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## ESSAY

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### SOURCES OF CONSERVATIVE THINKING ON DEMOCRACY

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STEPHEN E. GOTTLIEB†

#### I. IDEOLOGICAL ATTACKS ON DEMOCRACY

Not all conservatives are hostile to democracy or question the legitimacy of the democratic process, but many do, and their hostility matters. This is an attempt to describe, explain, and address that hostility. Most prominently, a large group of conservatives treat the marketplace as better than regulation, implicitly attacking democracy and rendering illegitimate democratic attempts to shape the marketplace in the common interest.

##### A. *The Market Supersedes Democracy*

The business sector argues for laissez faire principles and against regulation. In reaction to the totalitarian regimes of Hitler and Stalin, “conservatives” seized on collectivist politics as the threat.

Ayn Rand emigrated from Soviet Russia to help show American conservatives that government is the problem and capitalism is the solution. Her worldview was Hobbesian, rejecting the unselfish, collective spirit the founding generation sought to instill.<sup>1</sup> Ignoring Cardozo’s warning against “[t]he tendency of a principle to expand itself to the limit of its logic,”<sup>2</sup> Rand decided the enemy was not merely the totalitarian state but government itself. As she stated, “The only function of the government, in [a capitalist] society,

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† Jay and Ruth Caplan Distinguished Professor of Law, Albany Law School. B.A., 1962, Princeton University; LL.B., 1965, Yale Law School. His most recent book is UNFIT FOR DEMOCRACY: THE ROBERTS COURT AND THE BREAKDOWN OF AMERICAN POLITICS (2016).

<sup>1</sup> She celebrated this worldview in wildly successful novels. See generally, e.g., AYN RAND, ATLAS SHRUGGED (1957); AYN RAND, THE FOUNTAINHEAD (1943).

<sup>2</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

is . . . the task of protecting [man] from physical force.”<sup>3</sup> Everything else gets in man’s way. De Tocqueville described Americans using collective action for the common good, an antidote to rampant individualism.<sup>4</sup> But Rand was suspicious of collectives, urging reason and individualism instead. “[C]apitalism is the only system that can uphold and protect” individual rights because it promotes an ideology of freedom.<sup>5</sup>

Rand was no democracy devotee; her ideas were elitist. Public choices often repelled her. Nevertheless, if democracy depends on individual freedom, it also depends on capitalism. Capitalism, she thought, permits virtue since everyone stands on their own ground.<sup>6</sup> Government power leads only to more power.

Virtue conflicts with conservative libertarianism. In the moralist tradition, conservatives turn to homogeneity, small communities, shared traditions, and mutual oversight.<sup>7</sup> Some argue devotion to family breeds virtue, despite obvious counterexamples. Others argue for federalism, though “states’ rights” have mounted the greatest of abuses. Rand disliked moralist conservatives—theirs were merely collectives ruling the individual. She frequently supported Democrats.<sup>8</sup>

Friedrich Hayek wrote *The Road to Serfdom* abroad before settling in America at the University of Chicago.<sup>9</sup> He argued for more freedom by opposing everything that smacked of Russian style economic planning. *The*

3 Ayn Rand, *What Is Capitalism?*, in CAPITALISM: THE UNKNOWN IDEAL 11, 19 (Ayn Rand ed., 1967).

4 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 466 (Bruce Frohnen ed., 2002).

5 Ayn Rand, *Man’s Rights*, in THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM 108, 108 (Ayn Rand ed., 1961).

6 See Rand, *What Is Capitalism?*, *supra* note 3, at 19-20 (stating that the moral justification for capitalism is that it protects man’s individual freedom to build relationships voluntarily, protecting the creative mind from unwanted intrusion).

7 See ROBERT DEVIGNE, RECASTING CONSERVATISM: OAKESHOTT, STRAUSS, AND THE RESPONSE TO POSTMODERNISM 95 (1994) (“The[se] conservatives reject this notion that the national state should foster community and social justice.”); William A. Schambra, *Progressive Liberalism and American “Community,”* 80 PUB. INT., Summer 1985, at 31, 40 (discussing dissatisfaction with the “national community” movements in conservative America during the 1960s and 1970s).

8 See generally Ayn Rand, *Conservatism: An Obituary*, in CAPITALISM: THE UNKNOWN IDEAL 192 (Ayn Rand ed., 1967). Her point is that altruism conflicts with freedom, so all moralisms are constraints on human beings. See also Frank James, *Ayn Rand: Conservatives’ Abortion-Rights, Anti-Religion Inspiration*, N.P.R. (Nov. 14, 2011, 10:00 AM), <http://www.npr.org/sections/itsallpolitics/2011/11/14/142300606/ayn-rand-conservatives-pro-abortion-anti-religion-inspiration> [<https://perma.cc/U6VJ-XAMP>] (stating that conservatives who view Rand as a “conservative hero” are “cherry-picking her ideas”); Ayn Rand, *POV: Ayn Rand Excerpts on Religion*, AYN RAND INST. (1988), <https://ari.aynrand.org/issues/culture-and-society/religion-and-morality/Lexicon-excerpts-on-Religion#filter-bar> [<https://perma.cc/K7QJ-YZ6F>] (summarizing Rand’s views on life, morality, and religion); William R. Thrones, *Myth: Ayn Rand Was a Conservative*, ATLAS SOCIETY (May 2, 2011), <http://atlassociety.org/commentary/commentary-blog/3448-myth-ayn-rand-was-a-conservative> [<https://perma.cc/M38D-ZWWG>] (arguing that Rand was not a conservative).

9 F.A. HAYEK, THE ROAD TO SERFDOM, at xvii (1944).

*Road to Serfdom* made government planning the enemy—the less the better. Hayek did not support everything capitalists wanted. Monopolies could be antagonistic to both democracy and capitalism, especially with government protection.<sup>10</sup> Nor did he assume capitalism fostered democracy. But central planning would destroy democracy because efficiency cannot be accomplished democratically.<sup>11</sup> Trying it would hollow out democratic controls. He claimed only that democracy is “possible” in a capitalist system.<sup>12</sup>

For Hayek, democracy was a means toward freedom.<sup>13</sup> But people demanding legal rulings or changes undermine the rule of law.<sup>14</sup> And “distributive justice,” a fair distribution of the rewards of economic activity, conflicts with the rule of law.<sup>15</sup> Laws “under the name of the Welfare State . . . need[] very careful sorting-out [to avoid] full-fledged socialism.”<sup>16</sup> His general argument is critical of the effects of democracy and fearful of demands for economic justice. Business needs rules applied without exceptions. Particularly problematic were the administrative mechanisms of modern government.<sup>17</sup>

Rand’s and Hayek’s encomiums on individualism fit American attitudes well, except when national emergencies keep them in check. Joseph Schumpeter’s counterargument, that America already had a bureaucratically run economy,<sup>18</sup> identified precisely what angered conservatives.

In 1955, William F. Buckley, the brother of James L. Buckley who would later be a plaintiff in *Buckley v. Valeo*, founded *National Review* and wrote in its *Credenda* that “[t]he most alarming single danger to the American political system” is “Fabian” social democracy.<sup>19</sup> He focused on “[t]he competitive price system” as under attack and needing defense.<sup>20</sup> Further, he included monopolies as a threat but thought business was in danger and unions were the problem.<sup>21</sup>

The 2010 *Mount Vernon Statement* of Constitutional Conservatism elaborated: “Constitutional conservatism . . . encourages free enterprise, the individual entrepreneur, and economic reforms grounded in market

<sup>10</sup> See *id.* at 46-47 (comparing the evils of corporate collusive control over industry to communism).

<sup>11</sup> *Id.* at 77-79.

<sup>12</sup> See *id.* at 77-78 (discussing how democracy and central planning inevitably lead to loss of individual freedom).

<sup>13</sup> *Id.* at 78.

<sup>14</sup> *Id.* at 90-91.

<sup>15</sup> *Id.* at 87-88.

<sup>16</sup> *Id.* at xxxiv.

<sup>17</sup> See *id.* at 87-89 (decrying the “socialization of the law”).

<sup>18</sup> See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM & DEMOCRACY* (1943) (predicting the inevitable evolution of capitalism into socialism).

<sup>19</sup> William F. Buckley, Jr., *Our Mission Statement*, *NAT’L REV.* (Nov. 19, 1955), <http://www.nationalreview.com/about> [https://perma.cc/B6ZW-TEJZ].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

solutions . . . .”<sup>22</sup> It mentions “popular will” only where consistent with “the principle of limited government based on the rule of law.”<sup>23</sup> In these documents the “market” underlies liberty and capitalism; it limits democracy.

Another strand of conservative thought is the primacy of consent. The market is imagined as governed by mutual consent, making a simplified understanding of capitalism the moral paradigm of conservative thought.<sup>24</sup>

John Locke’s notion of consent to the system of government was not to oppose government, but to control it.<sup>25</sup> In modern conservative thought, people have an individual right to reject government power beyond the control of force and fraud. For instance, what galled conservatives about the Affordable Care Act health care legislation was the mandate to buy health insurance.<sup>26</sup> Conservative philosophers deny other bases of authority and obligation.<sup>27</sup> But their view of consent justifies only unanimous political action.<sup>28</sup> James Buchanan once floated that idea, but later concluded that rules are often valuable even when unanimity is impossible.<sup>29</sup> Still, in economic matters, modern conservatism favors consent and unanimity over other values.<sup>30</sup>

Since conservatives require no consent for the existing conditions, they make consent conservative; only *change* requires consent,<sup>31</sup> preventing correction of injuries defined by other moral obligations, and turning “minority rights” into conservative control. This branch of conservative theory is therefore largely in conflict with all other moral obligations, including the principle of majority rule or self-government.

<sup>22</sup> *The Mount Vernon Statement*, MOUNT VERNON STATEMENT (Feb. 17, 2010) <http://www.themountvernonstatement.com/> [<https://perma.cc/N47S-BV5J>].

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* notes 25, 27, and 28.

<sup>25</sup> On consent, see generally DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* (1980).

<sup>26</sup> Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES (Feb. 14, 2012), <http://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html> [<https://perma.cc/9DHU-NR6Y>].

<sup>27</sup> See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (attacking the legitimacy of state action to benefit others rather than allowing everyone to act solely for their own good).

<sup>28</sup> On unanimous consent, see generally IAN SHAPIRO, *DEMOCRACY’S PLACE* (1996).

<sup>29</sup> See JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* 163-64 (1975) (“Law is not only public; law is public *capital*.”).

<sup>30</sup> See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (developing an expansive interpretation of the protections of the Eminent Domain Clause).

<sup>31</sup> Compare John C. Calhoun, *A Disquisition on Government* (1851) (discussing how there must be structural protections within government to give minority interests a check against majority action), in *UNION AND LIBERTY* 3, 20-22 (Ross M. Lence ed., Liberty Fund, Inc. 1992), with SHAPIRO, *supra* note 28, at 17-52 (critiquing theories of unanimous consent).

### B. *The People Are Dangerous*

Rand, Hayek, and consent-based theories undergird libertarian and free market ideologies. Conservatives take a contrary position from Leo Strauss, a refugee from Nazi Germany. How to read Strauss is controversial.<sup>32</sup> The following describes what prominent conservatives take from him.<sup>33</sup> As many read Strauss, the rise of Hitler was about the failure of ideology. Conservatives take from Strauss the corporate leadership's obligation to rule within traditional electoral forms. Strauss rejected any unshakable bedrock for moral truths. From the lack of a logically demonstrable foundation, conservatives read Strauss as leaping to relativism. Logically, the nonprovability of propositions does not demonstrate their moral equality.<sup>34</sup> But their argument is that the Nazis took over because some Germans had absorbed this highly contestable philosophical claim,<sup>35</sup> though German aristocrats handed the reins to Hitler to preserve their own power. Strauss concluded that the people could not deal with the uncertainties of relativism. They needed a bedrock. Without it, a Hobbesian world of warring factions beckoned.

With bedrocks shattering, beliefs must be strengthened. Conservatives conclude that liberals are relativists. For liberals, morality depends on what injures others. In conservatives' eyes that makes them relativists, and, for Strauss's followers, liberal relativism destroys the state.<sup>36</sup>

The conservative reading of Strauss does not support democracy—democracy was the problem. The ability to make choices challenges bedrock beliefs. Therefore, people need guidance. American bedrock beliefs include the Founders' work. Hence, while Straussians support the mechanisms the Founders created, they do not accept the implications of the underlying principles. The attempt to improve democracy, to make it more accountable and egalitarian, is precisely the problem. They claim too much democracy, accountability, and equality will undermine democracy. In other words, the People are dangerous. In separating ultimate truth from politics, Straussians argue the leaders' task is to flout the rules to achieve greater state security.<sup>37</sup>

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32 The late Walter Murphy, my teacher and Strauss's student, told me shortly before his death that Strauss's claim that people must be told falsehoods is misunderstood. Cf. JOHN GRAY, *BLACK MASS: APOCALYPTIC RELIGION AND THE DEATH OF UTOPIA* 133 (2007) ("The idea that Strauss's work sanctions deception is questionable."). On Strauss's views on American conservatism, see Nathan Tarcov, *Leo Strauss and American Conservative Thought and Politics*, in *NOMOS LVI: AMERICAN CONSERVATISM* 381 (Sanford Levinson et al. eds., 2016); Alan Gilbert, *Segregation, Aggression, and Executive Power: Leo Strauss and "the Boys"*, in *NOMOS LVI supra*.

33 On Strauss, I draw heavily from DEVIGNE, *supra* note 7.

34 See GRAY, *supra* note 32, at 131-34 (discussing the logical weaknesses of Strauss's philosophy).

35 Cf. DEVIGNE, *supra* note 7, at 48-49, 69-74, 177-79 (discussing Strauss's political philosophy).

36 See GRAY, *supra* note 32, at 131-34 (referring to liberalism as the "failure" of modernism).

37 Cf. DEVIGNE, *supra* note 7, at 48-49, 69-74, 177-79 (discussing conservative political philosophy).

Leaders are inherently above the law. For Straussians, deception of the American people, whether about Iraqi weapons or sending arms to Contras in the teeth of a statutory prohibition, were acts of leadership. But Clinton's sexual immorality was a serious problem because it undermined popular faith and morality.

Many neoconservatives and Straussians argue that capitalism undermines community spirit and democracy by placing a premium on selfish behavior.<sup>38</sup> They argue that capitalism can destroy itself as there is no standard; instead it is simply who gains and who loses. What some call "unregulated" simply means that the law favors the rights of one of the parties. The moral rules of capitalism can either promote constructive self-reliance and generosity or encourage an egoism and corruption that destroys the community, or perhaps both.

Some conservatives, then, treat capitalism and democracy as limited to consent or unanimity, except for the exclusion of force, fraud, and slavery. Straussians, by contrast, are more devoted to tradition than to specific conceptions of capitalism or democracy.

## II. CAPITALIST ATTITUDES ABOUT DEMOCRACY

Polling data in the United States links support for capitalism with reduced support for important mechanisms of democracy, and vice versa.<sup>39</sup> Working in the early 1980s, Herbert McClosky and John Zaller found general support for elections but skepticism about the underpinnings of democracy<sup>40</sup>: universal suffrage which is central to democracy; free speech which empowers intelligent votes; religious and ancestral equality which affects participation in and fairness by democracy;<sup>41</sup> and treatment of the accused, manipulated by autocracies to cow and control the population.<sup>42</sup> Collectively they reflect a willingness to take account of others, essential for democratic systems.

For capitalist values, McClosky and Zaller focused on ownership rights. Those most invested in ownership show less support for other liberties and those who most support civil liberties and equality show less support for

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38 See *id.* at 59-64 (discussing the views of neoconservatives). See generally DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976) (arguing that American capitalism substituted material hedonism for a traditional sense of Protestant work ethic).

39 See *infra* notes 47-48 and accompanying text.

40 HERBERT MCCLOSKEY & JOHN ZALLER, *THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY* 162, 181-84 (1984).

41 Cf. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 95, 96 (Thomas P. Pearson ed., Liberal Arts Press, Inc. 1952) (1690) (discussing man's inherent freedom).

42 See Steven E. Finkel et al., *Democratic Values and Political Tolerance* (critiquing public studies of democratic values), in *MEASURES OF POLITICAL ATTITUDES* 203, 207-08, 217-18 (John P. Robinson et al. eds., 1999).

ownership.<sup>43</sup> This mirrors Hayek's conflict between popular sovereignty and the rule of law.<sup>44</sup>

Support for universal suffrage showed a small decline among those who most supported capitalism.<sup>45</sup> And "those who differ in their support for capitalism . . . disagree over virtually every other democratic value."<sup>46</sup> The difference is clear among the general public and pronounced among the leadership.<sup>47</sup>

McClosky and Zaller found those who felt strongest about capitalism showed much less support for equality in any form.<sup>48</sup> In line with their finding, conservatives have enlisted the Supreme Court to limit the scope of laws designed to protect equal opportunity or a level playing field.<sup>49</sup>

For some strong supporters of capitalism, democracy infringes on their freedom of action. They perceive government regulation as burdensome, even regulation designed to provide rules of fairness and honesty.<sup>50</sup> George W. Bush represented this attitude when he labeled Al Gore's criticisms of tax breaks for the wealthy and of corporate power as a mean-spirited attempt "to

43 MCCLOSKY & ZALLER, *supra* note 40, at 260.

44 See, e.g., HAYEK, *supra* note 9, at 87-88 (discussing how popular desire to have central government care for individual needs can override rule of law protections).

45 MCCLOSKY & ZALLER, *supra* note 40, at 162, 182.

46 *Id.* at 184; see also KEVIN PHILLIPS, WEALTH AND DEMOCRACY 418 (2002) (noting the cyclic tensions between capitalism and democracy); Finkel et al., *supra* note 42, at 214, 238-43 (discussing further McClosky & Zaller's "Democratic Values Scale" thesis); James L. Gibson, *The Structure of Attitudinal Tolerance in the United States*, 19 BRIT. J. POL. SCI. 562, 569 (1989) (highlighting the weakness of American democracy because of the intolerance Americans tend to have against groups they find disagreeable).

47 MCCLOSKY & ZALLER, *supra* note 40, at 174; see also Paul M. Sniderman et al., *The Fallacy of Democratic Elitism: Elite Competition and Commitment to Civil Liberties*, 21 BRIT. J. POL. SCI. 349, 351-53 (1991) (supporting the McClosky and Zaller thesis while taking issue with their earlier work).

48 See MCCLOSKY & ZALLER, *supra* note 40, at 163, 185 (showing a lack of support for issues including equal job opportunities for minorities).

49 See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (declining to extend Title VI protection to language rights); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (finding ADA disabilities suits against state entities barred by the Eleventh Amendment); *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (upholding a private organization's right to discriminate against gays); *United States v. Morrison*, 529 U.S. 598 (2000) (finding a federal law that protected women's rights an unconstitutional extension of Congress's commerce power); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (finding that a federal provision regarding age discrimination unconstitutionally exceeded Congress's authority under the Fourteenth Amendment); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to race-based classifications); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (lowering the level of scrutiny regarding segregated neighborhood schools); *Buckley v. Valeo*, 424 U.S. 1 (1976) (protecting money in politics as First Amendment expression). *But see Tennessee v. Lane*, 541 U.S. 509 (2004) (protecting access to state courts); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the Family Medical Leave Act of 1993).

50 See MCCLOSKY & ZALLER, *supra* note 40, at 309-10 (presenting a "Capitalist Value Scale" including a question about whether government regulation "does more harm than good / is necessary to keep industry from becoming too powerful").

wage class warfare to get ahead.”<sup>51</sup> Such “class warfare,” in the view of many, has no place in a democracy. Efforts to democratize political power can restrict or threaten what conservatives think of as their “rights” and what liberals would describe as improper “privileges” given to conservatives.<sup>52</sup>

Conservatives are less likely to defend the rule of law, including the Bill of Rights, in the criminal process.<sup>53</sup> Yet, conservatives insist on constitutional protections against “regulation” of the market and resist being bound by such laws by challenging campaign finance regulations or stripping the Internal Revenue Service’s ability to investigate taxpayers.

### III. CONSEQUENCES OF THE CAMPAIGN AGAINST GOVERNMENT

The direction of modern conservatism bears McClosky and Zaller out. Conservative ideology actually pushes its attack beyond markets to the door of democracy. Free market conservatives deny that democratic institutions can profitably regulate the market, while favoring rules that protect large monopolies.<sup>54</sup> Democracy has a minimal role in “limited government.” Insistence on consent narrows the legitimate range of democratic decisionmaking. Treating the marketplace as better than regulation implicitly attacks democracy, rendering illegitimate democratic attempts to shape the marketplace in the common interest. The marketplace model attacks both democracy and equality.

This is explicit in conservative thought. Robert Nozick would deny government the right to intervene except to stop force or fraud,<sup>55</sup> thus preventing the pursuit of the “general welfare.”<sup>56</sup> Richard Epstein argues taxes unconstitutionally take private property, unless for the benefit of the taxpayer.<sup>57</sup> His theory had a test run on the Supreme Court but failed when Justice O’Connor switched her vote.<sup>58</sup>

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51 Sean Wilentz, *Bush’s Ancestors*, N.Y. TIMES MAG. (Oct. 16, 2005), <http://www.nytimes.com/2005/10/16/magazine/bushs-ancestors.html> [<https://perma.cc/3B7J-DPA3>].

52 There is no neutral term.

53 For examples, see questions 5, 12, 13, 19, 22, 28, 30, 31, 35, 36, and 39 in McClosky & Zaller’s Democratic Values Scale, *supra* note 40, at 311-14.

54 See generally William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985) (positing that corporations use antitrust rules to defeat competition).

55 NOZICK, *supra* note 27.

56 U.S. CONST. pmbl.; *id.* art. I, § 8, cl. 1.

57 EPSTEIN, *supra* note 30.

58 Compare *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 159-60 (1998) (holding that accrued interest on money placed in a legal trust account is still private property and cannot be taken by the state per the Fifth Amendment’s Takings Clause), with *Brown v. Legal Found.*, 538 U.S. 216, 240-41 (2003) (finding no violation of the Takings Clause).



Conservative ideology even denies that democratic principles can serve as a guide for the conduct of elections.<sup>59</sup> A Court majority explicitly welcomed plutocracy, cutting out nonlandowners from some elections.<sup>60</sup> *Bush v. Gore* literally stopped the Florida count.<sup>61</sup> And *Buckley v. Valeo* insisted that the *only* government interest justifying the regulation of money in politics is the prevention of quid pro quo corruption or its appearance.<sup>62</sup>

The underlying idea here is aristocratic. The conservative revival is not about promoting democracy but about controlling it. Social Darwinism was more honest.<sup>63</sup>

If they went no further than to recognize and try to correct the pitfalls of democratic government, liberals and conservatives would remain on common ground. Liberals also see the risks of democratic governance. People can be misled. Money can influence them via political and issue advertisements to make the wrong decisions. Education for everyone is important to strengthen the quality of decisions. For liberals, a fair process in which each side is well-represented should result in a popular decision that the system is bound to respect.

But for conservatives, money gives capitalists a way to control the multitude. They would subordinate the democratic process to the economic marketplace, which they think far superior.

Those views make it hard to persuade conservatives to improve democracy or to make it more responsive to the general public. On the other hand, their anti-democracy views are also a potential weakness, best disguised or covered over.

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59 See, e.g., *Holder v. Hall*, 512 U.S. 874, 896-903 (1994) (Thomas, J., concurring in judgment) (refusing to look to “standard, practice, or procedure” in interpreting the Voting Rights Act).

60 Cf. *Ball v. James*, 451 U.S. 355, 366-71 (1981) (finding that an agency with “narrow” and “special” functions is exempt from popular election requirements); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728-30 (1973) (holding that “the popular election requirements” do not apply to government agencies with “special limited purpose[s]”).

61 *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam); see also STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* 38-48 (2000) (noting the rejection of democratic values in opinions by conservative justices).

62 424 U.S. 1, 45-47 (1976).

63 See ERIC F. GOLDMAN, *RENDEZVOUS WITH DESTINY* 90-91 (1952) (discussing Herbert Spencer’s Social Darwinist philosophy).

## IV. RESPONSES

The Roberts Court's output reflects an attachment only to economic liberties;<sup>64</sup> democracy is not treated as a governing standard. But democracy and self-government should be treated as compelling interests, protected in the Republican Government Clause,<sup>65</sup> built into constitutional language and structure, and into its repeated references to liberty.<sup>66</sup> In the Founding era, there was no greater liberty than self-government.<sup>67</sup>

Constitutional interpretation is incoherent without a commitment to protect self-government. Every theory of interpretation is purportedly based on democratic premises. Therefore, failure to commit to protecting democracy, while insisting on its implications, ultimately abandons the underlying premise of self-government.<sup>68</sup>

The only conservative on the existing Court who sometimes feels the pull of democratic values is Justice Kennedy, but only regarding freedom of speech and an occasional voting rights case. A mathematical formula for gerrymandering was beyond him.

There is considerable evidence from political scientists, in histories, case studies, game theory, and statistical studies confirming the importance of classical republican egalitarian thinking and the fair distribution of resources to the stability of democracy, and embedded in virtuous and vicious cycles. As Bruce Bueno de Mesquita and his colleagues have explained, the broader the group who select the leadership, the broader the distribution of benefits is likely to be, while the narrower the group who determine the leadership, the narrower the distribution of benefits. Both cycles are self-confirming.<sup>69</sup> Infrastructure that benefits the general population, from water to roads and health, is more widely distributed in democratic than dictatorial governments, where those projects are undertaken only for the benefit of the powerful.

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<sup>64</sup> See STEPHEN E. GOTTLIEB, UNFIT FOR DEMOCRACY: THE ROBERTS COURT AND THE BREAKDOWN OF AMERICAN POLITICS 212-26 (2016) (discussing the Court's recent treatment of regulation on business activities).

<sup>65</sup> U.S. CONST. art. IV, § 4.

<sup>66</sup> Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 955-58 (1988).

<sup>67</sup> See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 24-25, 167-68 (1969) (discussing early American Whig philosophy). On pre-Convention economic and regulatory thinking, see generally LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1968), and WILLIAM J. NOVAK, INTELLECTUAL ORIGINS OF THE STATE POLICE POWER: THE COMMON LAW VISION OF A WELL-REGULATED SOCIETY (1989).

<sup>68</sup> See GOTTLIEB, UNFIT FOR DEMOCRACY, *supra* note 64, at 238-61 (criticizing the Roberts Court's approach to democracy).

<sup>69</sup> See generally BRUCE BUENO DE MESQUITA & ALASTAIR SMITH, THE DICTATOR'S HANDBOOK: WHY BAD BEHAVIOR IS ALMOST ALWAYS GOOD POLITICS (2011); BRUCE BUENO DE MESQUITA ET AL., THE LOGIC OF POLITICAL SURVIVAL (2003).

The Bueno de Mesquita group's work explains not only the importance of equality to the stability of democracy, but also the output of democracy to the distribution of infrastructure. In turn, many of the most reputable scholars investigating the links between democracy and development have found that the most democratic governments produce better economic results. Democracy, rather than a hindrance to development, turns out to be its engine.<sup>70</sup> At best, some conservative jurists might be interested in such studies that relate democracy to economic success. But the thrust of the modern conservative argument is not in that direction.

The public should understand that "ideological" conservatives are trying to take people's votes away, attack democracy, and promote a free market ideology above all other democratic values. And the people need to understand the benefits that government investment can and has promoted. But, although the antiregulatory posture runs counter to the evidence<sup>71</sup> and antidemocratic, it remains popular.

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<sup>70</sup> See generally ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990* (2000).

<sup>71</sup> See generally JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016).