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## The Unconstitutionality of Eliminating Estate and Gift Taxes

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# THE UNCONSTITUTIONALITY OF ELIMINATING ESTATE AND GIFT TAXES

JAMES G. WILSON<sup>1</sup>

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## I. INTRODUCTION

The recent proposal to eliminate estate and gift taxes is not only immoral and a poor allocation of resources,<sup>2</sup> but also is unconstitutional. Irrespective of their ideology, virtually all American lawyers will initially dismiss this accusation as frivolous because it conflicts with their tradition of equating conceptions of “constitutionality” with United States Supreme Court opinions. The Court has long been highly deferential to Congress in federal tax law cases.<sup>3</sup> It is inconceivable that the current Court would find anything “irrational” in a facially neutral law eliminating all estate and gift taxes. Indeed, if I sat on that bench, I would join my far more conservative colleagues in upholding such a law against any constitutional challenges. The taxation power remains the central government’s primary tool for social/economic transformation and military operations. After all, money is the “sinew” of war.<sup>4</sup> When in doubt, it is best to follow Justice Holmes’ admonition in his *Lochner v. New York* dissent to a decision invalidating a state law that limited bakers’ working hours: “[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation on the citizen to the State or of laissez faire.”<sup>5</sup>

It already should be obvious that the only way to sustain any allegation of unconstitutionality against these tax policy changes is to extend meanings of “constitutionality” beyond the legalistic paradigm of constitutional adjudication. Consider the following tawdry example of political action that is seemingly “unconstitutional” but would probably be “legal” because the Supreme Court would

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<sup>2</sup>For a general overview, see RONALD CHESTER, *INHERITANCE, WEALTH, AND SOCIETY* (1982).

<sup>3</sup>For example, the Court is reluctant to examine Congressional “motives” behind particular tax policies so long as the taxes produce some revenues, even when the “primary purpose” of the tax appears to be a restriction of certain activities. *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (upholding tax on gun dealers).

<sup>4</sup>THE FEDERALIST NO. 41, at 232 (James Madison) (Jack Rakove ed., 1999).

<sup>5</sup>198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

almost certainly not intervene. Suppose that the House and Senate had sought to impeach President Clinton solely for having an extramarital affair (leaving aside such issues as perjury, cover-ups, character assassination, and lying)? Clinton's lawyers would have told the House and Senate that a vote for impeachment is an abuse of Congressional constitutional discretion. His opponents would have been using his sexual escapades as a pretext for partisan political warfare, because such wayward behavior is not a "High Crime or Misdemeanor." Adultery (or whatever one prefers to label Clinton's peculiar sexual proclivities) is neither a crime nor a misdemeanor, much less a "High Crime and Misdemeanor" threatening the nation. Nevertheless, Clinton could have been impeached (it is hard to imagine a politician surviving such disclosures fifty years earlier). Should Clinton have next appealed his defeat to the Supreme Court, it most likely would have rejected his claim as a nonjusticiable political question. The Court decided in *Nixon v. United States*<sup>6</sup> not to review a federal judge's procedural challenges to the Senate's impeachment procedures. Although the Clinton case would have involved a different part of the impeachment text ("High Crimes and Misdemeanors" instead of "The Senate shall have sole power to try all impeachments")<sup>7</sup> the Court should follow the *Nixon* precedent. If the Court is unwilling to second-guess procedural choices, where it has great expertise, it should be far more reluctant to reverse substantive political decisions reflecting the will of the elected branches and indirectly the citizenry. It seems absurd for nine unelected members of the Court to reverse such an important political decision as the poll-driven termination of a Presidency. It is time for the country to move on whenever its leader has lost the "mandate of heaven," irrespective of reasons.

There are many more instances of major constitutional powers that are not regulated by the Supreme Court. Rather, they are controlled by unwritten "constitutional conventions" similar to the numerous "constitutional conventions" that help organize the English Constitution.<sup>8</sup> The elected branches can pack the Court because the text is silent about the number of Justices. The Senate and House may expel their own members for virtually any reason. Congress has vast authority over lower federal court jurisdiction and Supreme Court appellate decision. There are no legal constraints on the Senate's discretion in using its Advise and Consent power to ratify treaties or Presidential nominees. Thus, it is possible in all these areas for politicians to act "unconstitutionally," in the sense that they are violating the text, spirit, structure, precedent, and purposes surrounding a particular section of the Constitution, but "legally" because there is nothing the Supreme Court could or should do. The politicians and the American electorate determine many important Constitutional questions, not the Court. After all, Clinton barely survived the impeachment process primarily because the polls steadily indicated that a majority of Americans did not think his repellant actions warranted impeachment. The electorate helped create constitutional impeachment doctrine and complete an additional precedent that can be invoked and distinguished in the future. Whether

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<sup>6</sup>506 U.S. 224 (1993).

<sup>7</sup>U.S. CONST. art. I, § 6.

<sup>8</sup>See, e.g., James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645 (1992).

one agrees with the ultimate outcome of the Clinton episode or not, it coincides with James Madison's theory of checks and balances that went far beyond formal governmental structures: "[I]n the last resort, a remedy must be obtained from the people, who can by election of more faithful representatives, annul the acts of usurpers. The truth is, that this ultimate redress may be more confided in against *unconstitutional acts* of the federal than the state legislatures..."<sup>9</sup>

While these examples validate the claim that politicians can act unconstitutionally but legally (and thus refuting any rigid equation of "constitutionality" with "legality" and any theory that places the Supreme at the apex of all constitutional conflicts), they do not necessarily demonstrate that estate and gift taxes have constitutional dimensions. There are vast differences between the areas of political discretion that both the Constitutional text and the Supreme Court from *Marbury v. Madison*<sup>10</sup> to Judge Nixon's impeachment case<sup>11</sup> have left to the nation's elected leadership and the economic issue of wealth transfer taxes. To extend notions of constitutionality this additional distance, we need to resurrect earlier constitutional conceptions from such influential political thinkers as Aristotle, David Hume, James Madison, and Thomas Jefferson. Even a cursory glance at the Founding generation reveals that it had much broader understandings of constitutionality, including wealth allocation in general and estate distributions in particular. Ultimately, this historical/analytical inquiry is more important than any quibbling over the preferred meanings of a particular word like "constitution." Should the reader remain unconvinced about the utility of using the phrase "constitutionality" to analyze and normatively assess estate and gift tax policy, this work will nevertheless not have been in vain if it has placed that immediate problem within a broader historical/conceptual perspective.

## II. ARISTOTLE'S CONSTITUTIONS

Even if one must rely on the inspired vagaries of brilliant translators, Aristotle is worth studying for several reasons. First of all, he laid the groundwork for much of contemporary political/legal thought, an attraction for lawyers and politicians seeking well-tested, traditional authority for their arguments. Aristotle's intellectual influence can easily be traced to the formation of the Constitution, because Madison (along with his Enlightenment colleagues) was profoundly inspired by Ancient Greek history and political theory. One need only envision Jefferson's columns at Monticello and the University of Virginia for evidence of that generation's gratitude and respect for their Greek forebears. Suffused with genius, Aristotle's work remains more provocative and developed than most contemporary political and legal theory. Quite simply, it is far easier for the average citizen to develop useful, humane insights from Aristotle and Madison than from such arcane intellectuals as Heidegger, Lacan, and Habermas. The vast differences in time and culture are also helpful. We perceive how our major political conflicts are merely variations of

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<sup>9</sup>THE FEDERALIST NO. 44, at 257 (James Madison) (Jack Rakove ed., 1999) (emphasis added).

<sup>10</sup>5 U.S. (1 Cranch) 137, 166 (1803) (leaving the conduct of foreign affairs largely within the President's discretion).

<sup>11</sup>*Nixon v. United States*, 506 U.S. 224 (1993) (federal judge's challenge to Senate impeachment procedures presented nonjusticiable political question).

ancient disputes, enduring controversies that have been deeply analyzed by somebody who has no interest in our particular issues. In other words, one shouldn't study those suspect "dead white males" because they are white or male. But in some ways it helps that they are dead.

Aside from stylistic and translation problems, Aristotle is somewhat difficult to grasp because he self-consciously gives different definitions to many of his major terms and then blends those terms into two elegantly circular systems, one normative and one descriptive. In particular, he uses the word "constitution" in many different ways and then commingles those definitions with such words as "citizen" and "virtue," which have their own cluster of normative and analytical definitions. Here are a few examples that undermine the parochial vision equating constitutional inquiry with Supreme Court jurisprudence. The notion of "constitutionality" first appears in Aristotle's *Politics* as a psychological concept, a reminder that Aristotle was the ultimate interdisciplinary scholar, blending anthropology, economics, psychology, politics, morality, law and theory into illuminating analytical and normative models: "At all events we may firstly observe in living creatures both a despotical and a constitutional rule; for the soul rules the body with a despotical rule, whereas the intellect rules the appetite with a constitutional and royal rule."<sup>12</sup> Although Aristotle was an infamous apologist for slavery, he conceded that the institution injured both master and slave: "[T]he rule of a master is not a constitutional rule."<sup>13</sup> He then used the term to cover political systems: "Our purpose is to consider what form of political community is best of all for those who are most able to realize their ideal of life. We must therefore examine not only this but other constitutions, both such as actually exist in well-governed states, and any theoretical forms which are held in esteem, so that what is good and useful may be brought to light."<sup>14</sup> Incidentally, it is worth noting that Aristotle was not a one-dimensional utilitarian or efficiency expert; he wanted constitutions that were both "good" and "useful." In his discussion of Plato's *Republic*, he narrowed his conception of "constitution" to state action: "Socrates has definitely settled in all a few questions only; such as the community of women and children, the community of property, and the constitution of the state."<sup>15</sup> Turning to Plato's *Laws*, he applied the word to his famous distinction between monarchies, aristocracies, and democracies—the rule of the majority, the elite, or a single person.<sup>16</sup> "Some, indeed, say that the best constitution is a combination of all existing forms."<sup>17</sup> He relied on history to empirically evaluate these rival systems: "The superiority of the Carthaginian form of government is proved by the fact that the common people

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<sup>12</sup>ARISTOTLE, *POLITICS*, reprinted in 2 THE COMPLETE WORKS OF ARISTOTLE 1990 (Jonathan Barnes ed., 1984) [hereinafter ARISTOTLE, *POLITICS*].

<sup>13</sup>*Id.* at 1992.

<sup>14</sup>*Id.* at 2000.

<sup>15</sup>*Id.* at 2007.

<sup>16</sup>ARISTOTLE, *NICOMACHEAN ETHICS*, reprinted in 2 THE COMPLETE WORKS OF ARISTOTLE 1834-35 (Jonathan Barnes ed., 1984) [hereinafter ARISTOTLE, *NICOMACHEAN ETHICS*].

<sup>17</sup>ARISTOTLE, *POLITICS*, *supra* note 12, at 2008.

remains loyal to the constitution; the Carthaginians have never had any rebellion worth speaking of, and have never been under the rule of a tyrant.”<sup>18</sup> Although he frequently used cognates of “constitution” as terms of praise<sup>19</sup> (he preferred regulated republics which he calls “constitutional government” instead of perverted “democracies” in which the majority pursue their interests at the expense of the common good),<sup>20</sup> he also approached these issues more amorally. He explained why citizens must conform to their constitutional order (which now incorporated the entire society, not just the government): “[O]ne citizen differs from another, but the salvation of the community is the common business of them all. *This community is the constitution*; the excellence of the citizen must therefore be relative to the constitution of which he is a member.”<sup>21</sup> A few pages later, he reverted to a more bounded definition: “The words constitution and government have the same meaning.”<sup>22</sup> At times he sounds like a modern political scientist: “A constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community. But laws are not to be confounded with the principles of the constitution; they are the rules according to which the magistrates should administer the state, and proceed against offenders.”<sup>23</sup> Here is another fluctuation towards breadth: “[T]he constitution is so to speak the life of the city.”<sup>24</sup>

Aristotle’s next conception of “constitution,” one that could just as easily have been penned by James Madison or Karl Marx, is the most relevant for our purposes: “For a constitution is an organization of offices, which all the citizens distribute among themselves, according to the power which different classes possess (for example the rich and the poor), or according to some principle of equality which includes both.”<sup>25</sup> In other words, one crucial constitutional question is the actual distribution of wealth and power among the citizenry: “But the form of government is a democracy when the free, who are also poor and the majority, govern, and an oligarchy when the rich and noble govern, they being at the same time few in number.”<sup>26</sup> I believe this issue is the most important constitutional question now facing the United States. Although the formal “political constitution” of United States retains the structure of a republic, the country has in many ways become an oligarchy. The most rabid leftist could not have written a more disturbing lead paragraph than the following from a recent *Wall Street Journal* article entitled *Bush’s Donors Have a Long Wish-List and Expect Results*:

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<sup>18</sup>*Id.* at 2019

<sup>19</sup>ARISTOTLE, CONSTITUTION OF ATHENS, *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 2349 (Jonathan Barnes ed., 1984) [hereinafter ARISTOTLE, CONSTITUTION OF ATHENS].

<sup>20</sup>ARISTOTLE, POLITICS, *supra* note 12, at 2046.

<sup>21</sup>*Id.* at 2026. (emphasis added)

<sup>22</sup>*Id.* at 2030.

<sup>23</sup>*Id.* at 2046.

<sup>24</sup>*Id.* at 2056.

<sup>25</sup>ARISTOTLE, POLITICS, *supra* note 12, at 2047.

<sup>26</sup>*Id.* at 2048.

For an idea of what a George W. Bush presidency would be like, peek in on a fund-raising gala here Wednesday afternoon during the Republican National Convention. Amid the harmonies of the Philadelphia Boys Choir will gather the underwriters of the richest political campaign ever—the lawyers and corporate executives who have helped build a \$92.3 million campaign fund and who, as shareholders in Bush, Inc., will hold a bit stake in a Bush presidency.<sup>27</sup>

Aristotle sought a Constitution whose strength and stability did not overwhelm most citizens' opportunity to achieve a life of "happiness," which he once defined normatively as "an activity of the soul in accordance with complete excellence."<sup>28</sup> The two greatest threats to any constitutional community were external conquest and internal strife usually caused by the perpetual tensions between the rich and the poor. Aristotle believed that a "constitutional democracy" was the best form of government because it best represented and protected the masses from rapacious rulers. In addition, that system had the strongest tendency to create a powerful middle class that gravitates toward a life of virtuous moderation. The middle class is less likely than the rich and their progeny to become decadently and arrogantly ambitious, putting pursuit of wealth and glory above the community. Nor do they suffer from the turbulent demoralization of poverty, for "poverty is the parent of revolution and crime."<sup>29</sup> The middle class operates as a buffer between the two more dangerous factions. Furthermore, a vibrant middle class life provides more opportunities for more citizens to achieve some degree of happiness through leading a virtuous life.

Aristotle bequeathed more than generalities to future generations. He praised Athen's ancient lawgiver Solon for eliminating all existing public and private debts<sup>30</sup> (an alternative worth considering today to resolve the crushing debt burdens of the "undeveloped countries"). Because he feared the rich as much as the poor, he proposed legal constraints to their power. First of all, he recommended that the city exile anyone who became too wealthy because that person would threaten the constitutional order. Under *Trop v. Dulles*,<sup>31</sup> the Supreme Court would find that draconian solution a violation of the Eighth Amendment's ban on "cruel and unusual punishments." In *Trop*, the Court held that Congress did not have the power to strip individuals of their fundamental right to citizenship. Far more importantly for our purposes, he discussed in some depth the issue of wealth transfers at the time of death. Neither the underlying dispute nor the accompanying arguments have changed very much over the past two thousand years. Notice how Aristotle combines his moral standards (opposition to greed) with his more practical norms (preserving the community). Before reading this somewhat lengthy excerpt, I should acknowledge that I edited out the sexist parts:

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<sup>27</sup>Greg Hitt, *Bush's Donors Have a Long Wish-List and Expect Results*, WALL ST. J., July 31, 2000, § A, at 1.

<sup>28</sup>ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 16, at 1740.

<sup>29</sup>ARISTOTLE, *POLITICS*, *supra* note 12, at 2008.

<sup>30</sup>To reduce class tensions, Solon cancelled all debts. ARISTOTLE, *CONSTITUTION OF ATHENS*, *supra* note 19, at 2343.

<sup>31</sup>356 U.S. 86 (1958).

The mention of avarice naturally suggests a criticism on the inequality of property. While some of the Spartan citizens had quite small properties, others have very large ones: hence the land has passed into the hands of the few. And this is due also to faulty laws: for, although the legislator rightly holds up to shame the sale or purchase of an inheritance, he allows anybody who likes to give or bequeath it. Yet both practices lead to the same result. \*\*\* [T]he whole number of Spartan citizens fell below 1000. The result proves the faulty nature of their laws respecting property; for the city fell in a single defeat; the want of men was their ruin. There is a tradition that, in the days of their ancient kings, they were in the habit of giving the rights of citizenship to strangers, and therefore, in spite of their long wars, no lack of population was experienced by them; indeed, at one time Sparta is said to have numbered not less than 10,000 citizens. Whether this statement is true or not, it would certainly have been better to have maintained their numbers by the equalization of property.<sup>32</sup>

Of course, this statement does not prove that Aristotle would believe that the United States should preserve estate and gift taxes. Although it is legitimate to employ hallowed authorities to explore recurring problems and bolster particular outcomes, it is sophistry to argue that the time-tested thinker would now agree with one's particular recommendations. We can never know what great thinkers like Aristotle, Hume, and Madison would think of modern times, because enough has changed that they might alter any of their conclusions (as well as some underlying assumptions). One would hope, for instance, that Aristotle would no longer embrace slavery, sexism, and racism. Furthermore, they would have been raised in our culture, successful members committed to its growth and their own advancement. They could still make amazing insights about our social order, but those insights would not have the peculiar impartial clarity attributable to time, distance, and death. For instance, Aristotle might conclude that the United States has so much power and so many middling citizens that it can violate many of his old norms and ignore many of his proposals while still maintaining stability, a dynamic middle class, and a republican form of government. After all, Aristotle's constitutional approach requires each of us to make an empirical assessment of our society: How appropriately are wealth and power distributed? It is inevitable that we will disagree about the answer to this basic constitutional question. Where some will argue that major private corporations have become the real "citizens" who run this country, others will reply that never before have so many people been able to lead a comfortable life providing them with the possibility of achieving some degree of happiness. Where some see only injustice, others perceive vast opportunity.

### III. ENLIGHTENMENT MODIFICATIONS OF ARISTOTLE

The pagan Aristotle helped provide the groundwork for the Enlightenment figures who imagined and then designed secular states no longer intertwined with religious institutions. But some of his norms and beliefs clashed with aspects of Enlightenment thinking. Aristotle believed that avarice, wealth, and luxury threatened the body politic. Large, imperial countries could never preserve republican norms and constitutional structures. Blessed with an equally formidable

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<sup>32</sup>ARISTOTLE, *POLITICS*, *supra*, note 12, at 2015-16.



capacity to master a wide range of disciplines, David Hume helped revolutionize political thought just as he transformed metaphysics, epistemology, causation, moral philosophy, psychology, and political economy. Hume believed that the pursuit of luxury would provide the social adhesive necessary to replace Aristotle's virtue and Christianity's religious enthusiasms. Aristotle's virile virtues emanated from the art of war, while Christianity disintegrated into several factions that had drenched Europe in blood for centuries. In Hume's materialistic future, good manners would combine with relentless acquisitiveness to create a relatively peaceful middle class world revolving around commerce: "[T]he eternal contrarities, in company, of men's pride and self-conceit, have introduced the rules of Good Manners or Politeness, in order to facilitate the intercourse of minds, and an undisturbed commerce and conversation."<sup>33</sup> In an extraordinary passage, Hume explained how and why the ancient Greek and Roman conceptions of "virtue" must be changed:

Luxury, or a refinement of the pleasures and conveniences of life, had not long been supposed the source of every corruption in government, and the immediate cause of faction, sedition, civil wars, and the total loss of liberty. It was, therefore, universally regarded as a vice, and was an object of declamation to all satirists, and severe moralists. Those, who prove, or attempt to prove, that such refinements rather lead to the increase of industry, civility, and arts regulate anew our *moral* as well as our *political* sentiments, and represent, as laudable or innocent, what had formally been regarded as pernicious and blameable.<sup>34</sup>

Americans have never fully accepted Hume's embrace of luxury.<sup>35</sup> In 1766, "The Tribune" wrote from South Carolina: "That luxury naturally creates want, and that want, whether artificial or real, has a tendency to make men venal, are truths that are too evident to be disputed. Luxury therefore leads to Corruption, and whoever encourages great luxury in a free state must be a bad citizen; so, of course, whatever government does the same must be a bad government, because it therein acts against the interest of the community."<sup>36</sup> Nor did some members the Revolutionary generation see any necessary contradiction between property rights and opposition to concentration of wealth. Benjamin Rush assumed that "Liberty and property from the basis of abundance, and good agriculture."<sup>37</sup> Such principles led him to oppose both slavery and large concentrations of private power: "Now if the plantations in the islands and southern colonies were more limited, and freemen only employed in

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<sup>33</sup>DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 139 (Tom L. Beauchamp ed., 1998) (1777).

<sup>34</sup>*Id.* at 13-14 (emphasis in original).

<sup>35</sup>See, e.g., Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L. J. 119 (1974) and Carolyn C. Jones, *The Moral Hazard of the Estate Tax*, 48 CLEVE. ST. L. REV. 729 (2000).

<sup>36</sup>*The Tribune*, No. xvii (1766), reprinted in 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 93 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

<sup>37</sup>Benjamin Rush, An Address to the Inhabitants of the British Settlements in America Upon Slave-Keeping (1773), in 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 220 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

working them, the general product would be greater, although the profits to individuals would be less,— a circumstance this, which by diminishing opulence in a few, would suppress Luxury and Vice, and promote that equal distribution of property, which appears best calculated to promote the welfare of Society.”<sup>38</sup> Many Americans proudly distinguished their culture from “the Old World, drowned in luxury and lewd excess!”<sup>39</sup> Because “experience proves that none are more insatiable than the rich,” efforts must be made to “maintain a mediocrity and equipoise.”<sup>40</sup> Concentrated wealth corrupts not just those who have it, but the entire nation: “Its influence on civil elections is still more pernicious. Money is frequently the most forcible logic, and he that carries the longest purse, will often carry the most votes.”<sup>41</sup>

On the other hand, Carter Braxton opposed all sumptuary laws, Agrarian laws, and “unjust attempts to maintain... equality by an equal division of property.”<sup>42</sup> He explained that people living in a bountiful country will “always claim a right of using and enjoying the fruits of their honest industry, unrestrained by any ideal principles of government, and will gather estates for themselves and children without regarding the whimsical impropriety of being richer than their neighbors. These are rights which freemen will never consent to relinquish, and after fighting for deliverance from one species of tyranny, it would be unreasonable to expect they should tamely acquiesce under another.”<sup>43</sup> The virulently articulate Fisher Ames condemned pro-debtor laws as violations of the social contract: “Without my consent, or a crime committed, neither you, nor any individual, have a right to my property. I refuse my consent; I am innocent of any crime. I solemnly protest against the transfer of my property to my debtor.”<sup>44</sup> But more was at stake than individual rights: “[W]e shall see our free Constitution expire, the state of nature restored, and our rank among savages taken somewhere below the Oneida Indians. If government do worse than nothing, should make paper money or a tender act, all hopes of seeing the people quiet and property safe, are at an end. Such an act would be the legal triumph of treason.”<sup>45</sup>

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

<sup>39</sup>Philips Payson, A Sermon (1778), in 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 536 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

<sup>40</sup>[Anonymous], *Rudiments of Law and Government Deducted from the Law of Nature* (1783), reprinted in 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 580-81 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

<sup>41</sup>Peres [Perez] Fobes, An Election Sermon (1795), in 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 1002 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

<sup>42</sup>Carter Braxton, An Address to the Convention of the Colony and Ancient Dominion of Virginia on the Subject of Government in General, and Recommending a Particular Form to Their Attention (1776), reprinted in 1 AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 334 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

<sup>43</sup>*Id.* at 334-35.

<sup>44</sup>Fisher Ames, *From Confederation to Nation* (1786), reprinted in 1 WORKS OF FISHER AMES 43 (William B. Allen ed., 1983).

<sup>45</sup>*Id.* at 44.

Because James Madison played such a major role in convening, creating, defending, and amending the Constitution, modern intellectuals--particularly those with a lawyer's perspective that habitually searches for the "intentions" of legal documents' "framers"-- can easily make the mistake of equating James Madison's politics with his fellow Americans. Even Jack Rakove's Pulitzer Prize winning book *Original Meanings*<sup>46</sup> is largely an analysis of Madison. The first problem with focusing on Madison is that some of his views changed over the course of his career. But more importantly, his was only one of many perspectives. Consider, for example, how differently Madison and his *Federalist* coauthor Alexander Hamilton reacted to Hume.

A Virginia aristocrat immersed in precapitalist, agrarian economics, Madison never fully accepted Hume's vision. Along with his good friend and mentor Thomas Jefferson, Madison foresaw a vast empire of virtuous yeoman, the physiocratic version of Aristotle's middle class. There was no place for a large central government, powerful military forces, manufacturing, and decadent, luxurious living (although Jefferson had a lifelong interest in expensive wines and other extravagances). Hume's greatest legacy to Madison was a heightened fear of divisive factionalism,<sup>47</sup> usually caused by religious differences or wealth disparities. In his famous *Federalist Number Ten*, Madison relied upon Hume to explain how a large republic would be more stable than a smaller one; factions would have less ability to seize and maintain power at the expense of the public good. The large nation's multiplicity of religious sects and economic interests would prevent any single interest group from seizing power.<sup>48</sup> He was even more blunt in a letter to Jefferson: "Divide et imperia, the reprobated axiom of tyranny, is under certain qualifications, the only policy, by which a republic can be administered on just principles."<sup>49</sup> This theory, later to be verified by historical experience, undermined Aristotle and Montesquieu's belief that republics must remain small to endure.

Madison's *Federalist* coauthor Alexander Hamilton was far more receptive to Hume's entire approach to political economy. In addition to pursuing wealth and luxury, the central government should create such institutions as national banks, public credit, and powerful military forces.<sup>50</sup> Hamilton agreed with Hume that "corruption" was a tool necessary to solidify state and private power into a formidable alliance. Although Jefferson's reporting of his bitter rival Hamilton's views at a dinner party cannot be considered completely reliable, the following summary was probably not far off the mark: "Hamilton's financial system ... had

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<sup>46</sup>JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997).

<sup>47</sup>GARY WILLS, *EXPLAINING AMERICA: THE FEDERALIST 20-23* (1981). Wills expressly grounded his analysis in prior work by Douglas Adair, *That Politics May Be Reduced to a Science: David Hume, James Madison, and the Tenth Federalist* (1957), reprinted in DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* 132-51 (Trevor Colburn ed., 1974).

<sup>48</sup>THE FEDERALIST NO. 10, at 167 (James Madison) (Jack Rakove ed., 1999).

<sup>49</sup>James Madison, Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in *WRITINGS* 151 (Jack Rakove ed., 1999).

<sup>50</sup>STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 118 (1992).

two objects. First, as a puzzle to exclude popular understanding and inquiry. Second, as a machine for the corruption of the legislature; for he avowed the opinion that man could be governed by one of two motives only, force or interest: force he observed, in this country, was out of the question; and the interest therefore of the members must be laid hold of, to keep the legislature in unison with the Executive.”<sup>51</sup> Hamilton dismissed John Adam’s argument that “corruption” had no place in a republic: “[P]urge the constitutional system of corruption, and give to it’s popular branch equality of representation, and it would become an impracticable government: as it stands at present, with all it’s supposed defects, it is the most perfect government that has ever existed.”<sup>52</sup> It is certainly possible that Hamilton was only using the word corruption in the Humean sense of the executive branch’s careful distribution of patronage,<sup>53</sup> but it is also quite possible that Hamilton was candidly acknowledging the darker side of politics.

Along with the raw political competition caused by personal ambition, these basic ideological differences largely explain why Jefferson and Madison so quickly opposed Hamilton after the Constitution’s ratification. Much to Hamilton’s surprise, they publicly and futilely battled his first major proposal as Secretary of Treasury under George Washington’s presidency. Hamilton recommended that the federal government assume all state and national public debts at face value. Unlike Jefferson and Madison, he was not upset that speculators had recently purchased much of the debt from unsuspecting rural citizens “by the most fraudulent practices and persuasions that they would never be paid.”<sup>54</sup> Indeed, he wanted much of the country’s capital to be concentrated in relatively few hands so it would not be quickly consumed but would rather remain a source of power for the central government and wealth for economic development.<sup>55</sup> Many of Hamilton’s financial initiatives brought immediate benefits not just to a group of powerful private individuals, but also to some of the legislators who supported the plans and the former Treasury official William Duer,<sup>56</sup> leading Madison to complain “The stock-jobbers will become the pretorian band of the Government, at once its tool and its tyrant; bribed by its largesses, and overawing it by clamours and combinations.”<sup>57</sup> During the New York ratification debates, Hamilton denied that such a philosophy was aristocratic. He too was a patriot. Even if fortune allowed him to remain in the elite, he had broader interests: “But what reasonable man, for the precarious enjoyment of rank and power, would establish a system, which would reduce his

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<sup>51</sup>Thomas Jefferson, *The Anas-Selections (1791-1806)*, in *JEFFERSON WRITINGS* 666 (Merrill D. Peterson ed., 1984).

<sup>52</sup>*Id.* at 671.

<sup>53</sup>ELIKINS & MCKITRICK, *supra* note 50, at 106.

<sup>54</sup>Jefferson, *supra* note 51, at 666.

<sup>55</sup>ELIKINS & MCKITRICK, *supra* note 50, at 117.

<sup>56</sup>*Id.* at 274.

<sup>57</sup>Letter from James Madison to Thomas Jefferson (August 8, 1791), *quoted in* ELIKINS & MCKITRICK, *supra* note 50, at 244.

nearest friends and his posterity to slavery and ruin?"<sup>58</sup> There was a streak of hypocrisy in the Virginia Republicans' opposition. For decades, Virginians had made and lost millions on land speculation based upon generous land grants from the state government.<sup>59</sup>

Relying exclusively on such hoary figures as Madison and Hamilton also distorts the quest to determine the historical "meaning" of the Constitution. Madison believed that the Framers were irrelevant; the really important purposes and interpretations can be gleaned from the ratification debates because those public proceedings best reflected the beliefs and will of the people of each state. After all, it was the people who ratified the Constitution, not the Framers. In other words, the Supreme Court's interpretative methodology of relying heavily on a narrow group of leaders, most notably Madison and Hamilton in *The Federalist Papers* and the Framers at the Constitutional Convention, gives the document an upper class patina. Such a narrow historical inquiry fails to capture the class rage of many Anti-Federalists, a fury the Founders had to account for while framing and later defending the document. Not surprisingly, some of the Anti-Federalists hated the rich, anticipating Charles Beard's argument that a lot of the Constitution's supporters were in it for immediate gain. Samuel Bryan saw the new Constitution as "a most daring attempt to establish a despotic aristocracy among freeman, that the world has ever witnessed,"<sup>60</sup> destroying any proper conception of republican government: "A republican, or free government, can only exist where the body of people are virtuous, and where property is pretty equally divided, in such a government the people are sovereign and their sense of opinion is the criterion of every public measure..."<sup>61</sup> It is also easy to overlook the lust for dominion and wealth that invariably motivated those who were in power but were neither strongly committed to republicanism as a principle nor heavily involved with the formation of this particular Constitution, which would only immortalize a select few who remain the focal points of most constitutional history.

Madison and Jefferson remain attractive because they provide us with several ways to develop a constitutional morality that is neither excessively maudlin nor cynical. Madison had two basic conceptions of "republicanism." The formal definition consisted of two principles: The government must be derived from the people and all branches of the government must be traced back to electoral authority.<sup>62</sup> Under this approach, the new Constitution was more "republican" than the Articles of Confederation because state legislatures had created the Articles while

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<sup>58</sup>Alexander Hamilton, Alexander Hamilton Discusses Federal Taxation and Denies that His Views are Influenced by Personal Ambition (June 28, 1788), in 2 THE DEBATE ON THE CONSTITUTION 835 (Bernard Bailyn ed., 1993) [hereinafter Alexander Hamilton Discusses Federal Taxation].

<sup>59</sup>CHARLES ROYSTER, THE FABULOUS HISTORY OF THE DISMAL SWAMP COMPANY: A STORY OF GEORGE WASHINGTON'S TIMES 40-43 (1999).

<sup>60</sup>Samuel Bryan, *A Most Daring Attempt to Establish A Despotic Aristocracy*, INDEPENDENT GAZETTEER (Oct. 5, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION 57 (Bernard Bailyn ed., 1993).

<sup>61</sup>*Id.* at 56.

<sup>62</sup>THE FEDERALIST NO. 37, at 196 (James Madison) (Jack Rakove ed., 1999).

the people would ratify the Constitution through their election of delegates to special conventions in each State. The central government's three branches satisfied Madison's republican criteria of direct or indirect representation: the people elected the members of the House, they chose the State representatives who would elect members of the Senate; they picked the electors who would choose the President; and they even more indirectly determined who would sit on the Supreme Court because those appointments were made by the President and the Senate who were ultimately accountable to the electorate. Under this structural definition, the United States government remains a republic.

We have already encountered Madison's broader republican vision-- a land of independent farmers living simple, virtuous lives. There was no place for cities, manufacturing, national banks, large armies, national debt, and concentrated private power. The federal government would be primarily involved in international affairs; the States would provide education and enforce basic common law rights; and the people would directly participate only through the hallowed jury system. Both "banking establishments" and "standing armies" were threats to the humane culture of republicanism.<sup>63</sup>

Charles Beard overstated his case in the *Economic Interpretation of the Constitution* when he claimed that the Framers were primarily motivated to create a new central government to cash in the governmental debts they had purchased at prices far below face value. As subsequent critics pointed out, many Anti-Federalists also held a significant amount of governmental debt. But there can be no doubt that the Convention sought to protect the wealthy from the depredations of excessive democracy, typified by Rhode Island's paper money and debt forgiveness schemes.<sup>64</sup> Madison feared two particular forms of majority tyranny: religious persecution and exploitation of the rich. Along with religious minorities, the wealthy were the Constitution's original "suspect classes" warranting additional constitutional protections. The opulent were not to be protected just because they had money. Facially neutral property laws encourage every individual's diverse skills, particularly the skill to obtain wealth: "The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to the uniformity of interests. The protection of these faculties is the first object of government. 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 sentiments and views of the respective proprietors, ensues a division of society into different interests and parties."<sup>65</sup> Madison's materialism contained its own limits; the government's duty was to defend those first generation rich who could acquire wealth. It is not as important to worry about heirs, who have shown no special acquisitive capacities. Madison also favored the rich (old and new), because they are likely to be good role models committed to stable government: "If the law allows an opulent citizen but a single

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<sup>63</sup>Letter from Thomas Jefferson to John Taylor (May 28, 1816), in *JEFFERSON WRITINGS* 1395 (Merrill D. Peterson ed., 1984).

<sup>64</sup>In *Federalist Number Ten*, Madison deplores "A rage for paper money, for an abolition of debts, for an equal distribution of property, or any other improper or wicked project...." *THE FEDERALIST* NO. 10, *supra* note 48.

<sup>65</sup>*Id.* at 161 (emphasis added).

vote in the choice of his representative, the respect and consequence which he derives from his fortunate situation, very frequently guide the votes of others to the objects of his choice..."<sup>66</sup> Under contemporary constitutional forms, the rich have far better tools than popular admiration; they donate hundreds of millions of dollars to choose and control the political leadership of both major parties.

Although Madison feared the "leveling spirit"<sup>67</sup> of majority tyranny far more than aristocratic oppression, he understood that the rich and powerful could undermine a republic: "Give all power to property, and the indigent will be oppressed."<sup>68</sup> The goal was to create an "equilibrium of interests."<sup>69</sup> Madison wrote of the need to look beyond formal constitutional structures to actual distributions of wealth and power; a corrupt government "may support a real domination of the few, under an apparent liberty of the many."<sup>70</sup> Because wealthy aristocracies are both inevitable and desirable, the problem never ends: "The most difficult of all political arrangements is that of so adjusting the claims of the two Classes as to give security to each and to promote the welfare of all."<sup>71</sup> Like Aristotle, Madison understood that "haughty heirs"<sup>72</sup> could become "tyrannical nobles"<sup>73</sup> willing to sacrifice the "supreme object" of "real welfare of the great body of the people"<sup>74</sup> to their pursuit of pleasure, power, and glory. They often start by diluting the "right of suffrage:" "A gradual abridgment of this right has been the mode in which Aristocracies have been built on the ruins of popular forms."<sup>75</sup> At the Constitutional Convention, he warned "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect."<sup>76</sup> The current American system, which favors rich candidates, wealthy donors, and powerful corporations, has so little to offer the average citizen that barely fifty per cent of the people vote in Presidential elections. While the powerful will predictably claim that such silence is an endorsement of the status quo, it often signifies alienation and

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<sup>66</sup>THE FEDERALIST NO. 54, at 315 (James Madison) (Jack Rakove ed., 1999).

<sup>67</sup>JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 194 (Adrienne Koch intro., 1966)(1840) [hereinafter NOTES OF DEBATES].

<sup>68</sup>James Madison, Remarks on Mr. Jefferson's Draught of a Constitution, sent to John Brown (Oct. 15, 1788), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 36 (Marvin Meyers ed., 1973).

<sup>69</sup>James Madison, Speech in the Federal Convention on the Divisions Between the States (June 30, 1787), in WRITINGS 119 (Jack Rakove ed., 1999).

<sup>70</sup>James Madison, *Spirit of Governments*, NATIONAL GAZETTE (Feb. 20, 1792), reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 184 (Marvin Meyers ed., 1973).

<sup>71</sup>James Madison, Speech in the Federal Convention on Suffrage, WRITINGS 133 (Jack Rakove ed., 1999) [hereinafter Speech].

<sup>72</sup>THE FEDERALIST NO. 57, at 326 (James Madison) (Jack Rakove ed., 1999).

<sup>73</sup>THE FEDERALIST NO. 39, at 212 (James Madison) (Jack Rakove ed., 1999).

<sup>74</sup>THE FEDERALIST NO. 45, at 260-61 (James Madison) (Jack Rakove ed., 1999).

<sup>75</sup>Speech, *supra* note 71, at 132.

<sup>76</sup>NOTES OF DEBATES, *supra* note 67, at 427.

despair. One only needs to talk to a number of citizens who do not vote. They understand that the Supreme Court created a “right of donation” has diluted the “right of suffrage.”

The Founders’ primary goal of protecting the affluent from “turbulent” democratic “follies”<sup>77</sup> was tempered by a fear of aristocratic excesses. Many of them knew their own class’s motives too well to assume the elite’s perpetual good faith. These fears influenced virtually every aspect of the Constitution’s structure. George Mason ironically defended the Constitution’s prohibition against placing congressional members in executive positions because the alternative would “[complete] that Aristocracy which was probably in the contemplation of some among us...[by]... inviting into the Legislative Service, those generous and benevolent characters who will do justice to each other’s merit, by carving out offices and rewards for it.”<sup>78</sup> Hugh Williamson opposed making the Senate the ultimate decision-maker in Presidential elections because “Referring the appointment to the Senate lays a certain foundation for corruption and aristocracy.”<sup>79</sup> These fears eventually persuaded the Convention to make the House of Representatives the institution to resolve Presidential elections that could not be initially determined by the Electoral College.<sup>80</sup> Linking the President with the House of Representatives reinforced Gouverneur Morris’ constitutional vision. Although Morris was very conservative, he observed that “Wealth tends to corrupt the mind and to nourish its love of power, and to stimulate it to oppression. History proves this to be the spirit of the opulent.” Even if the legislature can no longer create paper money, it could be “seduced” and turned into a legislative tyranny favoring the rich. Thus, the Constitution needs to insulate the President from the wealthy: “The Executive therefore ought to be so constituted as to be the great protector of the Mass of the people.”<sup>81</sup> Many of the Framers who believed in a property qualification for federal voters defended their position because it would weaken the power of the wealthy, who create an unholy alliance with the poor at the expense of the autonomous middle class: “The aristocracy will grow out of the House of Representatives. Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them.”<sup>82</sup>

Anti-aristocratic concerns extended beyond formal governmental structures to private power’s effects on the entire culture. For the Founders, the United States Constitution was just part of an overall republican system. John Dickinson “doubted the policy of interweaving into a Republican constitution a veneration for wealth. He always understood that a veneration for poverty and virtue, were the objects of republican encouragement.”<sup>83</sup> To maintain a relative degree of equality and to

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<sup>77</sup>*Id.* at 42.

<sup>78</sup>*Id.* at 451.

<sup>79</sup>*Id.* at 583. Edmund Randolph, Colonel Mason, and James Wilson expressed similar concerns. *Id.* at 584, 586-87.

<sup>80</sup>NOTES OF DEBATES, *supra* note 67, at 592.

<sup>81</sup>*Id.* at 323.

<sup>82</sup>*Id.* at 402.

<sup>83</sup>*Id.* at 374.



prevent the rise of an elite class with “a distinct interest” from the people, Charles Pinkney explained that the overall constitutional system (which includes state law) must use inheritance taxes to maintain republican equality: “The destruction of the right of primogeniture and the equal division of the property of Intestates will also have an effect to preserve this mediocrity; for laws invariably affect the manners of a people.”<sup>84</sup> Anticipating the future break between Hamilton and Madison, Pierce Butler was concerned that the clause authorizing payment of past debts would be construed to favor “the Blood-suckers who had speculated on the distresses of others, as to those who had fought and bled for their country.”<sup>85</sup>

While the Twentieth century meaning of anarchy applies to the collapse of law and order, Madison applied that term to the triumph of either faction over the common good which furthers the interests of all: “In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the stronger.”<sup>86</sup> Heavily influenced by Malthus, Madison and Jefferson feared that in the future the relentlessly increasing population would overwhelm the American frontier’s capacity to maintain an agrarian republic. At that time, the poor would flock to cities, where wealthy demagogues hostile to republican norms and institutions would manipulate them and corrupt them with anti-republican norms. Like Aristotle, Madison foresaw that the poor would either revolt or combine with the rich to destroy the republican system.<sup>87</sup> The Aristotelian solution was to create and maintain a healthy middle class, what Benjamin Franklin called a “happy mediocrity”<sup>88</sup> in contrast to the deplorable wealth disparities he observed while touring Ireland.<sup>89</sup> The predominant Madisonian solution was to reduce democratic influence, putting off the dreaded day when the existing republican structure would be threatened by the political and cultural damage caused by excessive wealth disparities.

The founding generation considered tax powers and policies to be fundamental constitutional questions. During the New York ratification debates, Hamilton defended the “unlimited power of taxation” as proper.<sup>90</sup> At some point, all private property can become public: “In the course of a war, it may be necessary to lay hold of every resource: and, for a certain period, the people may submit to it.”<sup>91</sup> The new central government would and should have the power to tax individuals directly instead of relying on the Article of Confederation’s inadequate alternative of requisitioning taxes from each of the States, a technique that forced the government

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<sup>84</sup>*Id.* at 184.

<sup>85</sup>NOTES OF DEBATES, *supra* note 67, at 519.

<sup>86</sup>THE FEDERALIST NO. 51, at 298 (James Madison) (Jack Rakove ed., 1999).

<sup>87</sup>Speech, *supra* note 71, at 132.

<sup>88</sup>Benjamin Franklin, *Information to Those Who Would Move to America* (1784), reprinted in BENJAMIN FRANKLIN WRITINGS 975 (J.A. Leo Lemay ed., 1987).

<sup>89</sup>Letter from Benjamin Franklin to Joshua Babcock (Jan. 13, 1772), in BENJAMIN FRANKLIN WRITINGS 874 (J.A. Leo Lemay ed., 1987).

<sup>90</sup>Alexander Hamilton Discusses Federal Taxation, *supra* note 58, at 831.

<sup>91</sup>*Id.* at 828.

either to do nothing in the face of State recalcitrance or use coercive force against the State. Quite simply, it would be far easier to collect money from individuals than States. The leading Framers intended that this tax burden contain elements of equality and proportionality. In *Federalist No. 54*, Madison explained that the Constitutional convention sought to allocate the tax burden based upon each State's "proportion of wealth."<sup>92</sup> Because there was no easy way to measure wealth, the Framers relied on overall population as crude proxy for wealth (providing the South with extra representation for its slave capital through the three fifths rule). Furthermore, the Framers did not want to impose unequal burdens on different states. Making population the major variable alleviated the tax burden because an increase in a state's population would mean more federal taxes but it also would provide that state with additional members in the House of Representatives, who would initially determine the extent and impact of any revenue laws.

To different degrees, the Constitution's leading advocates believed in proportional taxation. These founders had ample precedent. In 1768, John Dickinson had written in his highly influential *Letters From a Pennsylvania Farmer* that "[t]axes in every free state have been, and ought to be, as exactly proportioned as is possible to the abilities of those who are to pay for them. They cannot otherwise be just. Even a Hottentot would comprehend the unreasonableness of making a poor man pay as much for "defending" the property of a rich man, as the rich man pays himself."<sup>93</sup> Hamilton explained: "The system will be founded upon the most easy and equal principles—to draw as much as possible from direct taxation; to lay the principal burthens on the wealthy."<sup>94</sup> Adam Smith criticized primogeniture and entail in *The Wealth of Nations*.<sup>95</sup>

Thomas Jefferson never worried about the wealthy's fate as much as his friend Madison; he believed this "artificial aristocracy" had sufficient power to protect themselves from majority oppression.<sup>96</sup> Writing to Madison from France just before the French Revolution, Jefferson was dismayed at France's concentration of wealth and power in so few hands: "I am conscious that an equal division of property is impracticable, but the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind."<sup>97</sup> Jefferson recommended three means to achieve that end. He supported proportional taxation because of its subtlety: "Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions or property in geometric

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<sup>92</sup>THE FEDERALIST NO. 54, *supra* note 66, at 310.

<sup>93</sup>John Dickinson, *Letter X, Letters From a Farmer in Pennsylvania* (1768), reprinted in *EMPIRE AND NATION* 66 (Forrest McDonald ed., 1999).

<sup>94</sup>Alexander Hamilton Discusses Federal Taxation, *supra* note 58, at 829.

<sup>95</sup>ADAM SMITH, *THE WEALTH OF NATIONS* 407-12 (Edwin Cannan ed., 1976) (1776).

<sup>96</sup>Letter from Thomas Jefferson to John Adams (Oct. 12, 1813), in *JEFFERSON WRITINGS* 1306 (Merrill D. Peterson ed., 1984).

<sup>97</sup>Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in *JEFFERSON WRITINGS* 841 (Merrill D. Peterson ed., 1984).

progression as they rise.”<sup>98</sup> He believed that uncultivated land should be made available to the poor: “Whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as common stock for man to labor and live on.”<sup>99</sup>

Jefferson’s third solution brings us to the particular issue of death taxes, the focus of this conference, the issue this work has attempted to put into a deeper historical/conceptual context. He led the movement in Virginia to end the laws of primogeniture and entail: “the descent of property of every kind therefore to all the children, or to all the brothers and sisters, or other relations in equal degree, is a politic measure and a practicable one.”<sup>100</sup> In his *Autobiography*, he described egalitarian estate tax laws as part of “a system by which every fibre would be eradicated of ancient or future aristocracy; and a foundation laid for a government truly republican.”<sup>101</sup> The rest of the system consisted of the right to freedom of conscience and the right to a decent public education.<sup>102</sup> While hereditary rank may be the purest form of aristocracy, Jefferson also feared an “aristocracy of wealth.”<sup>103</sup> This aristocracy would continually attempt to subordinate the more necessary and useful elite, the aristocracy of talent and merit.<sup>104</sup>

Although Madison was not as eager to tax the wealthy, he also supported the elimination of feudal laws of descent as one of the “silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.”<sup>105</sup> As he explained to William Barry in a letter, “[I]n Governments like ours a constant rotation of property results from the free scope to industry, and from the laws of inheritance.”<sup>106</sup> However, he was much more committed than Jefferson to preserving whatever distribution of wealth emerged from the competition between men’s faculties (at least as long as those men remained alive). While he agreed that the country needed a powerful middling interest, he thought most people would be

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<sup>98</sup>*Id.*

<sup>99</sup>*Id.* at 842.

<sup>100</sup>*Id.* at 841.

<sup>101</sup>THOMAS JEFFERSON, *AUTOBIOGRAPHY 1743-1790* (1821), reprinted in *JEFFERSON WRITINGS* 44 (Merrill D. Peterson ed., 1984).

<sup>102</sup>*Id.*

<sup>103</sup>*Id.* at 32.

<sup>104</sup>*Id.*

<sup>105</sup>James Madison, *Parties*, *NAT’L GAZETTE*, Jan. 23, 1792, quoted in *JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 45 (1990).

<sup>106</sup>Letter from James Madison to William T. Barry (Aug. 4, 1822), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 345 (Marvin Meyers ed., 1973).

satisfied if they believed they had a chance to obtain property under equal laws.<sup>107</sup> Madison was more prescient than his more romantic, idealistic friend. Madison understood that the new forms of wealth created by trade and manufacturing would not be as easily divisible over time as land. The new manufacturing entities and commercial interests would create pools of wealth that could not be solved through the elimination of primogeniture and entail.<sup>108</sup> In fact, society's demand for capital to create additional wealth and to provide resources for defense would clash with the egalitarian republican laws of descent and distribution, creating a crisis that "will require for the task all the wisdom of the wisest patriots."<sup>109</sup>

Madison's fears have been realized. Each of us must use whatever wisdom and patriotism we have to determine the relevance and weight of the founding generation's competing, changing constitutional visions. Of course, this historical record is mixed. There is much truth in Jennifer Nedelsky's claim that "For the Framers, the protection of property meant the protection of *unequal* property and thus insulation of both property and inequality from democratic transformation."<sup>110</sup> Nevertheless, there remains an egalitarian, republican strain that provides both guidance and authority for the belief that Congress must pass legislation to reduce the steadily increasing wealth disparities that are eroding our republican constitutionalism.

Has it been useful to characterize these enduring economic controversies as "constitutional?" What difference, if any, does a word like "constitution" make? The above analysis and history could have been presented without attempting to "constitutionalize" it. One powerful argument against this technique is the confusion created by inevitably created whenever one attempts to add new meanings to prevailing conceptions of important political concepts. This article's presentation is the best defense I can make for the technique: broader conceptions of constitutionality link us more closely to some of the best aspects (both normatively and analytically) of our Western intellectual tradition. The current understanding of constitutionality creates the impression that our basic social issues will be and should be resolved by unelected experts called Supreme Court Justices, assisted by elite lawyers and law school intellectuals. Implicit in such a technocratic conception of constitutionality is the assumption that most major constitutional issues have been resolved. There will be some more squabbling over federalism, affirmative action, and abortion, but the basic issues of wealth and power are no longer constitutionally visible, much less contestable. Characterizing major shifts in tax policy as constitutional issues emphasizes the centrality of those issues to the future meaning and well being of the American republic. Many of us naively believed that the end of the Cold War would bring a "peace dividend" that would be used to assist the

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<sup>107</sup>James Madison, *Of Democracy and the Union* (1821), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 396 (Marvin Meyers ed., 1973) [hereinafter *Of Democracy and the Union*].

<sup>108</sup>*Id.* at 397.

<sup>109</sup>James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 408 (Marvin Meyers ed., 1973).

<sup>110</sup>JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 2 (1990).

impoverished and improve our overall public lives. We had not read our history. After Rome finally defeated Carthage, the ruling class became far more rapacious. They did not need to persuade the citizens to maintain loyalty; they did not need large armies to fight external threats. They could and did accelerate the plunder of public resources. When the Gracchi brothers proposed agrarian laws that would have redistributed public lands to poorer citizens, the elite counterattacked by overthrowing the republic. We are not doomed to repeat this history. But we should understand that the seemingly narrow issue of estate and gift taxes is but a symptom of a change in our political culture, in our constitutional order.

#### IV. CONCLUSION

Although it is attempting to conclude the article with a reassuring allocation of constitutional responsibilities between the elected branches and the Court, this article's history raises some disturbing intimations about judicial review. In the first paragraph, I relied upon Justice Holmes' famous aphorism in *Lochner* as an authoritative reason for judicial deference to Congressional death tax policies: "[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation on the citizen to the State or of laissez faire."<sup>111</sup> But that useful axiom is also profoundly misleading; the United States Constitution embodied a blend of particular economic theories, ranging from Madison's primary goal of protecting the rich to Benjamin Franklin and James Wilson's more egalitarian and democratic vision.<sup>112</sup> Economic concerns and interests dominate the document's history and permeate its text. James Wilson bluntly explained at the Constitutional Convention: "All the principal powers of the Nat. Legislature had some relation to money."<sup>113</sup> Every time a Supreme Court Justice is forced to confront (or avoid) a constitutional issue that has economic implications, the Justice should first consider the Founding generation's views. While that history should not be considered conclusive, it creates a heavy presumption in favor of propertied interests. In *Pennsylvania Coal Co. v. Mahon*,<sup>114</sup> Holmes himself relied on some kind of an economic perspective to conclude that the State of Pennsylvania had unconstitutionally "taken" property from coal owners when it required them to leave some of the coal in the land to keep the land's surface from collapsing.

Aside from equally potent external factors, powerful internal forces combine to make American jurisprudence a bastion of economic conservatism. The Constitution's history and text are filled with preferences for the wealthy. De Tocqueville observed that American lawyers serve as an aristocracy committed to the preservation and augmentation of existing distributions of power. The Supreme Court (staffed by those aristocratic lawyers in an institution providing the aristocratic protection of lifetime tenure) has consistently created legal doctrine to protect the

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<sup>111</sup>198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>112</sup>For a discussion of how Wilson's political economy differed from Madison's, see NEDELSKY, *supra* note 110, at 96-140. *Of Democracy and the Union*, *supra* note 107, at 416. For a discussion of how Wilson's political economy differed from Madison's, see NEDELSKY, *supra* note 110, at 96-140.

<sup>113</sup>*Of Democracy and the Union*, *supra* note 107, at 416.

<sup>114</sup>260 U.S. 393 (1922).

opulent from “majoritarian tyranny.” Even a judicial shift to formal equality and economic neutrality would not prevent the society from losing its republican equilibrium by concentrating too much power in too few unaccountable hands. Jean Jacques Rousseau observed that formal equality benefits the rich and powerful because they already have the economic, intellectual, and cultural assets to flourish under such a system.<sup>115</sup> Although one needs to go far beyond legal analysis when making cultural comparisons, the American Constitution’s ancient commitment to private power and tyranny, which can be traced back to Madisonian principles and the protection of slavery, helps explain why for over a century this country has led the wealthy industrial world in the ruthless exploitation of its workers. Periodically, this structural preference for the rich combines with political, cultural, and economic forces to create dangerous and unjust balances of power. There is no other similar country that has left tens of millions of its workers without any health care. No other country is contemplating the long-term concentration of wealth and power in a few families by completely eliminating estate and gift taxes. Despite or even because of their peculiar forms of conservatism, Madison and Jefferson foresaw this day and provided us with remedies to combat republican corruption. With each passing year, the elected branches are under a greater constitutional obligation to begin rectifying the situation. They can start by preserving estate and gift taxes, purging the electoral system of its reliance on private wealth, and requiring that all employers provide their employees with a living wage and basic benefits.

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<sup>115</sup>Jean Jacques Rousseau, *Second Discourse on the Origin and the Foundations of Inequality Among Men* (1755), reprinted in *THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS 172-78* (Victor Gourevitch ed., 1997)(1754).