon become. South Carolinian Charles Pinckney did not even mention cotton when he divided the states into “five distinct commercial interests,” but in 1793, Eli Whitney invented the cotton gin and transformed the cotton industry. In short order, cotton became an incredibly profitable crop, highly reliant on slave labor. Slave-supported cotton production would dominate the southern economy, though it also bolstered the northern textile industry. But when the framers met in Philadelphia, nobody 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.¹⁰⁴

Even so, of the 55 delegates who participated during at least part of the convention, 25 owned slaves. 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 had 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.”¹⁰⁵ The delegates turned to this proposal on May 30, 1787, and it immediately proved controversial. Rufus King of Massachusetts pointed out that the calculation of ‘quotas of contribution’ would be problematic because it would “be continually varying.”¹⁰⁶ 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. 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.¹⁰⁷

The convention returned to the problem on June 11. John Rutledge of South Carolina moved that state representation—specifically, “the proportion of [state] suffrage in the first branch”—should be based on “the quotas of contribution.” Pierce Butler of South Carolina seconded the motion and added that “money was power.” He explained that “States ought to have weight in the Government in proportion to their wealth.” Rutledge and Butler unquestionably wanted to protect the

interests of southern slaveholding states. King again objected that the determination of state wealth would be problematic. 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, Pinckney seconded Wilson's motion. Wilson proposed that representation be "in proportion to the whole number of white and other free Citizens and inhabitants of every age sex and 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." Gerry, from Massachusetts, immediately protested that, if "property [were] not the rule of representation, why then should the blacks, who were property in the South, be in the rule of representation more than the cattle and horses of the North." Nobody responded to Gerry. Instead, they voted to approve Wilson's motion.¹⁰⁸

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 against the three-fifths clause, nobody declared that slavery was immoral—at least at this point. Nobody 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.¹⁰⁹

The three-fifths clause still left an ambiguity. Were slaves being counted because they were part of the population—even if not free—or were they being counted as property—thus reintroducing an implicit element of wealth into the calculation of proportional representation? The delegates never completely clarified this murkiness.¹¹⁰ The three-fifths formula, however, had originated in a failed 1783 Continental Congress proposal for calculating the wealth of particular states.¹¹¹ Moreover,

the delegates' subsequent statements and actions regarding slavery underscored their commitment to protecting property. When, approximately 1 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."¹¹² Wilson objected: "[H]e could not agree that property was the sole or the primary object of Government and society. The cultivation and improvement of the human mind was the most noble object."¹¹³ Wilson was an outlier in viewing cultivation of the human mind as the primary goal of the Constitution, though not all delegates agreed with Butler that property was the primary object. 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."¹¹⁴

While many delegates worried about protecting the property interests of slave-owners, no delegates protested that slavery would contravene the most fundamental principles of a capitalist economy. Capitalism depends on the drive for profit in a competitive free market. Slavery is the antithesis of a free market; it is coerced labor. Without doubt, slavery enabled slave-owners to accumulate capital in a commercial market economy and thus facilitated the eventual emergence of capitalism. In fact, slavery crucially supported the gradual nineteenth-century development of capitalism in multiple ways. Regardless, throughout the pre-Civil War decades, slavery skewed the natural movement of capital among various productive and profitable market activities. Slavery constrained the marketplace as it constrained human freedom.¹¹⁵

George Mason of Virginia came closest to acknowledging a tension between slavery and a free market when he stated, "Slavery discourages arts and manufactures. The poor despise labor when performed by slaves."¹¹⁶ After Mason's observation, though, nobody elaborated 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 modern theory of contract based on marketplace values, but this innovation would not be adopted in any American states until the early-nineteenth century, well

after ratification of the Constitution. In late-eighteenth-century America, the assignability and enforcement of contracts were limited by notions of fairness and equity. Contract law, in fact, emerged as a separate common law realm in the United States only after the turn into the nineteenth century. Under the American common law of the late-eighteenth and early-nineteenth centuries, duties arose because of established status relationships. The common law, for example, attached a specific duty of care to many occupations. Innkeepers owed a particular duty to protect lodgers, while ferrymen owed a duty of safe transportation to travelers. 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 conclude that the defendant neglected to fulfill a duty in accord with his distinct status. 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." Slave and master constituted a status relationship within this pre-modern worldview.¹¹⁷

A scarce few delegates condemned slavery as immoral. When discussing whether Congress should have power to regulate or prohibit the slave trade, Roger Sherman of Connecticut denounced it as "iniquitous."¹¹⁸ Luther Martin of Maryland stated that the slave trade "was inconsistent with the principles of the revolution and dishonorable to the American character."¹¹⁹ Gouverneur Morris uttered perhaps the strongest condemnation of slavery. On August 8, Morris 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." Morris moved to count only "free" inhabitants, not slaves, in determining representation. Jonathan Dayton of New Jersey seconded the motion. Yet Sherman, who had just denounced the iniquity of slavery, explained that he "did not regard the admission of Negroes into the ratio of representation, as liable to such insuperable objections." Charles Pinckney thought "the fisheries and the Western frontier as more burdensome to the U.S. than the slaves." The state delegations then defeated Morris's motion by near-unanimous vote, with only one exception.¹²⁰ Almost 2 weeks later, Mason offered the most surprising moral denunciation of

slavery, given that he owned 300 slaves. 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. [Slaves] 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.”¹²¹ Such condemnatory statements demonstrate that at least some of the framers understood the immoral ramifications of their ultimate acceptance of slavery. Yet, one cannot 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 and humanity had nothing to do with this question. Interest alone is the governing principle with nations.”¹²²

While the framers’ pragmatism served them well in many ways, it led them to acquiesce far too readily to slavery. 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? Then why is not other property admitted into the computation?” Yet, Wilson immediately bypassed this logical problem for practical purposes, “by the necessity of compromise.”¹²³ Unquestionably, one reason for such pragmatic acquiescence to slavery was unabashed racism. 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.” Wilson agreed that “the tendency of the blending of the blacks with the whites [would] give disgust to the people of Pennsylvania.” Neither Morris nor Wilson criticized this racist attitude of their fellow Pennsylvanians. In fact, during this era, racism was so thick that even free blacks were saddled with legal and social disabilities.¹²⁴ Meanwhile, the delegates from South Carolina, North Carolina, and Georgia all threatened to abandon the proposed constitution if it did not protect slavery. The northern delegates’ desire for a union of all thirteen states, combined with the widespread racism, left little doubt as to 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 provisions without securing any southern concessions.¹²⁵ One clause, for instance, apportioned congressional representation and direct taxes by counting slaves as three-fifths of a person.¹²⁶ Another clause prohibited Congress from banning the slave trade before the year 1808.¹²⁷ The Fugitive Slave Clause mandated that an escaped slave did not become free if entering a free state; to the contrary, the escaped slave was to be “delivered up on Claim” of the slave-owner.¹²⁸ Some protections of slavery were more subtle but no less significant. For instance, when discussing the possible methods for choosing a chief executive (president), the delegates primarily considered the legislature (Congress), the people (in a direct vote), and a group of electors (an Electoral College). Wilson favored election by the people and “perceived with pleasure that the idea was gaining ground.”¹²⁹ Madison immediately *agreed* about the merits of the people. “The people at large,” Madison stated, “was in his opinion the fittest in itself [to choose the executive].” But Madison nonetheless did not support this method. “There was one difficulty however of a serious nature attending an immediate choice by the people,” he explained. “The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to fewest objections.”¹³⁰ In other words, because African American slaves could not vote, southern states would not accept a direct vote by the people when choosing the executive. In a direct vote, northern (white) votes would typically outweigh southern (white) votes. But an Electoral College would allow southern states to receive electoral credit for their slaves (based on the three-fifths accounting) without allowing slaves themselves to vote.¹³¹

Although historians have subsequently disagreed about the extent of 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.”¹³² If anything, Pinckney was being too modest. Early presidential elections were telling. Slave states dominated because of their outsized power in the Electoral College. Of the first seven presidents, from George Washington to Andrew Jackson, from 1789 to 1836, five were slave owners. Not

coincidentally, the two non-slave owners, John Adams and his son, John Quincy Adams, were the only single-term presidents during that time. And of course, slave-owning presidents were empowered to nominate federal judges that supported and protected slavery.¹³³

BALANCING THE PUBLIC AND PRIVATE

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, for most framers, both the public and private spheres were important, and as such, they sought to achieve a balance between the two. Madison famously argued in *Federalist, Number 10*, that in a large republic a multiplicity of factions would protect liberty and republican government (in pursuit of the common good). In a properly structured constitutional system, competing factional interests would balance against or offset each other.¹³⁴ Likewise, in *Federalist, Number 51*, Madison maintained that a balance among a “multiplicity of sects” would preserve religious liberty.¹³⁵ Madison similarly viewed the public and private spheres. If both were vigorous, they would balance against each other and, in doing so, preserve individual liberty and republican government. Neither government nor private (economic) actors would be able to tyrannize the people. In *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.” 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 spiral soon 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. The framers wanted balance, yet they knew it would not be easily achieved. To attain a 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. The government could facilitate economic development but could not succumb to the control of private (economic) interests. If the framers failed to construct such an integrated system, with balance between the public and private spheres, then the entire political-economic society would likely crumble.¹³⁶

Enlightenment thinkers typically conceived of the self (or individual) living in a world divided into dichotomous realms. 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 a self confronting these characteristic modernist dichotomies.¹³⁷ Given such a vision of the self vis-à-vis the world, the framers could not only 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.¹³⁸

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. As such, the framers' self served as a connection, a bridge, between the two spheres. The citizen-self enjoyed liberty, for instance, 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.¹³⁹ 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. In the private sphere, however, reason was primarily instrumental. The self sought to use reason to calculate the most advantageous means for satisfying a goal arising from passions and interests. Yet, the framers realized that such calculations were often imprecise. From the framers' standpoint, individuals were swayed as much by their passions and prejudices as by a rational assessment of their own opportunities.¹⁴⁰

With the citizen-self as a bridge, the public and private spheres were conceptually (or intellectually) separable, but they were not pristine. 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. The Free Exercise Clause of the First Amendment protected freedom of conscience, a Protestant prerequisite for individual religious salvation. The Establishment Clause, meanwhile, prohibited the institution of a national church, which would too closely resemble the Church of England. Yet, establishments were allowed to continue at the state level, and did so for several years.¹⁴¹ 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. The first Congress did not hesitate to appoint Protestant chaplains for both houses and to ask the president to declare “a day of Thanksgiving and Prayer.”¹⁴²

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.¹⁴³ More precisely, the framers believed the government could diminish or infringe on individual rights and liberties if the government acted in pursuit of the common good (and otherwise acted consistently with the Constitution). In this sense, the balance was skewed in favor of the public over the private. The Fifth Amendment in the Bill of Rights—“nor shall private property be taken for public use without just compensation”—illustrates this key point. On the one hand, the Constitution unequivocally protected private property, but on the other hand, the government could still take private property for public use—that is, to promote the common good. To be sure, under the Fifth Amendment, the government was required to pay just compensation for a taking. But the government was otherwise permitted to regulate property and the economic marketplace—anything short of an actual taking—without paying compensation, so long as the regulation was for the common good. In *Federalist, Number 10*, Madison stated that the government must have 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 views. *The regulation of these various and interfering interests forms the principal task of modern legislation.*"¹⁴⁴ The framers understood that, ultimately, the crucial public-private balance depended on government empowerment to control private interests when they threatened the common good. As Wilson put it, "no government, either single or confederated, can exist, unless private and individual rights are subservient to the public and general happiness of the nation."¹⁴⁵

The framer with the most well-developed vision of a modern competitive free-market economy bustling with industry and commerce was undoubtedly Hamilton.¹⁴⁶ His understanding of the relationship between the public and private spheres is, therefore, especially illuminating. Hamilton strongly admired the British political-economic system and sought to create an American system that would move in a roughly similar direction.¹⁴⁷ 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.

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 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. Consequently, the framers' desire to protect property rights while simultaneously strengthening the national government required that the nation be put on firm financial footing. To achieve these goals, Hamilton conceived a "grand design" for a "utopian financial system." Hamilton laid out this plan in three reports to Congress: *Report on Public Credit* (January 9, 1790), *Report on a National Bank* (December 13, 1790), and *Report on Manufactures* (December 5, 1791).¹⁴⁸

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. He articulated

the main objections to such government support and then responded to each objection. For instance, Hamilton acknowledged that some Americans viewed manufacturing in opposition to agriculture. 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.¹⁴⁹ 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. Jefferson not only was the primary author of the Declaration of Independence, but he also was the first Secretary of State and owned the Virginia plantation, Monticello, worked by between 100 and 200 slaves. Jefferson, however, participated directly in neither the constitutional convention nor the Virginia ratification debates because he was serving, at the time, as the nation's minister to France.¹⁵⁰

Even so, because of Jefferson's national prominence, his antagonism to Hamilton's financial plan and Hamilton's response to Jefferson bear elaboration. Two streams of thought, one British and one French, helped shape Jefferson's outlook. In the early-eighteenth century, the British Country (or Opposition) theorists, including Trenchard and Gordon, had argued that the enhanced power of England's central (Court) government, tied to commercial interests, had corrupted the republican British government. 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 (which subsequently would collapse in the French Revolution). The Physiocrats opposed industrialization and instead argued that the natural development of an agrarian economy led to prosperity; all moral and economic values were based on the land and agriculture. 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. Jefferson favored a weaker national and stronger state government, similar to the confederated system that had existed under the Articles of Confederation.¹⁵¹ Meanwhile, the Physiocrats' writings suggested to Jefferson that the strength of the American political-economic system grew from the existence of independent and self-sufficient agrarian households.¹⁵² Even before the conflict with Hamilton had emerged, Jefferson had written that "[t]hose who labour in the earth are chosen people of God," while manufacturers display "subservience and

venality.” 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.”¹⁵³ And several years later, soon after he became president, Jefferson wrote to his friend and former Physiocrat, Pierre Samuel du Pont de Nemours, to praise “the agricultural inhabitants” of the United States, whom Jefferson sharply distinguished “from those [residents] of the cities.”¹⁵⁴

Hamilton responded to the Jeffersonian position not by attacking agriculture but by explaining that an opposition between manufacturing and agriculture was false. Government support for manufacturing would inevitably benefit agriculture as well as the national economy as a whole. 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 away from 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. Naturally, then, his next argument was not only politically pointed, but it also related specifically to the constitutional plan for the public and private spheres. One of the primary objections 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.¹⁵⁵

Hamilton, in this passage, of course did not explicitly use the term, *laissez faire*, but he unquestionably was articulating the *laissez-faire* position against government control. He would reiterate it later in the *Report*: “Industry, if left to itself, will naturally find its way to the most useful and profitable employment: 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.”¹⁵⁶

As one would expect from Hamilton, he answered the *laissez-faire* objection with a sophisticated and powerful argument. He stated, 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 “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 foreign nations second the exertions of their own Citizens in the branches, in which they are to be rivalled.” To counter such market imperfections, Hamilton maintained that government “interference and aid ... are indispensable.” 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.” 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.” Instead of following utopian ideals, Hamilton recommended a more balanced approach that weighed the various factors in the particular circumstances. Thus, in evaluating the arguments, Congress should evaluate “the considerations, which plead in favour of manufactures, and which appear to recommend the special and positive encouragement of them; in certain cases, and under certain reasonable limitations.”¹⁵⁷ 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. As Lance Banning put it, Hamilton “never meant for monied men to use the government.” In fact, if anything, Hamilton “intended the reverse.”¹⁵⁸

Overall, though, one should be careful not to overstate the clarity of the framers’ vision. There were many ambiguities, 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.”¹⁵⁹ Toward the end of the convention, Rufus King moved to add a Contract Clause. After a brief discussion, generally negative, the motion was dropped.¹⁶⁰ 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.¹⁶¹ No documentation clarifies the thoughts of the committee members regarding the inclusion or meaning of this clause. 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.”¹⁶² That is, most viewed it as a relatively unimportant reassertion that the state governments would not be able to undermine private debts and disrupt credit and finances. In 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. Nobody suggested that the clause would protect profit-driven exchanges in a competitive free market—or in other words, capitalism. After all, as I already mentioned, the American common law did not yet identify a separate realm of contract law based on marketplace values.¹⁶³

Keeping in mind the ambiguities of the framers’ overall vision as well as more specific ones (such as the Contract Clause), we nonetheless can reasonably conclude that the framers created a political-economic system balancing 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, 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. Of course, some of the broad proscriptions against suffrage would eventually be lifted—though to be clear, progress toward full suffrage in the United States has not been steady and uninterrupted.¹⁶⁴ 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.¹⁶⁵

In any event, under republican democracy, the pursuit of the common good both empowered and limited the government. 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 a republican democratic government that had achieved the proper public–private balance.¹⁶⁶ 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. Thus, municipal and state governments frequently exercised their so-called police powers to regulate the economy, particularly in the antebellum decades. Such regulations could be purely promotional—intended to generate economic activity—or restrictive, or both.¹⁶⁷ Moreover, regulations were rarely, if ever, neutral; instead, some individuals or groups in society would be favored over others.¹⁶⁸

Given the frequency and effects of economic regulations, individuals sometimes challenged the legality (or constitutionality) of government actions. These judicial challenges often not only 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.¹⁶⁹ 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."¹⁷⁰

Regardless, federal and state courts consistently upheld government actions as being in pursuit of the common good, even when they 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. 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 farm not more than three miles distant from his own dwelling-house." The seller objected, contending that "the by-law is contrary to common right, in restraint of trade, against public policy, unreasonable and void." The court upheld the regulations, with 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." Shaw concluded: "[W]e think [the regulations] are well calculated to promote the public and general benefit," notwithstanding the restrictions on the economic marketplace.¹⁷¹ Chancellor James Kent of New York, in his influential *Commentaries on American Law*, succinctly summarized this fundamental judicial perspective: "[P]rivate interest must be made subservient to the general interest of the community."¹⁷²

FREE SPEECH AND A FREE PRESS

What about free expression?¹⁷³ 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? And did the constitutional guarantee of free expression encompass the protection of property rights and other wealth in some direct manner? The overwhelming majority of delegates to the constitutional convention believed a Bill of Rights, which would include explicit protections for expression, was unnecessary. Several times, Charles Pinckney suggested considering a Free Press Clause, but the delegates never followed his lead.¹⁷⁴ 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.” Gerry’s motion, seconded by Mason, failed. Sherman expressed the general sentiment: “It is unnecessary—The power of Congress does not extend to the Press.”¹⁷⁵ For the most part, the framers believed that the scheme of enumerated rights in article I would limit congressional power and render a Bill of Rights superfluous.¹⁷⁶ Once the ratification debates had begun, however, the Anti-Federalist opponents of the proposed Constitution seized on the lack of a Bill of Rights as an issue with strong 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?¹⁷⁷

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.¹⁷⁸ 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. 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 would be “neither improper nor altogether useless.” 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.” The rest of the Federalist-controlled House apparently thought a Bill of Rights so insignificant that they did not want to devote even a day to it, at least at that point. 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. Thus, 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.” South Carolinian Aedanus Burke agreed that until “other important subjects are determined, he was against taking this up.” 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.”¹⁷⁹

Congress finally considered the Bill of Rights on July 21, 1789, 6 weeks after Madison had introduced the proposed amendments. 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 substantive meanings of the proposed rights, 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. Gerry, who had wanted a Bill of Rights in the original document and was also now a member of the House, expressed disgust with his congressional colleagues. He was angry because they were saying “it is necessary to finish the subject [merely] in order to reconcile a number of our fellow-citizens to the government.”¹⁸⁰ 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 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 ordinally, almost by happenstance, to become the First Amendment.¹⁸¹ 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.¹⁸² 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 state case decided in 1788, Chief Justice Thomas McKean reasoned that prior restraints are 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.”¹⁸³ 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.”¹⁸⁴

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.¹⁸⁵ Zengerian reforms were twofold. First, juries rather than judges should decide whether the disputed speech was 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 also grounds for aggravation of the crime). 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.” Therefore, he reasoned that the law of seditious libel is “wise and salutary when administered properly, and by the proper persons.” 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.¹⁸⁶

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 or speaking one’s mind reached back to colonial times and the Revolution.¹⁸⁷ Many Americans had declared, for example, that free expression was the grand palladium, the bulwark of liberties, 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.”¹⁸⁸ The Virginia *Bill of Rights*, adopted nearly 1 month before the Declaration of Independence, proclaimed: “That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.”¹⁸⁹ During the ratification debates, Anti-Federalists repeatedly declared that freedom of the press was the grand

or sacred palladium of freedom.¹⁹⁰ In fact, Madison's first draft of the article that would eventually be ratified as the First Amendment read: "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."¹⁹¹ Regardless of the precise meaning (or inherent ambiguity) of the First Amendment and any subsequent developments in free-expression doctrine, many Americans believed in and experienced a robust *de facto* liberty of speech and writing.

Yet, alongside this cultural tradition of dissent, one must acknowledge a countervailing tradition of suppression. While Americans have reasonably expected to speak their minds, without penalty, many (and often the same) Americans simultaneously have been quick to suppress social and cultural outsiders, whether based on race, religion, or otherwise. Suppression has often operated through unofficial but nonetheless effective mechanisms. Mob violence, tar-and-feathering, and chasing outsiders from town have been common and widely accepted means of suppressing those who seem to diverge too far from the mainstream. In fact, as is true with the tradition of dissent, the tradition of suppression reaches back to before the constitutional framing. While many Revolutionary-era Patriots enjoyed a full sense of free expression, those same patriotic Americans often suppressed Tories who wanted to voice their support for the British. For instance, at the direction of the Continental Congress, numerous towns created Committees of Observation or Inspection that monitored the output of suspected Tory printers, frequently scaring the Tories into silence.¹⁹²

Thus, the general meaning of free speech and a free press in America was inherently enigmatic, and the law of free expression in the states was even more ambiguous partly because of the uncertain Zengerian reforms. The congressional debates and subsequent state ratifications of the First Amendment did nothing to clarify the obscurities of free speech and a free press. Nobody, 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 indeterminacy of the First Amendment would contribute to controversy during 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).¹⁹³ Jefferson and the Republicans' opposition to Hamilton's financial

plan for the nation was but one of several contentious issues, albeit an explosive one. Through 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. Free expression suddenly became a concrete and combusive political issue.¹⁹⁴

From the Federalist perspective, Congress had 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. Freedoms of speech and of the press were, from this perspective, beside the point: Congress could criminally punish criticisms of public officials and policies. In fact, the Federalists believed they had enacted the most liberal seditious libel statute imaginable because the Sedition Act fully incorporated Zengerian reforms.¹⁹⁵

In terms of the contemporaneous meaning of the First Amendment, 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.¹⁹⁶ Congress's enumerated powers, the Republicans emphasized, did not include a power to punish seditious libel. The First Amendment merely reinforced this congressional impotency. Most important, 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 libels, then state governments could impose the punishment, regardless of state constitutional guarantees of free expression.¹⁹⁷ Thus, for instance, 1 month after the first Sedition Act prosecution, Kentucky protested the Federalist actions by issuing a legislative resolution that articulated the jurisdictional argument (Jefferson actually wrote the first draft of the resolution). If the national government attempted to act beyond its enumerated powers, the resolution stated, its actions were "unauthoritative, void, and of no force." 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.” 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.”¹⁹⁸

Because of ambiguity in the First Amendment, both the Federalists and the Republicans were able to articulate reasonable though opposed arguments. Interestingly, they agreed 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 end 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.¹⁹⁹ 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.²⁰⁰ Nevertheless, when courts articulated the legal doctrine of free expression in the nineteenth century, these expansive theories were largely ignored or forgotten. Courts treated legal rights to free speech and a free press similarly to other individual rights under republican democracy. To be sure, state constitutions, as well as the national Constitution, protected citizens’ rights to free expression, but government could always limit such rights if in pursuit of the common good. As it was often phrased, individuals enjoyed rights to speech and press but were nonetheless responsible for abuses of those freedoms.²⁰¹ Liberty was not equivalent to license.²⁰²

The lower courts, consequently, developed free-expression doctrine consistent with these republican democratic principles, recognizing government power to punish speech or writing if such punishment would further the common good. This republican democratic approach engendered the 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. 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 defendant's criminal intent would be inferred.²⁰³

NOTES

1. Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* 88–92 (2016); George R. Minot, *The History of the Insurrections, In Massachusetts* 83–86 (1788); Richard Beeman, *Plain, Honest Men* 16 (2009); Forrest McDonald, *Novus Ordo Seclorum* 176–77 (1985); Leonard L. Richards, *Shays's Rebellion* 1–2, 6 (2002); David P. Szatmary, *Shays' Rebellion* 66 (1980). Additional sources on the founding cited in this chapter include: Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (2012); Pauline Maier, *Ratification* (2010); 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]; Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (1970); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1969); Gordon S. Wood, *The Radicalism of the American Revolution* (1991) [hereinafter *Radicalism*]; Sonia Mittal et al., *The Constitutional Choices of 1787 and Their Consequences*, in *Founding Choices: American Economic Policy in the 1790s* 25 (Douglas A. Irwin and Richard Sylla eds., 2011). 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].

I rely heavily on Madison's notes from the constitutional convention, though I modify some quoted passages for stylistic purposes. For instance, I spell out Madison's abbreviations.

All citations to *The Federalist* are to the Project Gutenberg Etext of *The Federalist Papers*.

2. Knox Letter to Washington (Oct. 23, 1786).
3. Beeman, *supra* note 1, at 16–18; Szatmary, *supra* note 1, at 98–106; Howard Zinn, *A People's History of the United States* 93–94 (1980).
4. Jay Letter to Washington (June 27, 1786); Wood, *supra* note 1, at 412–413.
5. Washington Letter to Jay (Aug. 1, 1786).

6. Madison Letter to Edmund Pendleton (Feb. 24, 1787), *reprinted in* James Madison: Writings 61, 62 (Library of America, 1999).
7. Mittal, *supra* note 1, at 33. On conceptions of the self, see Philip Cushman, *Constructing the Self, Constructing America* (1995); Charles Taylor, *Sources of the Self* (1989).
8. *Political Problems*, Essex Journal, Dec. 27, 1786, at 3 (characterizing Shays' Rebellion as a "political problem"). Sources discussing economic development cited in this chapter include: John Kenneth Galbraith, *A History of Economics* (1987); Robert Heilbroner and William Milberg, *The Making of Economic Society* (10th ed. 1998); Robert Heilbroner and Aaron Singer, *The Economic Transformation of America* (1999); Ronald E. Seavoy, *An Economic History of the United States From 1607 to the Present* (2006); Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 Iowa L. Rev. 1 (2015). Sources discussing the legal development of corporations include: Lawrence M. Friedman, *A History of American Law* (2d ed. 1985); Kermit L. Hall, *The Magic Mirror* (1989); Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (1977); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 William and Mary Q. 51 (1993).
9. Klarman, *supra* note 1, at 239.
10. Beeman, *supra* note 1, at 66–67, 180, 359–368.
11. The Declaration of Independence, *reprinted in* 2 Great Issues in American History 70, 92–93 (Richard Hofstadter ed., 1958) [hereinafter Great Issues]; The English Libertarian Heritage (David L. Jacobson ed., 1994 ed.) [hereinafter English] (writings of Trenchard and Gordon); Bailyn, *supra* note 1, at 1–21, 34–35, 94–103; Pocock, *supra* note 1, at 406–408, 486–487 (Court and Country ideologies); Quentin Skinner, 1 *The Foundations of Modern Political Thought: The Renaissance* (1978) (history of early civic humanist thought); Wood, *supra* note 1, at 46–90.
12. Wood, *supra* note 1, at 3.
13. Declaration of Independence, *supra* note 11, at 71; Morton White, *The Philosophy of the American Revolution* (1978).
14. Mr. Barlow's Oration (July 4, 1787), *in* Hezekiah Niles, *Principles and Acts of the Revolution in America* 384, 389 (1822); Declaration of Independence, *supra* note 11, at 72–74; Bailyn, *supra* note 11, at vi–vii (American Revolution as an ideological struggle); Edmund S. Morgan, *The Birth of the Republic, 1763–1789*, at 7 (rev. ed. 1977); Wood, *supra* note 1, at 100.
15. Sydney E. Ahlstrom, *A Religious History of the American People* 124 and n.1 (1972); Radicalism, *supra* note 1, at 329; Ellis Sandoz, *A Government of Laws: Political Theory, Religion, and the American*

- Founding 99–101, 110–113, 134–136 (1990) (importance of religion to Revolution); William G. McLoughlin, *Enthusiasm for Liberty: The Great Awakening as the Key to the Revolution*, 87 *Proceedings of the Am. Antiquarian Soc.* 69, 70–73, 77–78, 93–94 (1977).
16. Ahlstrom, *supra* note 4, at 149 (quoting Urian Oakes, *New England Pleaded With* 49 (1673)).
 17. Wood, *supra* note 1, at 118 (quoting Adams).
 18. *Id.* at 117.
 19. Constitution of Massachusetts (1780), *reprinted in* 1 Poore, *supra* note 1, at 956, 958; Constitution of New Hampshire (1784), *reprinted in* 2 Poore, *supra* note 1, at 1280, 1281.
 20. Wood, *supra* note 1, at 59; Mittal, *supra* note 1, at 33 (discussing Revolutionary-era emphasis on virtue).
 21. Virginia Bill of Rights (1776), *reprinted in* 2 Poore, *supra* note 1, at 1908, 1909; Constitution of Maryland (1776), *reprinted in* 1 Poore, *supra* note 1, at 817, 818.
 22. Beeman, *supra* note 1, at 8, 346–347; Willi Paul Adams, *The First American Constitutions* (2001); Wood, *supra* note 1, at 125–256, 356–357.
 23. John Locke, *The Second Treatise of Government* 4–5, 70–74, 119, 139 (Thomas P. Peardon ed., 1952).
 24. Constitution of North Carolina (1776), *reprinted in* 2 Poore, *supra* note 1, at 1409, 1409; Constitution of Massachusetts (1780), *reprinted in* 1 Poore, *supra* note 1, at 958.
 25. Cushman, *supra* note 7, at 30–31; Taylor, *supra* note 7, at 174.
 26. ~I Virginia Bill of Rights (1776), *reprinted in* 2 Poore, *supra* note 1, at 1909; *see* Constitution of New York (1777), *reprinted in* 2 Poore, *supra* note 1, at 1328, 1338 (protecting “liberty of conscience”). On liberty of conscience, *see* Jean Calvin, *Institutes of the Christian Religion*, at bk. 3, ch. XI, § 19; bk. 3, ch. XIII, § 5; bk. 3, ch. XVII, § 1; bk. 3, ch. XVIII, § 9; bk. 4, ch. X, § 3 (Ford Lewis Battles trans., John T. McNeill ed., 1960) (1st published 1536); Ralph C. Hancock, *Calvin and the Foundations of Modern Politics* 128–129, 132 (1989). For a more extensive discussion of religion during the Revolution and the 1780s, *see* Stephen M. Feldman, *Please Don’t Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* 145–174 (1997) [hereinafter *Critical History*].
 27. Mark DeWolfe Howe, *The Garden and the Wilderness* 11 (1965); Martin E. Marty, *Protestantism in the United States: Righteous Empire* 22 (2d ed. 1986).

28. Constitution of Pennsylvania (1776), *reprinted in* 2 Poore, *supra* note 1, at 1540, 1543; Morton Borden, *Jews, Turks, and Infidels* 11–15 (1984). States that maintained some type of establishment included South Carolina, Maryland, Georgia, Massachusetts, Connecticut, Virginia, and New Hampshire. Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* 258–261 (1990); Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 134–192 (1986).
29. Letter from John Jay to George Washington (June 27, 1786); James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), *in* 3 Farrand, *supra* note 1, at 138, 141–142, appendix A (lamenting licentiousness of citizens and government problems); Beeman, *supra* note 1, at 16–18; Wood, *supra* note 1, at 409–413.
30. 1 Farrand, *supra* note 1, at 18 (May 29, 1787); Federalist No. 44 (Madison) (tying limits on state government powers to economic concerns); Nedelsky, *supra* note 1, at 30, 125–126; McDonald, *supra* note 1, at 94–96, 138–142, 177–179; Wood, *supra* note 1, at 403–425. For statements about the dangers emanating from state governments, see 1 Farrand, *supra* note 1, at 153 (June 7, 1787) (Wilson); *id.* at 356 (June 21, 1787) (Wilson); *id.* at 356 (June 21, 1787) (Madison).
31. 1 Farrand, *supra* note 1, at 255 (June 16, 1787) (Randolph); *id.* at 282–283, 291 (June 18, 1787) (Hamilton); Beeman, *supra* note 1, at 3–21; Stourzh, *supra* note 1, at 38; Wood, *supra* note 1, at 413–425; Mittal, *supra* note 1, at 26–28 (defects of the Articles and policy concerns that arose during the 1780s); *see* Stephen M. Feldman, *American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage* 61–65 (2000) (discussing framers’ premodern or cyclical view of history).
32. James Madison, *Vices of the Political System of the United States*, *reprinted in* James Madison: Writings 69, 71–72, 75–77 (Library of America, 1999); Beeman, *supra* note 1, at 27–29.
33. 1 Farrand, *supra* note 1, at 27 (May 29, 1787); James Madison, *The Virginia Plan*, *reprinted in* James Madison: Writings 89 (Library of America, 1999); Beeman, *supra* note, at 86–92. 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 1, at 512 (July 2, 1787).
34. 2 Farrand, *supra* note 1, at 278 (Aug. 13, 1787) (Dickinson); 1 Farrand, *supra* note 1, at 48 (May 31, 1787) (Gerry); *id.* at 101 (June 4, 1787) (Mason).

35. 2 Farrand, *supra* note 1, at 202 (Aug. 7, 1787) (Dickinson); *id.* at 249 (Aug. 10, 1787) (Franklin); *id.* at 248 (Aug. 10, 1787) (Pinckney); 1 Farrand, *supra* note 1, at 512 (July 2, 1787) (Morris).
36. *E.g.*, 1 Farrand, *supra* note 1, at 153–155 (June 7, 1787) (discussing protection of property in relation to the election of legislators); Beeman, *supra* note 1, at 281.
37. 1 Farrand, *supra* note 1, at 376 (June 22, 1787).
38. 1 Farrand, *supra* note 1, at 125 (June 5, 1787) (Pierce Butler) (arguing that delegates should not devise the best possible government, but the best the people would receive); Levinson, *supra* note 1, at 131.
39. Federalist No. 55 (Madison); Peter Gay, 2 *The Enlightenment: An Interpretation* 170, 566 (1969); McDonald, *supra* note 1, at 70–77; *see* Levinson, *supra* note 1, at 80 (emphasizing Madison’s belief in the public good).
40. Federalist No. 51 (Madison); Morton White, *Philosophy, The Federalist, and the Constitution* 97, 127 (1987) (tying to Hume). Hamilton believed a citizen could cooperate in pursuit of the “public good, notwithstanding his insatiable avarice and ambition.” Adams, *supra* note 22, at 225 (quoting Hamilton, who was quoting Hume).
41. Federalist No. 55 (Madison); Stephen Holmes, *The Secret History of Self-Interest, in Beyond Self-Interest* 267, 286 (Jane Mansbridge ed., 1990).
42. Federalist No. 15 (Hamilton). An individual’s opinion would “depend much on the number which he supposes to have entertained the same opinion.” Federalist No. 49 (Madison).
43. Federalist No. 49 (Madison).
44. Federalist No. 55 (Madison).
45. Federalist No. 37 (Madison); 1 Farrand, *supra* note 1, at 82 (June 2, 1787) (Benjamin Franklin); *id.* at 285 (June 18, 1787) (Hamilton); *id.* at 491 (June 30, 1787) (Gunning Bedford); Federalist No. 1 (Hamilton); Federalist No. 2 (Jay); *see* Albert O. Hirschman, *The Passions and the Interests* (1997 ed.); White, *supra* note 40, at 102–112; Gordon S. Wood, *The Fundamentalists and the Constitution*, N.Y. Rev. Books, Feb. 18, 1988, at 33 (comparing reason, passion, and interest in ancient and modern philosophy).
46. Federalist No. 10 (Madison); White, *supra* note 40, at 102–128 (puzzling through Publius’s uses of reason, passion, and interest). Publius was not merely being sloppy. Rather, in western thought, this was a transitional period in the understanding of the concepts of passion, interest, and reason—and the transition was far from linear. Hirschman, *supra* note 45, at 33–48.

47. Federalist No. 6 (Hamilton); 1 Farrand, *supra* note 1, at 285 (June 18, 1787) (Hamilton); Federalist No. 72 (Hamilton) (discussing potential influence of avarice, vanity, and ambition on president); White, *supra* note 40, at 106.
48. *E.g.*, Federalist No. 10 (Madison); *see* White, *supra* note 40, at 108–109 (distinguishing passions and interests). In 1776, Adam Smith defined economic interest—“the desire of bettering our condition”—as “generally calm and dispassionate.” Adam Smith, *The Wealth of Nations*, bk. II, ch. 3, p. 453 (1776).
49. Federalist No. 10 (Madison) (distinguishing between “reason” and “self-love”). Smith argued that one must appeal to another’s “own interest” or “self-love.” Smith, *supra* note 48, at bk. I, ch. 2, p. 30.
50. Hirschman, *supra* note 45, at 32.
51. Federalist No. 10 (Madison); 1 Farrand, *supra* note 1, at 49 (May 31, 1787) (George Mason); 1 Farrand, *supra* note 1, at 581 (July 11, 1787) (Pierce Butler emphasizing protection of property).
52. Federalist No. 6 (Hamilton); 2 Farrand, *supra* note 1, at 278 (Aug. 13, 1787) (Dickinson arguing experience is more important than reason); Gay, *supra* note 39, at 563 (calling *The Federalist* “a classic work of the Enlightenment”); White, *supra* note 40, at 86–87.
53. Federalist No. 49 (Madison); Cushman, *supra* note 7, at 31 (explaining Enlightenment philosophers as relying on empiricism and logic). Pangle and White both emphasize Locke’s rationality, but Locke is typically characterized as an empiricist. Thomas L. Pangle, *The Spirit of Modern Republicanism* 134–135 (1988); White, *supra* note 1, at 86–87. Cushman writes that “[t]he self of the early modern era was capable of building the order of the universe from sense impressions and inner logic.” Cushman, *supra* note 7, at 381.
54. Taylor, *supra* note 7, at 167–171. Kant declared that “[t]he motto of enlightenment is ... Have courage to use your *own* understanding!” Immanuel Kant, *An Answer To The Question: What Is Enlightenment?* (1784), *reprinted in* Kant’s *Political Writings* 54, 54 (Hans Reiss ed., H.B. Nisbet trans., 1970). Kant was but one of several writers to respond to the question, “What is Enlightenment?” For a collection of the various responses, *see What Is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Questions* (James Schmidt ed., 1996).
55. Pangle, *supra* note 53, at 244–246, 266–272; Taylor, *supra* note 7, at 172. Locke equated the “personal identity” of a “self” with “a thinking intelligent being, that has reason and reflection.” John Locke, *An Essay Concerning Human Understanding*, *reprinted in* *The English Philosophers From Bacon to Mill* 238, 315 (Edwin A. Burttt ed., 1939).

56. U.S. Const. pmb.
57. *E.g.*, Federalist No. 49 (Madison). Publius, here, disagreed with Hume, who argued that reason cannot overcome passion so as to produce virtuous action. David Hume, *Treatise of Human Nature* (1739–1740), at book II, part 3, § 3; Hirschman, *supra* note 45, at 20–31.
58. Federalist No. 10 (Madison).
59. Federalist No. 6 (Hamilton).
60. Federalist No. 49 (Madison).
61. Federalist No. 10 (Madison); Federalist No. 6 (Hamilton); Pangle, *supra* note 53, at 47, 129–275; Pocock, *supra* note 1, at 516–517; Wood, *supra* note 1, at 391–564.
62. U.S. Const. pmb. (“We the People”); Federalist No. 39 (Madison); Locke, *supra* note 23, at 71–74; *see* Frank Tariello, Jr., *The Reconstruction of American Political Ideology, 1865–1917*, at 6–7, 11–14 (1982) (emphasizing Lockean premises of American republicanism). Louis Hartz famously argued that American government was grounded solely on Lockean liberalism, Louis Hartz, *The Liberal Tradition in America* (1955), but his thesis was undermined by the likes of Bailyn, *supra* note 1; Pocock, *supra* note 1; and Wood, *supra* note 1. Some commentators, however, still argue the framers were influenced more by Locke than by civic republicanism. David F. Prindle, *The Paradox of Democratic Capitalism* 2–5 (2006).
63. Federalist No. 10 (Madison) (distinguishing between “public and private faith” as well as “public and personal liberty”); Federalist No. 14 (Madison) (emphasizing government would be “in favor of private rights and public happiness”); 1 Farrand, *supra* note 1, at 166 (June 8, 1787) (Wilson); 1 Farrand, *supra* note 1, at 288–290 (June 18, 1787) (Hamilton); *see* Taylor, *supra* note 7, at 20 (distinguishing between public life of a citizen or warrior and private life aimed at “peace and economic well-being”).
64. Federalist No. 10 (Madison); 1 Farrand, *supra* note 1, at 581 (July 11, 1787) (Butler emphasizing protection of property); Federalist No. 48 (Madison) (emphasizing the need to protect the people from even their own legislature).
65. Pocock, *supra* note 1 at 466 (discussing two paradigms); *id.* at 506–552 (focusing on America). For Pocock’s definition of the Machiavellian moment, *see id.* at vii–viii; *cf.*, Gay, *supra* note 39, at 563–564 (emphasizing Publius contributed to the Enlightenment by fusing philosophical themes into a practical framework for government).
66. Locke, *supra* note 23, at 73, 82.
67. Pocock, *supra* note 45, at 466; Wood, *supra* note 1.

68. "Madison's political thought was characterized by an often agonized effort to find a working balance between the rights of property and republican principles." Nedelsky, *supra* note 1, at 12; *id.* at 22, 203–204; Richard C. Sinopoli, *The Foundations of American Citizenship* 4–7 (1992) (emphasizing balance).
69. McDonald, *supra* note 1, at 189–209; Nedelsky, *supra* note 1, at 37; Pocock, *supra* note 1, at 513–526; Wood, *supra* note 1, at 391–468. The founders themselves did not agree on a precise definition of republican government. Stourzh, *supra* note 1, at 44–45. My definition of republican democracy overlaps but is not identical with some technical definitions of civic republicanism. Sinopoli, *supra* note 68, at 9–12.
70. Virginia Bill of Rights (1776), *reprinted in* 2 Poore, *supra* note 1, at 1908; Wood, *supra* note 1, at 59.
71. Federalist No. 10 (Madison); James Madison, *In Virginia Convention*, June 5, 1788, *reprinted in* *The Complete Madison: His Basic Writings* 46, 46 (Saul K. Padover ed., 1953) (majority factions have produced unjust laws) [hereinafter *Complete*].
72. White, *supra* note 40, at 120.
73. 1 Farrand, *supra* note 1, at 422 (June 26, 1787) (Madison); Federalist No. 1 (Hamilton); Federalist No. 2 (Jay); Federalist No. 6 (Hamilton); Federalist No. 10 (Madison).
74. Madison Letter to Monroe (Oct. 5, 1786), *reprinted in* *Complete*, *supra* note 71, at 45, 45.
75. Federalist No. 37 (Madison); Federalist No. 6 (Hamilton).
76. 1 Farrand, *supra* note 1, at 378 (June 22, 1787).
77. U.S. Const., Art. I, § 8, cl. 8 ("No title of Nobility shall be granted"); Federalist No. 39 (Madison); Federalist No. 36 (Hamilton) ("strong minds" could come from "every walk of life"). On the virtuous elite, see 1 Farrand, *supra* note 1, at 154 (June 7, 1787) (Wilson); *id.* at 422 (June 26, 1787) (Madison); White, *supra* note 1, at 125–127; see Nedelsky, *supra* note 1, at 158 (even virtuous elite could not be expected to rise constantly "above self-interest"). On wealth and the framers, see Beeman, *supra* note 1, at 67; *id.* at 114, 280–281; Nedelsky, *supra* note 1, at 142–144.
78. Beeman, *supra* note 1, at 130–131; Stourzh, *supra* note 1, at 82–83.
79. Federalist No. 17 (Hamilton); Federalist No. 71 (Hamilton).
80. Federalist No. 57 (Madison).
81. Federalist No. 10 (Madison).

82. Id.; Federalist No. 3 (Jay) (the “best men” would be elected to national offices because the people would have “the widest field for choice”). Publius, here, was influenced by Hume, who argued that factionalism was more likely in smaller republics. David Hume, *Of Parties in General*, in *Essays: Moral, Political and Literary* 54, 56 (Oxford University Press ed. 1963).
83. Federalist No. 51 (Madison).
84. Id.
85. Federalist No. 10 (Madison); Federalist No. 14 (Madison); see Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 Yale J. L. and Human. 311, 321–329 (1992) (arguing American revolution and Constitution had two faces).
86. 1 Farrand, supra note 1, at 48 (May 31, 1787) (Mason); Beeman, supra note 1, at 122–123.
87. Id. at 49 (May 31, 1787).
88. Id. at 52 (May 31, 1787); id. at 68 (June 1, 1787) (statements of Wilson).
89. Id. at 51 (May 31, 1787).
90. Id. at 164–165 (June 8, 1787); Beeman, supra note 1, at 228. Joyce Appleby argued the Constitution weakened the state governments yet constrained the national government, and in doing so, it enhanced the protection of the private realm of liberty and property. Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. Amn. Hist. 798, 804 (1987).
91. Constitution of Maryland (1776), reprinted in 1 Poore, supra note 1, at 817, 821; Adams, supra note 22, at 315–127; Alexander Keyssar, *The Right to Vote* 8–24, 340–341 (2000).
92. Keyssar, supra note 91, at 5, 9; G. Edward White, *The Political Economy of the Original Constitution*, 35 Harv. J. L. and Pub. Pol’y 61, 83 (2011).
93. 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).
94. William Blackstone, 2 *Commentaries on the Laws of England* 2 (1st ed. 1765–1769); Horwitz, supra note 8, at 32.
95. Galbraith, supra note 8, at 39–42; Heilbroner and Singer, supra note 8, at 26–27, 48–49.

96. Smith, *supra* note 48; Galbraith, *supra* note 8, at 31; Heilbroner and Singer, *supra* note 8, at 26, 70–71; McDonald, *supra* note 1, at 97–98, 108–142; Hovenkamp, *supra* note 1, at 8 and n.33 (on Smith’s influence on Madison); *see* Heilbroner and Milberg, *supra* note 8, at 60–69 (England’s Industrial Revolution).
97. McDonald, *supra* note 1, at 14; Online Oxford English Dictionary (showing English use of *laissez faire* in 1825 and capitalism in 1833); Karl Polanyi, *The Great Transformation* 143 (2001 ed.) (*laissez-faire* ideology emerged in 1830s).
98. “The United States Constitution was written at an important transitional time in the history of western political and economic thought. To the extent the Constitution reflects a theory of economics and government intervention, it came mainly from the predecessors of classical economic thought.” Hovenkamp, *supra* note 8, at 9.
99. Heilbroner and Milberg, *supra* note 8, at 55; Horwitz, *supra* note 8, at xiii–xiv, 33; McDonald, *supra* note 1, at 18, 101–06. Hamilton, Wilson, and Gouverneur Morris hoped the American economy would develop similarly to that of England. McDonald, *supra* note 1, at 115, though in 1787, “the concept of an ‘economy’ as an entity having a life of its own was just emerging.” *Id.* at 4.
100. Joyce Appleby, *Capitalism and a New Social Order* 14–15 (1984); *Radicalism*, *supra* note 1, at 215–219, 230; *see* Lawrence D. Brown and Lawrence R. Jacobs, *The Private Abuse of the Public Interest* 8–9 (2008) (Adam Smith and David Hume were also pragmatic realists, not market ideologues); Sean Wilentz, *Chants Democratic* 14–15 (2004) (discussing struggles over the meaning of virtue and the common good); Isaac Kramnick, *Republican Revisionism Revisited*, 87 *Am. Historical Rev.* 629, 662 (1982) (emphasizing changing notion of virtue).
101. Wood, *supra* note 1, at 326 (quoting Samuel Mitchill).
102. *E.g.*, Samuel Blodget, *Economica* 12 (1806) (emphasizing social cohesion engendered by commerce); *see* Wood, *supra* note 1, at 325–347 (describing emerging celebration of commerce).
103. Mittal, *supra* note 1, at 38 (“slavery was the real, material, palpable interest that had to be accommodated if a lasting, intersectional Union was to be created, and with it the benefits of economic integration the Constitution was intended to promote”); Klarman, *supra* note 1, at 257–304. Helpful sources focusing on slavery include the following: Derrick Bell, *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 (Melvin Drimmer ed., 1968).

104. 2 Farrand, *supra* note 1, at 449 (Aug. 29, 1787) (Pinckney); Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 164–165, 519–524 (2009) [hereinafter *Empire*]; Beeman, *supra* note 1, at 310–315; Hall, *supra* note 8, at 130; Seavoy, *supra* note 8, at 111; *see* Sven Beckert, *The Empire of Cotton* 140 (2014) (on the development of cotton mills in northern and border states); *id.* at 98–109 (on the expansion of the cotton industry); Bell, *supra* note 103, at 8 (listing years in which northern states abolished slavery); Finkelman, *supra* note 103, at ix (detailing when states eliminated slavery).
105. 1 Farrand, *supra* note 1, at 20 (May 29, 1787).
106. *Id.* at 36 (May 30, 1787).
107. Beeman, *supra* note 1, at 106–107, 309–311.
108. 1 Farrand, *supra* note 1, at 196–197, 201 (June 11, 1787); Beeman, *supra* note 1, at 152–153.
109. Bell, *supra* note 103, at 22; Finkelman, *supra* note 103, at 34.
110. Beeman, *supra* note 1, at 153–155. Madison subsequently acknowledged this ambiguity. *Federalist* No. 54 (Madison).
111. 1 Farrand, *supra* note 1, at 201 (June 11, 1787); Beeman, *supra* note 1, at 154.
112. 1 Farrand, *supra* note 1, at 580–581 (July 11, 1787).
113. *Id.* at 605 (July 13, 1787).
114. 1 Farrand, *supra* note 103, at 594 (July 12, 1787); Beeman, *supra* note 1, at 334; Finkelman, *supra* note 1, at 3–36; Lynd, *supra* note 103, at 130–131; McDonald, *supra* note 1, at 3–4, 268.
115. David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823*, at 346–354 (1975); Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* 44–45, 291–292 (1974); Heilbroner and Singer, *supra* note 8, at 9–12, 132; Eric Williams, *Capitalism and Slavery* vii, 210 (1961). On the crucial role played by slavery in the development of capitalism, *see* Beckert, *supra* note 104, at 98–135; Sven Beckert and Seth Rockman, *Slavery's Capitalism, in Slavery's Capitalism: A New History of American Economic Development* 1 (2016).
116. 2 Farrand, *supra* note 1, at 370 (Aug. 22, 1787).
117. 1 U.S. 180, 185 (Pa. Err. and App. 1786); Alan Calnan, *A Revisionist History of Tort Law* 235, 279 (2005); Friedman, *supra* note 8, at 225–226; Hall, *supra* note 8, at 119–223, 131; Horwitz, *supra* note 8, at 180–181; McDonald, *supra* note 1, at 113–114; G. Edward White, *The Intellectual Origins of Torts in America*, 86 *Yale L.J.* 671, 685 (1977).
118. 2 Farrand, *supra* note 1, at 220 (Aug. 8, 1787).
119. *Id.* at 364 (Aug. 21, 1787).
120. *Id.* at 221–223 (Aug. 8, 1787).

121. *Id.* at 370 (Aug. 22, 1787); Beeman, *supra* note 1, at 321–322.
122. 2 Farrand, *supra* note 1, at 364 (Aug. 21, 1787).
123. 1 Farrand, *supra* note 1, at 587 (July 11, 1787); Bell, *supra* note 103, at 11 (explaining “analytical contortions” common within the law of slavery); Lynd, *supra* note 103, at 131.
124. 1 Farrand, *supra* note 1, at 583, 587 (July 11, 1787); Bell, *supra* note 103, at 9–10; Lynd, *supra* note 103, at 129.
125. Beeman, *supra* note 103, at 332–333; Finkelman, *supra* note 1, at 34–35. Even the provisions explicitly protecting slavery did not use the words ‘slave’ or ‘slavery.’ Beeman, *supra* note 1, at 335–336; Finkelman, *supra* note 1, at 6. *See* 2 Farrand, *supra* note 103, at 364 (Aug. 21, 1787) (Charles Pinckney stating “South Carolina can never receive the plan if it prohibits the slave trade”).
126. U.S. Const. art. I, § 2, cl. 3.
127. U.S. Const. art. I, § 9, cl. 1.
128. U.S. Const. art. 4, § 2, cl. 3. For more complete lists of the constitutional provisions, see Bell, *supra* note 103, at 22–23; Finkelman, *supra* note 103, at 6–9.
129. 2 Farrand, *supra* note 1, at 56 (July 19, 1787).
130. *Id.* at 56–57.
131. Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, *Time Magazine* (Nov. 8, 2016).
132. Finkelman, *supra* note 103, at 103 (quoting Pinckney); *id.* at 9–10 (southern attitudes toward protection of slavery); Klarman, *supra* note 1, at 297–303 (same). During ratification debates in the northern states, the proposed constitutional protections of slavery generated contentious debate. Finkelman, *supra* note 103, at 35–36; Maier, *supra* note 1, at 175–176, 351–352.
133. Erik W. Austin, *Political Facts of the United States Since 1789*, at 94–95 (1986) (Table 3.1, National Electoral and Popular Vote Cast for President, 1789–1984).
134. *Federalist* No. 10 (Madison).
135. *Federalist* No. 51 (Madison); Critical History, *supra* note 26, at 160.
136. *Federalist* No. 10 (Madison) (emphasis added); *Federalist* No. 14 (Madison) (the new government would be “in favor of private rights and public happiness”); Maier, *supra* note 8, at 81–82; Nedelsky, *supra* note 1, at 174; Mittal, *supra* note 1, at 36–37. The Constitution successfully created “a common market” that developed over the next decades. Mittal, *supra* note 1, at 40–41.
137. Cushman, *supra* note 7, at 381. Much of modern philosophy has been devoted to attempting to bridge various gaps in this dichotomous world. Richard J. Bernstein, *Beyond Objectivism and Relativism* (1983); Richard Rorty, *Philosophy and the Mirror of Nature* (1979).

138. Brown and Jacobs, *supra* note 100, at 10 (Adam Smith and David Hume argued for both strong markets and strong government).
139. Wood, *supra* note 1, at 24, 410–411, 609; McDonald, *supra* note 1, at 4, 9–55 (ambiguity of terms such as liberty).
140. Alexander Hamilton, *Letter to Robert Morris* (1780), in 3 *The Works of Alexander Hamilton* (Henry Cabot Lodge ed., 1904) (do not to overestimate the ability of individuals to calculate rationally); Federalist No. 1 (Hamilton) (calling on Americans “to deliberate” about the merits of the proposed Constitution); Nedelsky, *supra* note 1, at 76 (Gouverneur Morris questioning individual rationality); Pocock, *supra* note 1, at 464–465, 522–523 (discussing public and private rationalities).
141. U.S. Const. amend. I; Federalist No. 51 (Madison) (“multiplicity of sects” would protect “religious rights”); Critical History, *supra* note 1, at 148–149, 155; Isaac Kramnick and R. Laurence Moore, *The Godless Constitution* 118 (2005) (Massachusetts eliminated the final state establishment in 1833); Noah Feldman, *From Liberty to Equality: the Transformation of the Establishment Clause*, 90 Cal. L. Rev. 673, 690 (2002).
142. Annals of Congress (Sept. 25, 1789), *reprinted in* Anson Phelps Stokes, 1 *Church and State in the United States* 486 (1950); Critical History, *supra* note 26, at 158–168; Curry, *supra* note 28, at 218; Sandoz, *supra* note 15, at 130–131, 151–162.
143. U.S. Const. art. I, § 8, cl. 3.
144. Federalist No. 10 (Madison) (emphasis added). The Constitution did not embody a “free market” approach to economic activity. White, *supra* note 92, at 84.
145. James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), in 3 Farrand, *supra* note 1, at 141, appendix A; *see* William J. Novak, *The People’s Welfare* 9–11 (1996) (emphasizing the superiority of the public over the private sphere continued at least through the nineteenth century).
146. Stanley Elkins and Eric McKittrick, *The Age of Federalism* 93, 113–116 (1993); Heilbroner and Singer, *supra* note 8, at 85 (Hamilton was ahead of his times); James Roger Sharp, *American Politics in the Early Republic* 33–43 (1993); Empire, *supra* note 104, at 98.
147. 1 Farrand, *supra* note 1, at 288–289 (June 18, 1787); McDonald, *supra* note 1, at 115; Sharp, *supra* note 146, at 33, 43.
148. Elkins and McKittrick, *supra* note 1, at 93; McDonald, *supra* note 146, at 94–96, 138–142; Nedelsky, *supra* note 1, at 125–126; Empire, *supra* note 104, at 95–139.
149. Alexander Hamilton, *Report on Manufactures* (Communicated to the House of Representatives, December 5, 1791), 2 *Annals of Congress* 971, 1005 (1791–1793).

150. Thomas Jefferson, *Notes on the State of Virginia* (1787), *reprinted in* Thomas Jefferson: Writings 123 (Library of America, 1984); Finkelman, *supra* note 103, at 193–194; Seavoy, *supra* note 8, at 84–85; Henry Wiencek, *Master of the Mountain* 13 (2012).
151. Thomas Jefferson, *First Inaugural Address* (March 4, 1801); Elkins and McKittrick, *supra* note 146, at 13–19; Empire, *supra* note 104, at 287–301. On the Country ideology, see English, *supra* note 11; Bailyn, *supra* note 1, at 34–35; Pocock, *supra* note 1, at 406–408, 486–487.
152. Lance Banning, *The Jeffersonian Persuasion* 187–191 (1978); Elkins and McKittrick, *supra* note 146, at 199–200; Galbraith, *supra* note 8, at 46–56; Heilbroner and Singer, *supra* note 8, at 79–81; Lawrence S. Kaplan, *Thomas Jefferson: Westward the Course of Empire* 51–52 (1999); McDonald, *supra* note 1, at 98, 106–108.
153. Jefferson, *supra* note 150, at 290–291.
154. Thomas Jefferson, *To P.S. Dupont de Nemours* (Jan. 18, 1802), *reprinted in* Thomas Jefferson: Writings 1099 (Library of America, 1984).
155. Hamilton, *supra* note 149, at 972–973, 1006; Elkins and McKittrick, *supra* note 146, at 92–114.
156. Hamilton, *supra* note 149, at 988.
157. *Id.* at 973, 988–989. In other contexts, Madison repeatedly argued the government could assist a particular business enterprise if doing so would further the common good. James Madison, *In First Congress* (April 9, 1789), *reprinted in* Complete, *supra* note 71, at 276; James Madison, *In First Congress* (1789), *reprinted in* Complete, *supra* note 71, at 272; James Madison, *Letter to Clarkson Crolius* (Dec. 1819), *reprinted in* Complete, *supra* note 71, at 270; James Madison, *Letter to D. Lynch, Jr.* (June 27, 1817), *reprinted in* Complete, *supra* note 71, at 271.
158. Banning, *supra* note 152, at 139; Richard Hofstadter, *Federalists and Republicans, in* 2 *Great Issues*, *supra* note 11, at 141; Prindle, *supra* note 62, at 32; Empire, *supra* note 104, at 97.
159. U.S. Const. art. I, § 10, cl. 1.
160. 2 Farrand, *supra* note 1, at 439–440 (Aug. 28, 1787).
161. *Id.* at 597 (Report of the Committee of Style).
162. McDonald, *supra* note 1, at 270–274.
163. Maier, *supra* note 8, at 285; Horwitz, *supra* note 8, at 180–181; McDonald, *supra* note 1, at 113–114, 274.
164. Keyssar, *supra* note 91, at xxi–xxiv, 340–341 (state suffrage requirements through 1790); U.S. Const. amend. XV (prohibiting denial of vote based on race; 1870); U.S. Const. amend. XIX (prohibiting denial of vote based on sex; 1920).
165. Beckert, *supra* note 104, at 117 (on the transition from a “mercantilist logic” to a more free flowing capitalist market).

166. Novak, *supra* note 145, at 1–2; *Commonwealth v. Alger*, 61 Mass. 53, 7 Cush. 53, 85–86 (1851) (“well ordered governments”); Robert A. Dahl, *A Preface to Economic Democracy* 1 (1985) (“a well-ordered society” required “political equality, political liberty, and economic liberty”).
167. Stephen M. Feldman, *Free Expression and Democracy in America: A History* 167–169 (2008); Heilbroner and Milberg, *supra* note 8, at 87–88; Novak, *supra* note 145, at 10, 86, 237 (emphasizing local control); White, *supra* note 92, at 84; John Joseph Wallis, *The Other Foundings: Federalism and the Constitutional Structure of American Government*, in *Founding Choices: American Economic Policy in the 1790s* 177 (Douglas A. Irwin and Richard Sylla eds., 2011) (emphasizing the significance of state government policies for antebellum economic development). A growing emphasis on individualism was not equivalent to *laissez faire*. Walter Light, *Industrializing America: The Nineteenth Century* 191 (1995).
168. Hall, *supra* note 8, at 88; Horwitz, *supra* note 8, at xiv–xv; William J. Novak, *The Myth of the “Weak” American State*, 113 *Am. Hist. Rev.* 752, 754, 769–771 (2008) (government exercise of infrastructural power influenced distribution of wealth); *see* Jerry L. Mashaw, *Creating the Administrative Constitution* 3–12, 18–25 (2012) (there was far more regulation of the economy, even at the federal level, than is ordinarily acknowledged).
169. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (natural law); *Vanzant v. Waddel*, 10 Tenn. 260 (1829) (state law of the land provision).
170. *Goshen v. Stonington*, 4 Conn. 209, 221 (1822). For additional examples, *see State Bank v. Cooper*, 10 Tenn. 599 (1831); *Eakin v. Raub*, 12 Serg. and Rawle 330 (Pa. 1825); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.); *VanHorne’s Lessee v. Dorrance*, 28 F.Cas. 1012 (C.C. Pa. 1795).
171. *Commonwealth v. Rice*, 9 Metcalf 253, 50 Mass. 253, 256, 259 (1845); Novak, *supra* note 145, 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 and Burlington Railroad Co.*, 27 Vt. 140 (1855); *Vandine’s Case*, 23 Mass. 187 (1828); *Vanderbilt v. Adams*, 7 Cow. 349, 351–352 (N.Y. 1827).
172. James Kent, 2 *Commentaries on American Law* 276 (1827; Legal Classics Library Reprint). Although courts readily upheld numerous government actions, the republican concept of limited government was not specious. *State Bank v. Cooper*, 10 Tenn. 599 (1831) (invalidating law creating special court for Bank of Tennessee); *Pingrey v. Washburn*, 1 Aik. 264, 15 *Am.Dec.* 676 (1826) (invalidating turnpike toll law).

173. For extensive discussions of free expression in the early years of nationhood, including the Sedition Act crisis, see Feldman, *supra* note 167, at 46–100; Leonard W. Levy, *Emergence of a Free Press* (1985); David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. 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 and Ralph Lerner eds., 1987) [hereinafter Founders]; *The Bill of Rights: A Documentary History* (Bernard Schwartz ed., 1971) [hereinafter Schwartz, *Documentary*].
174. 3 Farrand, *supra* note 1, at 599 (Appendix D. The Pinckney Plan); 2 Farrand, *supra* note 1, at 334, 341 (Aug. 20, 1787); *id.* at 617 (Sept. 14, 1787).
175. 2 Farrand, *supra* note 1, at 587–588 (Sept. 12, 1787); *id.* at 618 (Sept. 14, 1787).
176. James Wilson, Speech at a Meeting in Philadelphia (Oct. 6, 1787), *reprinted in* Cogan, *supra* note 173, at 102 (Congress without power over freedom of the press).
177. Herbert J. Storing, *What the Anti-Federalists Were For* (1981). For examples of Anti-Federalists questioning the lack of protection for freedom of the press, see Centinel, No. 1 (Oct. 1787), *reprinted in* 5 Founders, *supra* note 173, at 13, 19–20; Federal Farmer, No. 4 (Oct. 12, 1787), *reprinted in* 5 Founders, *supra* note 173, at 54, 59; Centinel, No. 2 (Oct. 24, 1787), *reprinted in* Cogan, *supra* note 173, at 103, 103–104; Federal Farmer, No. 16 (Jan. 20, 1788), *reprinted in* 5 Founders, *supra* note 173, at 79, 85–86.
178. Letter from James Madison to Alexander Hamilton (June 22, 1788), *reprinted in* Schwartz, *Documentary*, *supra* note 173, at 848; *see* James Madison, Speech in the Virginia Ratifying Convention on Ratification and Amendments (June 24, 1788), *reprinted in* James Madison: Writings 401, 406–407 (Library of America 1999).
179. Proposal by Madison in House (June 8, 1789), *reprinted in* Cogan, *supra* note 173, at 83; House of Representatives, Amendments to the Constitution (June 8, 1789) (from *The Annals of Congress*), *reprinted in* 5 Founders, *supra* note 173, at 20–22, 26.
180. House of Representatives, Amendments to the Constitution (Aug. 15, 1789) (from *The Annals of Congress*), *reprinted in* 5 Founders, *supra* note 173, at 204; Schwartz, *Documentary*, *supra* note 173, at 1050; Anderson, *supra* note 173, at 478.
181. Senate Journal (Sept. 1789), *reprinted in* Schwartz, *Documentary*, *supra* note 173, at 1163–1165.

182. Feldman, *supra* note 167, at 64.
183. *Respublica v. Oswald*, 1 Dall. 319 (Pa. 1788), *reprinted in* 5 *Founders*, *supra* note 173, at 124, 127.
184. Levy, *supra* note 173, at 213 (quoting Thomas McKean).
185. *Id.* at 37–45.
186. James Wilson, 2 *The Works of James Wilson* 287, 395–397 (James DeWitt Andrews ed., 1895 ed.).
187. Feldman, *supra* note 167, at 3–13, 46–60.
188. *Of Freedom of Speech: That the same is inseparable from Publick Liberty* (Feb. 4, 1720), *reprinted in* English, *supra* note 11, at 38, 42 (signed by Thomas Gordon). Samuel Adams emphasized “the bulwark of the People’s Liberties.” Levy, *supra* note 173, at 67 (quoting *Boston Gazette*, March 14, 1768).
189. Virginia Bill of Rights (1776), *reprinted in* 2 Poore, *supra* note 173, at 1908, 1909.
190. John Dawson at Virginia Ratification Convention (June 24, 1788), *reprinted in* Cogan, *supra* note 173, at 101; Patrick Henry at Virginia Ratification Convention (June 14, 1788), *reprinted in* Schwartz, *Documentary*, *supra* note 173, at 800; Cincinnatus, No. 2, to James Wilson (Nov. 8, 1787), *reprinted in* 5 *Founders*, *supra* note 173, at 122; Centinel, No. 2 (Oct. 24, 1787), *reprinted in* Cogan, *supra* note 173, at 103.
191. Proposal by Madison in House (June 8, 1789), *reprinted in* Cogan, *supra* note 173, at 83.
192. Wilbur H. Siebert, *The Loyalists of Pennsylvania* (1920) (describing treatment of Philadelphia Tories in 1775); Claude H. Van Tyne, *The Loyalists in the American Revolution* 62–65 (1902) (discussing the formation of various committees). Many of the most important nineteenth-century struggles over free expression, particularly those involving abolition and slavery, took place outside the courts—sometimes in Congress but sometimes in less formal settings—and thus revolved more around the traditions of dissent and suppression than around the legal doctrine of free expression. Feldman, *supra* note 167, at 118–152; Michael Kent Curtis, *Free Speech, “The People’s Darling Privilege:” Struggles for Freedom of Expression in American History* 3 (2000). On the relationship between the traditions and doctrine, see Feldman, *supra* note 167, at 4, 222, 470–471.
193. Sharp, *supra* note 146, at 8–9.
194. See Feldman, *supra* note 167, at 70–100 (discussing Sedition Act crisis).

195. The Sedition Act of 1798, 1 U.S. Statutes at Large 597, § 3, 5th Congress, 2d sess. (July 14, 1798); *see* The Legislature of Rhode Island on the Virginia Resolutions (Feb. 1799), *in* 2 Great Issues, *supra* note 11, at 184–186 (arguing Congress acted within its power to promote the general welfare).
196. *E.g.*, Annals of Congress of the United States, 1797–1799, 5th Congress, 2d sess. 2139 (July 1798) (statement of Virginia Representative John Nicholas).
197. *Id.* at 2153 (statement of New York Representative Edward Livingston).
198. Kentucky Resolutions (Nov. 10, 1798; Nov. 14, 1799), *reprinted in* 5 Founders, *supra* note 173, at 131–132; Sharp, *supra* note 146, at 196–197.
199. Elkins and McKittrick, *supra* note 146, at 746–750; Sharp, *supra* note 146, at 226–275.
200. *E.g.*, James Madison, *Report on the Alien and Sedition Acts* (Jan. 7, 1800), *reprinted in* James Madison: Writings 608 (Library of America 1999); George Hay, An Essay on the Liberty of the Press (1799), *reprinted in* Two Essays on the Liberty of the Press (1803; 1970 reprint ed.).
201. Constitution of Pennsylvania (1838), *reprinted in* 2 Poore, *supra* note 1, at 1557, 1564; Constitution of Arkansas (1836), *reprinted in* 1 Poore, *supra* note 1, at 101, 102.
202. *State v. Van Wye*, 136 Mo. 227, 37 S.W. 938, 939 (1896).
203. The bad tendency test first emerged as a truth-conditional standard. As articulated by Judge James Kent in *People v. Croswell*, 3 Johns. Cas. 337 (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. *E.g.*, *Castle v. Houston*, 19 Kan. 417 (1877); *Perkins v. Mitchell*, 31 Barb. 461 (N.Y. Sup. 1860); *Commonwealth v. Morris*, 3 Va. 176 (1811).



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