



THE
HIDDEN HISTORY *of*
THE
**SUPREME
COURT**
AND THE BETRAYAL OF
AMERICA

New York Times Bestselling Author

THOM HARTMANN

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—**Bill Luther, former member of Congress**

“Hartmann once again goes deep to understand the origin of the crisis in the Supreme Court, which didn’t stem from Trump alone. To understand the power of the Court, its dangerously dysfunctional state, and what you can do, read this book.”

—**Dahr Jamail, author of *The End of Ice***

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The Hidden History of the Supreme Court and the Betrayal of America

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Berrett-Koehler Publishers, Inc.

1333 Broadway, Suite 1000

Oakland, CA 94612-1921

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Tel: (510) 817-2277, Fax: (510) 817-2278

www.bkconnection.com

Ordering information for print editions

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Distributed to the U.S. trade and internationally by Penguin Random House Publisher Services.

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First Edition

Paperback print edition ISBN 978-1-5230-8594-1

PDF e-book ISBN 978-1-5230-8596-5

IDPF e-book ISBN 978-1-5230-8597-2

Digital audio ISBN 978-1-5230-8595-8

2019-1

Book production: Linda Jupiter Productions; Cover design: Wes Youssi, M.80 Design;

Edit: Elissa Rabellino; Proofread: Mary Kanable; Index: Paula C. Durbin-Westby

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A Rebellion against the Monarchy

The candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, [then] in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent [Supreme Court] tribunal.

—Abraham Lincoln, from his first inaugural speech, explaining why he refused to recognize the Supreme Court's *Dred Scott* decision

From the time Americans wake up in the morning, throughout their days (work or play), right through a full night's sleep, everything they do, touch, ingest, breathe, and use has been touched in one way or another by the Supreme Court.

Food, drugs, transportation, clothes, furniture, roadways, water, septic, electricity—everything in modern life is regulated in some way, either in manufacture, distribution, sale, or use, and those regulations are allowed or disallowed, ultimately, by the US Supreme Court.

At home and in the workplace, Americans' lives are regulated by the Supreme Court: whether there can be a minimum wage or unemployment insurance; how much power employers can have over labor unions and employees; whether consumers can sue when harmed by products or corporate actions; and how

far police and other agencies can go in prosecuting (sometimes persecuting) individuals or entire groups of people.

The Court determines and defines the limits of your right to protest and your right to a free press. It has final say in everything from taxation to regulation, from public space to private space, from contraception to marriage. Both directly and indirectly, the Court determines how wealth can be earned, accumulated, and disposed of; it decides how far the rich can go in exploiting the poor and working people, and whether working people can fight back.

Meanwhile, America has ended up—mostly since around 1980—with one of the most corrupted political systems in the developed world, with billionaires and big corporations literally writing legislation to benefit themselves, from the federal to state to local levels.

As Tim Wu¹ wrote for the *New York Times* in March 2019, “About 75 percent of Americans favor higher taxes for the ultrawealthy.² The idea of a federal law that would guarantee paid maternity leave attracts 67 percent support.³ Eighty-three percent favor strong net neutrality rules for broadband,⁴ and more than 60 percent want stronger privacy laws.⁵ Seventy-one percent think we should be able to buy drugs imported from Canada,⁶ and 92 percent want Medicare to negotiate for lower drug prices.”

Yet Congress as a whole has not even once seriously considered any of these things in decades. The reason, quite simply, is literally billions of dollars of politically poisonous cash flowing from corporations and ideologically motivated billionaires into the bloodstream of our body politic.

And it wasn't Congress or any president in history who changed laws to make this possible; it was the Supreme Court.

Right now, and throughout much of US history, the ideological makeup of the US Supreme Court has had little resemblance to the political makeup of our nation.

In 2019, for instance, solid majorities of Americans supported a woman's right to access abortion and birth control, voting rights, a national health care system, well-funded public schools and free education through college, higher taxes on corporations to pay for infrastructure and an expanded social safety net, and regulation of corporate behavior from pollution to banking.

These are issues that enjoy *majority* support from working Americans and American communities, but not from corporate America or America's billionaires.

As this book shows in parts 1 and 2, the Court has historically almost always sided with the wealthy, the powerful, and the corporate against the poor, the weak, and the individual.

In many cases, these decisions have struck down laws passed by Congress and signed by the president, a process called *judicial review*.

This book answers the core questions about the Supreme Court's decisive role in determining the fate of the planet: Why did the framers create the Supreme Court? What is judicial review—and how does it make the Supreme Court what Thomas Jefferson, post-1803, called a “despotic” branch? How does the history of the US Constitution explain the Court's frequent decisions in favor of the wealthy and corporations? When *has* the Court sided with popular opinion—and how

have people successfully challenged the Court in the past? How did a 20th-century coalition of businesses and billionaires seize control of the American government, including the Supreme Court, and why is this now a planetary crisis?

Most important, what can Americans do about all of this?

In the Beginning . . .

There were those among the founders and framers of the Constitution who didn't mean for the Court to have this much power—Thomas Jefferson among them. Part 1 of this book dives into the philosophies that guided the men who drafted the Constitution. It also shows how in 1803, the Supreme Court set itself above Congress and the president with the power to review, strike down, or rewrite laws based on its own lone interpretation of the Constitution.

Importantly, the framers of the Constitution gave no consideration to “the rights of nature” or even of the environment, other than its sheer productive potential to enhance the wealth of the nation.

Instead of the environment, when the Constitution was written in the summer and fall of 1787, the new thing in political circles was the idea of property rights for commoners, which had only clearly been articulated outside of the realm of royal prerogatives during the previous few centuries.

John Locke wrote in his 1689 *Two Treatises of Government* that the main purpose of government was to make sure that “no-one may take away or damage anything that contributes to the preservation of someone else's life, liberty, health, limb,

or goods.”⁷ He was speaking directly to the new ability of some commoners to actually claim title to things, including their own bodies.

After 1,000-plus years of either the monarch or the church (or both) wielding absolute rule and absolute ownership of *everything*, Locke was pushing a radical and revolutionary idea.

In his chapter titled “Political or Civil Society,” Locke noted that both the laws of *nature* and the laws of a *civilized society* would give the right of “life, liberty and possessions” to every man.⁸

If that language seems familiar, it’s because Locke is the man whom Thomas Jefferson plagiarized, or was inspired by, when he wrote in the Declaration of Independence that the purpose of our newly formed government was to provide for “life, liberty and the pursuit of happiness” because we had the right, simply as humans, to “assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle [us].”

A Suicide Pact

By the time Jefferson was writing, a mere century after Locke, the right of “commoners” (at least white male ones; women and people of color were still excluded) to own private property was well established and well recognized, so Jefferson didn’t see the need to restate it. Instead, he replaced Locke’s repeated and varied mentions of different types of property with “happiness.” It was the first time that word ever appeared in the founding documents of any nation.

Thus, the newest revolution in human rights in 1787, brought to North America by Enlightenment philosophers like Jefferson, was the idea of nonwealthy “commoners” having individual *property rights*—the right to private ownership of things: from the food a person grew; to the land on which they lived; to exerting agency over their own lives, workplaces, and bodies.

The concept of property rights was becoming a core Western philosophy in the 17th and 18th centuries, and one of the core functions of our 18th-century Constitution was to protect, regulate, and provide a mechanism to adjudicate those property rights. Without the Stuart monarchies’ losing their absolute power over property rights in the English Civil War of 1642–51 and the Glorious Revolution of 1688, the Industrial Revolution may never have happened.⁹ This shift of property rights, including land rights, from the Crown to the *people* (at least the white male people) created the legal and political floor for the thinking that led to the American Revolution.

But in 1787, the framers weren’t concerned about running out of arable land, clean water, and clean air. And they never imagined a time when several versions of that day’s East India Company would rise up on these shores and take over our political system to their own advantage and to the disadvantage of democracy itself. They were far more worried about how to create a republic in which the government would both protect a person’s right to own property and facilitate his (consideration of women was excluded) enjoyment of it (hence, “the pursuit of happiness”).

Today, all of that is at risk.

The world is facing a climate crisis that could very well end civilization as it's currently known, and perhaps could even lead to the death of every animal on earth larger than a dog (including humans), as has happened five times in our geologic past.¹⁰ Fossil-fuel interests are steering the planet toward those very undesirable outcomes at light-warp speed. If something isn't done about the climate/carbon crisis, people reading this book today might be living in the last generation to experience a stable atmosphere, and thus a stable form of governance, for any foreseeable future.

The Supreme Court has seized the power to decide what is "constitutional," and it uses that power to strike down or rewrite laws that have been passed by Congress and signed by the president. But because our Constitution doesn't mention the rights of nature (or even the environment), the Earth's biosphere is getting short shrift in our legal system—no matter how many laws Congress passes to protect the environment.

Thus, the judiciary has turned our Constitution in the direction of, as Thomas Jefferson feared, becoming a suicide pact.

Corporate America Seizes the Court

In many ways, the looming crisis is one created by the Supreme Court itself.

No legislature, governor, or president has ever suggested that corporations should be considered "persons" for the purpose of constitutional protections, particularly under the 14th Amendment's equal-protection rights.

No federal or state legislature, no president, and no state governor has ever, in more than 240 years, suggested that billionaires and corporations have a First Amendment “right” to unlimited political bribery. Congress has instead criminalized such behavior repeatedly.

Both doctrines, *corporate personhood* and *money as speech*, were simply invented by corporate-friendly Supreme Court rulings (in the 1819–86 era for corporate personhood, and in the 1976–2013 era for money as speech). Their combined effect has been to hijack America’s democratic experiment, concentrating power into the boardrooms of faceless corporations and the summer homes of reclusive billionaires.

As President Jimmy Carter told me some years ago, America is no longer a functioning democratic republic; we’ve devolved into an oligarchy.¹¹ Most of this crisis is the direct result of the Supreme Court’s use of judicial review.

Political power is now defined by wealth. That means that virtually unlimited political power has been concentrated into the hands of the richest industry in the world, the fossil-fuel industry—the very same industry that is endangering every aspect of our modern world with its reckless pursuit of ever-increasing profits.

The corruption that brought us to this point started with a 1971 memo, in which Republican activist Lewis Powell suggested to the US Chamber of Commerce (and the corporations and multimillionaires associated with it) that they should actively involve themselves in politics. They did, and were so successful that Republican presidents now look to petro-billionaire-funded organizations to select judicial nominees for the federal bench, including the Supreme Court.

How did America's great democratic experiment end in a functional oligarchy? And how can we change course in time to address the planetary crisis of climate change?

Part 2 details when and how the Court has ruled in favor of the country's elite, and how presidents and the people themselves have occasionally gone to war with the Court—and won.

With those histories in mind, part 3 of this book presents constitutionally available solutions for Americans to rein in the Supreme Court and claw back our democracy from the hands of billionaires and corporations—including one particularly startling “emergency” solution suggested by John Roberts when he worked for Reagan.

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The Hidden History of Judicial Review

To understand the Supreme Court, one must understand the zeitgeist of the Founding Fathers' generation and the philosophical history that led the founders and framers to create the Court itself.

Part 1 of this book looks at the founders' intents and concerns—and how quickly the Court seized the power of judicial review to become a nearly despotic branch of government. The conclusion of part 1 explores how one man sparked a right-wing movement to seize control of the American government—including the outsized power of the Supreme Court.