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An Intellectual History**

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# Economic Structure and Constitutional Structure: An Intellectual History

Ganesh Sitaraman\*

*In the last four decades, the American middle class has been hollowed out, and fears are growing that economic inequality is leading to political inequality. These trends raise a troubling question: Can our constitutional system survive the collapse of the middle class?*

*This question might seem tangential—if not unrelated—to contemporary constitutional theory. But for most of the history of political thought, one of the central problems of constitutional design was the relationship between the distribution of wealth in society and the structure of government. Two traditions emerged from thinking about this relationship. The first tradition assumed that society would be divided into rich and poor, and it designed class-warfare constitutions that incorporated economic classes directly into the structure of government. The second tradition was based on the assumption that society was relatively equal economically; as a result, it was not necessary to incorporate economic class into these middle-class constitutions.*

*This Essay identifies these two traditions and traces their intellectual history from Aristotle through the eighteenth century. It then shows that the intellectual tradition of the middle-class constitution was alive and flourishing during the time of the American founding—suggesting that the collapse of the American middle class today has consequences of constitutional significance.*

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## Introduction

In the last four decades, the American middle class has been hollowed out.<sup>1</sup> Economists have documented widening inequality and the increasing share of wealth going to the top 1% and 0.1% of Americans.<sup>2</sup> At the same time, fears are growing that economic inequality is leading to political inequality. In a variety of studies over the last decade, political scientists have shown that economic elites dominate all aspects of the American political system.<sup>3</sup> In fact, they have even demonstrated that the views of middle-class Americans have effectively no impact on policy outcomes, while the views of economic elites are strong predictors.<sup>4</sup> These findings operate across all areas of policy, and they provide systematic empirical evidence that American politics is skewed in favor of the wealthiest. Some scholars have even begun to study oligarchies throughout history as a way to better understand contemporary America.<sup>5</sup> These trends raise a troubling question: Can our constitutional system survive the collapse of the middle class?

What does the middle class have to do with preserving our constitutional system? The answer is hardly obvious. In the last few decades, constitutional theory has focused surprisingly little on the collapse of the middle class.<sup>6</sup> Work on economic and political inequality has primarily been in specific domains such as campaign finance reform and the rights of the poor.<sup>7</sup> With a few notable exceptions, constitutional theorists

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1. See generally DAVID MADLAND, *HOLLOWED OUT: WHY THE ECONOMY DOESN'T WORK WITHOUT A STRONG MIDDLE CLASS* (2015) (documenting the decline of the American middle class, and arguing that a strong middle class is necessary to America's economic growth).

2. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).

3. See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 1–3 (2008) (discussing the ramifications that economic inequality has on democratic politics); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 112 (2012) (documenting “enormous inequalities in the responsiveness of policy makers to the preferences of more- and less-well-off Americans”); KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 117 (2012) (connecting economic inequality with political inequality).

4. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 573 & fig.1 (2014).

5. See JEFFREY A. WINTERS, *OLIGARCHY* 211–20 (2011) (placing the United States within a greater discussion of various forms of oligarchies).

6. See Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 *CORNELL L. REV.* (forthcoming 2016) (noting and examining the lack of constitutional discourse surrounding growing economic inequality).

7. The literature is voluminous. For a few recent entries in the campaign finance literature, see LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (2014). On the rights of the poor, the classic statements are Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional*

rarely discuss the distribution of wealth in society in ways that implicate the basic structure of the Constitution.<sup>8</sup>

This is surprising. For most of the history of political thought, one of the central problems of constitutional design was the relationship between the distribution of wealth in society and the structure of government. From the ancient Greeks onward, political philosophers were preoccupied with the problem of economic inequality and the structure of government. Unless a society had a strong middle class, the wealthy elites would clash with everyone else—the rich oppressing the poor, the poor seeking to confiscate and redistribute the wealth of the rich. Economic inequality led inevitably to political inequality, and as a result, to instability, class warfare, and revolution. A vital task of constitutional theory was to design governments that would not fall prey to the tumults that accompanied economic inequality.

In this Essay, I make two arguments. The first argument is that many constitutional thinkers throughout history not only saw a relationship between the economic structure of society and the structure of government, but also recognized that the distribution of wealth in society constrained the type of government that could operate. To show this, I present a brief intellectual history of two different traditions that address the relationship between the economic structure of society and the structure of government. The first tradition assumed that society would be divided into the rich and poor. It held that the best way to prevent instability was to incorporate economic class directly into the structure of government. I call these systems class-warfare constitutions. The second tradition was based on the alternate assumption: society was not defined by economic inequality, but rather by relative equality and a large middle class. In a society with relative economic homogeneity, the constitution need not incorporate class into its structure. I call this kind of system a middle-class constitution. Importantly, political thinkers recognized that as the distribution of wealth changed in society, so too would the distribution of political power. These two traditions are the subject of Part I.

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*Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PENN. L. REV. 962 (1973); and Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659. See also Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). For an intellectual history of the evolution of constitutional welfare rights, see William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001). For a response, see Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893 (2001). A more recent entry is Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008).

8. The exceptions include Kate Andrias, *Separation of Wealth: Inequalities and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014); and Sitaraman, *supra* note 6.

My second argument is that the intellectual tradition of the middle class-constitution was alive and flourishing during the time of the American founding. The founding generation was well aware of the history of statesmen and theorists grappling with the problem of class warfare. But they did not adopt a design premised on the inevitability of class conflict. Instead, from the time of the American Revolution through the creation of the Constitution, many Americans believed that the New World was unique because it had relative economic equality. Americans understood and talked about this fact throughout the Founding Era and linked it to the kind of government they were trying to establish. My argument is not that these ideas about economic equality and republican government were the only intellectual tradition at the time of the founding, but that these ideas were prominent, widely accepted, and an important part of shaping the intellectual milieu from which the Constitution emerged. This is the subject of Part II.

The more ambitious argument—that the American Constitution was predicated on the assumption of relative economic equality and that widening inequality today threatens our constitutional system—must be left to another time and place. But even this brief intellectual history suggests the magnitude of the stakes. Many great political and constitutional theorists believed that when the economic structure becomes misaligned from the constitutional structure, one of two evils is likely to emerge. Either a government defined by freedom and stability will slowly and silently slide into oligarchy, or there will be instability, strife, and even conflict, leading ultimately to revolution. In this light, the collapse of the middle class and widening inequality over the last generation should raise grave concerns about the future of America’s constitutional system.

## I. Economic Structure and Constitutional Structure: An Intellectual History

When many people—including constitutional scholars—think about the structure of a constitution, the emphasis is on the arrangement of different offices or branches of government.<sup>9</sup> Is there a president or a prime minister? One house in the legislature or two? Federalism or nationalism?

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9. In the United States context, see generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (critiquing structural components of the U.S. Constitution, such as unequal Senate representation). In the comparative context, there is more attention to social preconditions but the emphasis is still on more formal structures. See generally, e.g., COMPARATIVE CONSTITUTIONAL DESIGN (Tom Ginsburg ed., 2012) (primarily comparing structural features of constitutional systems); DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN (2006) (same). Even in works that emphasize social and political context, there is little on economics. See generally, e.g., SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Denis J. Galligan & Mila Versteeg eds., 2013) (discussing theories of constitutions as means of social coordination, manifestations of elite self-interest, or expressions of national values).

Once the basic structure is set, the question becomes how the separate branches of government check and balance each other. Constitutional design is about the structure of government. Questions about society—like the distribution of wealth—rarely come into play. Of course, this is not the only way to think about constitutional design. Theories of consociationalism, for example, involve constitutional design for societies divided along social, ethnic, religious, or linguistic lines, and they use entrenched structures such as federalism, power sharing, and proportional representation to ensure the representation of different groups.<sup>10</sup> What is striking is that consociational design strategies are focused not on checks and balances between different branches of government, but rather on incorporating preexisting social groups directly into the structure of government.

While modern constitutional designers often use consociationalism to address ethnic, linguistic, and religious cleavages, they generally do not consider *economic* cleavages as a social grouping worthy of constitutional consideration.<sup>11</sup> Yet throughout history, economic division—the division between the rich and poor—was a central preoccupation of constitutional theory and design. Theorists focused on this problem came to see two equilibria in constitutional design. Class-warfare constitutions, the subject of Part A, incorporated economic divisions into government in ways similar to how consociationalism incorporates religious, linguistic, or ethnic divisions. Part A focuses on the best developed theory, found in Aristotle's *Politics*, and the most significant example in the history of political thought, the Roman Republic's Tribune of the Plebs. Middle-class constitutions, the topic of Part B, featured relative economic homogeneity in the population and thus did not incorporate class into the structure of government. Part B also begins with Aristotle's theory and then focuses on the works of Florentine Donato Giannotti and the English philosopher James Harrington, ultimately tracing Harrington's views into the eighteenth century. Importantly, political theorists recognized that as the distribution of wealth in society changed, the distribution of political power—and therefore the constitutional structure—would likely change as well.

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10. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* 25 (1977) (defining consociationalism). The classic article is Arend Lijphart, *Consociational Democracy*, 21 *WORLD POL.* 207 (1969). See also Arend Lijphart, *Constitutional Design for Divided Societies*, *J. DEMOCRACY*, Apr. 2014, at 96, 96–97; Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, *J. DEMOCRACY*, Apr. 1996, at 14, 26.

11. Of course, one might argue that there is a difference between characteristics that are entrenched or immutable (e.g., religion, ethnicity, and race) and economic class. But this depends on whether these social facts are seen as fixed or constructed. For example, in some societies, religion, ethnicity, and language might be considered constructed and mutable, and in others, economic status might actually be fixed (either formally or practically) from birth.

### A. *Class-Warfare Constitutions*

Since at least the time of Pindar, political theorists classified governments along the lines of monarchy, aristocracy, and democracy.<sup>12</sup> Herodotus, Thucydides, and Plato all gave accounts of constitutional forms along these lines, with varying degrees of specificity.<sup>13</sup> But the best developed account was Aristotle's. In *Politics*, Aristotle set as his task determining what the best constitution is for a state. Not just the best constitution in theory (which he called the "constitution of our prayers"), but more importantly, the best constitution that can actually be achieved in the real world.<sup>14</sup> Like other political philosophers throughout history, Aristotle identified the main forms of government as kingship, aristocracy, and what he called "constitutional government" or "polity." Each of these perfect systems had a corresponding imperfect form of government: tyranny, oligarchy, and democracy.<sup>15</sup>

The conventional wisdom is to think of these "forms" of government as based on the *number* of rulers.<sup>16</sup> Kingship and tyranny involve a single ruler. Aristocracy and oligarchy, the rule of the few. Constitutional government and democracy, government by the many. But Aristotle did not take this view. For Aristotle, social conditions could not be divorced from politics. That a community has some rich people and some poor people or is unified or divided in its beliefs mattered for politics.<sup>17</sup> Because "relations of power among social groups" determines political outcomes,<sup>18</sup> social factors are central to thinking about the structure of government. To gain any real insight into the best constitution for a society, Aristotle thus believed it was not enough to account for the structure of offices that leaders hold. It was also necessary to consider powerful groups in society.

12. MELISSA LANE, *THE BIRTH OF POLITICS: EIGHT GREEK AND ROMAN POLITICAL IDEAS AND WHY THEY MATTER* 69 (2014); David E. Hahm, *The Mixed Constitution in Greek Thought, in A COMPANION TO GREEK AND ROMAN POLITICAL THOUGHT* 178, 179 (Ryan K. Balot ed., 2009).

13. For a summary, see LANE, *supra* note 12, at 69–71; Andrew Lintott, *Aristotle and the Mixed Constitution, in ALTERNATIVES TO ATHENS: VARIETIES OF POLITICAL ORGANIZATION AND COMMUNITY IN ANCIENT GREECE* 152, 153 (Roger Brock & Stephen Hodkinson eds., 2000).

14. ARISTOTLE, *POLITICS*, in ARISTOTLE, *THE POLITICS AND THE CONSTITUTION OF ATHENS* V.1.1288b1–1288b34, at 91–92 (Stephen Everson ed., Cambridge Univ. Press 1996); FRED D. MILLER, JR., *NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE'S POLITICS* 191 (1995).

15. ARISTOTLE, *supra* note 14, III.7.1279a22–1279b10, at 71–72.

16. For the classic overview of how the concept of the separation of powers emerged and intersected with balance-of-power and checks-and-balances theories, see generally M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (2d ed. 1998). Vile does less with the economic component of these theories, though he does at various points note that economic class was relevant. *Id.* at 7, 25, 39, 108.

17. ARISTOTLE, *supra* note 14, IV.3.1289b28–1290a14, at 94.

18. Josiah Ober, *Aristotle's Political Sociology: Class, Status, and Order in the Politics, in ESSAYS ON THE FOUNDATIONS OF ARISTOTELIAN POLITICAL SCIENCE* 112, 112 (Carnes Lord & David K. O'Connor eds., 1991).



“[T]he constitution,” Aristotle commented, “is a community,” and the “community is the constitution.”<sup>19</sup>

While he recognized the link between the number of rulers and the type of government, because he believed that social conditions and government were intertwined, Aristotle did not think the number of rulers was the defining feature of the forms of government.<sup>20</sup> Rather, the critical feature was which *class* ruled.<sup>21</sup> Oligarchy was rule in the interest of the wealthy.<sup>22</sup> Democracy was rule in the interest of the poor.<sup>23</sup> “[T]he real difference between democracy and oligarchy is poverty and wealth,” Aristotle wrote.<sup>24</sup> “Wherever men rule by reason of their wealth, whether they be few or many, that is an oligarchy, and where the poor rule, that is a democracy.”<sup>25</sup> It was simply an “accident” that in most cases a few are wealthy and many are poor.<sup>26</sup>

For Aristotle, one of the central problems of constitutional design was the possibility of class warfare between the wealthy and the poor. In a democracy, Aristotle averred that the poor would govern the country because democracies are based on free and equal citizenship. The problem, however, was that because the poor are “equal in any respect” (freedom), they will believe they should be equal in all respects.<sup>27</sup> So if the poor control government, they are likely to confiscate and redistribute the wealth of the rich.<sup>28</sup> The rich, in turn, will be threatened by these efforts and revolt, bringing further strife and instability to the state. Giving control to the wealthy through an oligarchy was no better. The wealthy are susceptible to thinking that because they are “unequal in one respect” (their wealth), they should be unequal in all respects.<sup>29</sup> If the wealthy control government, they are likely to hoard money and property for themselves and oppress the poor because they will believe the poor are less worthy of respect.<sup>30</sup> The poor then have cause for rebellion. Aristotle outlined some suggestions on how to prevent class warfare—including honoring those who rule without personal gain and giving power and respect to the class not in power—but he was not optimistic that these solutions would stabilize

19. ARISTOTLE, *supra* note 14, II.1.1260b37–.1260b38, at 31; *Id.* III.4.1276b30, at 65.

20. *See id.* III.7.1279a25–.1279a30, at 71.

21. *See* Hahm, *supra* note 12, at 188.

22. ARISTOTLE, *supra* note 14, III.8.1279b17–.1279b18, at 72.

23. *Id.* III.8.1279b18–.1279b20, at 72.

24. *Id.* III.8.1279b40–.1280a1, at 72.

25. *Id.* III.8.1280a1–.1280a3, at 72.

26. *Id.* IV.4.1290b1–.1290b4, at 95.

27. *Id.* V.1.1301a28–.1301a30, at 120.

28. *See id.* III.10.1281a14–.1281a17, at 75 (considering the possibility of the poor redistributing the riches of the wealthy).

29. *Id.* V.1.1301a30–.1301a33, at 120.

30. *Id.* III.10.1281a25–.1281a27, at 75.

the community.<sup>31</sup> The division between the rich and the poor meant constitutional revolution was an ever-present risk.<sup>32</sup>

Aristotle's first solution—the one best known in history—is what he called “mixed” government.<sup>33</sup> Most people today think of mixed government as blending the three different “pure” types of government: rule by one (monarchy), by the few (aristocracy), and by the many (democracy). But because Aristotle thought of constitutional government as blending economic classes, not just the number of rulers, it might be better to rename this first solution a class-warfare constitution. A class-warfare constitution assumes that economic inequality in society is inevitable—and that class conflict presents a serious risk of internal discord. In response, class-warfare constitutions incorporate each economic class into government itself, fusing together different structures to create a hybrid political system that should, in theory, be more stable than any of the pure forms of government are alone. Class-warfare constitutions would work, Aristotle thought, because each economic class would have a share and a stake in governing, and as a result, no class would have any reason to destabilize the regime.<sup>34</sup> Participation meant responsible government.

Aristotle identified three strategies for mitigating class warfare. The first was to combine elements of both democracy and oligarchy. For example, in an oligarchy, Aristotle says, the rich are fined if they do not serve on juries.<sup>35</sup> The fine serves as an incentive for their participation. In contrast, in a democracy, the poor are paid to serve on juries, as this enables their participation. Aristotle recommends adopting both policies, so that both groups will participate.<sup>36</sup> Aristotle's second strategy is to take the middle point between the policies that a democracy and oligarchy would adopt.<sup>37</sup> In an oligarchy, there would be high property qualifications to participate in government; in a democracy, no property qualifications. The middle way is to have a moderate property requirement.

His final strategy has been the most influential. In this strategy, Aristotle advises taking something from each political system.<sup>38</sup> For example, the democratic approach is to have no property qualifications and pick officials by lottery, instead of election. That ensures that anyone and everyone can partake in governing. The oligarchic approach is the opposite: elections and property qualifications. Aristotle suggests adopting a system of elections as a nod to oligarchies, but requiring no property

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31. *Id.* V.8.1309a14–.1309a31, at 136–37.

32. *Id.* V.3.1303b4–.1303b7, at 125.

33. *Id.* IV.8.1293b35, at 105; *id.* IV.8.1294a22, at 104.

34. *Id.* IV.9.1294b14–.1294b41, at 105.

35. *Id.* IV.9.1294a38–.1294a40, at 104.

36. *Id.* IV.9.1294a40–.1294b3, at 104.

37. *Id.* IV.9.1294b3–.1294b6, at 104.

38. *Id.* IV.9.1294b6–.1294b14, at 104–05.

qualifications for voting or service.<sup>39</sup> The result is that only those chosen few can serve in government, but that everyone can participate in their selection. In this way, democracy and oligarchy are blended together.

In the ancient world, the best example of this third strategy was the Roman Republic which featured a senate for the patricians and a tribune for the plebeians. Tribunes—there were at least two when the tribunate was founded—would provide assistance to ordinary Romans, especially against consular actions. Patricians and senators were prohibited from serving as tribune. And perhaps most importantly, the plebs vowed to avenge any violence against the tribune, in effect rendering his person sacrosanct. Anyone who harmed a tribune would be killed.<sup>40</sup> Over time, the tribunate expanded to ten, and tribunes became some of the most powerful men in Rome. They had the authority to grant clemency (including from the death penalty), veto legislation at any stage in the process, block the actions of other magistrates, initiate legislation through plebiscites, call public assemblies, initiate prosecutions against magistrates who had abused their office, and keep a written record of the laws of Rome.<sup>41</sup> The creation of the tribunate is what first gave Rome a class-warfare constitution. It instituted economic class directly into the structure of government, with the tribunate and assembly giving plebeians a share and a stake in government and a check on the power of the patrician senate. So important was the tribunate that, throughout history, many of the great political philosophers used it to explore whether class-warfare constitutions could be stable forms of government and to explain their own views on the relationship between economic structure and constitutional structure.

Rome was the inspiration for the most important addition to the theory of class-warfare constitutions. While Aristotle had emphasized that each class had a share and stake in society, giving them an incentive to maintain stability, the Greek historian Polybius saw something different in the Roman example.<sup>42</sup> Polybius noted that each of the parts of the Republic—the consuls, the senate, and the plebeians—were dependent on the others to accomplish their goals, and as a result each could block the aims of the others. Each part of society, he said, “can be effectively counteracted and hampered by the others.”<sup>43</sup> In other words, Polybius emphasized that

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39. *Id.* IV.9.1294b8–1294b13, at 105.

40. 2 LIVY, *THE RISE OF ROME* ch. 33, at 104–05 (T. J. Luce trans., 1998). For scholarly discussions, see T.J. CORNELL, *THE BEGINNINGS OF ROME* 259–60 (1995); ANDREW LINTOTT, *THE CONSTITUTION OF THE ROMAN REPUBLIC* 32–33 (1999); Kurt A. Raaflaub, *Between Myth and History: Rome's Rise from Village to Empire (The Eighth Century to 264)*, in *A COMPANION TO THE ROMAN REPUBLIC* 125, 139–40 (Nathan Rosenstein & Robert Morstein-Marx eds., 2010).

41. CORNELL, *supra* note 40, at 259–64; LINTOTT, *supra* note 40, at 121–25; Lily Ross Taylor, *Forerunners of the Gracchi*, 52 *J. ROMAN STUD.* 19, 20 (1962).

42. POLYBIUS, *THE HISTORIES* 380–85 (Brian McGing ed., Robin Waterfield trans., 2010).

43. *Id.* at 385.

Rome's class-warfare constitution worked because each class had a check on the other. The system was, in modern parlance, one of checks and balances.<sup>44</sup>

One of the central problems with class-warfare constitutions is that it is unclear whether instituting class directly into the structure of government will lead to stability or strife. Important political thinkers throughout history took different views on this question, using the Roman tribune as a vehicle for making their case. Cicero, for example, indicated opposition to the tribunate. In a dialogue called *On the Laws*, a companion to his *Republic*, Cicero fleshed out what he saw as the best constitution in practice.<sup>45</sup> After Cicero has outlined the structure of Roman government, his interlocutor and brother in the dialogue, Quintus, attacks Cicero's position on the tribunate. He charges tribunes throughout history with inciting violence, making conflict and bloodshed a normal part of Roman politics, and stirring the mob to a frenzy.<sup>46</sup> Cicero defends the tribunate against these criticisms, noting that while the tribunate has some drawbacks, it also has done much good. When it was created, "conflict ceased, rebellion was at an end," and it became clear to all Romans that "compromise was the only salvation of the state."<sup>47</sup> Moreover, without the tribunate, mob rule might have been even more radical than the tribunes had been. Cicero then tells Quintus that the convention in a dialogue of this sort is for the interlocutor to agree wholeheartedly with the teacher's comments, so the lesson can go on.<sup>48</sup> But surprisingly, Quintus refuses.<sup>49</sup> He tells Cicero that he does not agree with his brother's views on the tribunate.<sup>50</sup> The third participant in the dialogue, Atticus, then chimes in, declaring that he too is unconvinced by Cicero's defense of the tribunate. Outnumbered, Cicero makes no reply. He simply moves to the next topic.<sup>51</sup> The result is that the reader is left with the distinct impression that Quintus has won the argument. The tribunate, in his memorable phrase, was "born in sedition and destined to create sedition."<sup>52</sup> Instituting class into government meant more strife, not less strife, and ultimately led to the downfall of the Republic.

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44. See VILE, *supra* note 16, at 40 (analogizing the ancient theory of mixed-government's focus on "separation of agencies" to the modern theories of separation of powers and of checks and balances).

45. CICERO, *ON THE REPUBLIC, ON THE LAWS* 481-91 (Jeffrey Henderson ed., Clinton Walker Keyes trans., 1928).

46. *Id.* at 483.

47. *Id.* at 487.

48. *Id.* at 491.

49. *Id.*

50. *Id.*

51. *Id.*

52. Taylor, *supra* note 41, at 19.

Machiavelli adopted the opposite stance. In his *Discourses*, Machiavelli took on the question of the best constitution for a state. For Machiavelli, Rome was the “perfect republic.”<sup>53</sup> Rome attained this perfection on account of the “disunion of the plebs and the Senate.”<sup>54</sup> While most people might think that conflict and clashing interests contribute to disorder and instability—and are to be avoided—Machiavelli saw the tension between these countervailing forces as the strength of the Republic. “I say that to me it appears that those who damn the tumults between the nobles and the plebs blame those things that were the first cause of keeping Rome free,” he wrote.<sup>55</sup> The central error in most people’s thinking is that they ignore the fact that “in every republic are two diverse humors, that of the people and that of the great.”<sup>56</sup> Citing the three hundred years without significant strife, Machiavelli argued that the conflict between these classes is what led to laws that ultimately promoted freedom.<sup>57</sup>

#### B. *The Middle-Class Constitution*

While mixed government usually gets the most attention in constitutional theory, Aristotle did not think mixed government was the best constitution for a state—or even the best achievable constitution in the real world. The best achievable constitution is what Aristotle called the “middle constitution,” which we might term, less awkwardly, a middle-class constitution. This subpart focuses on the middle-class constitution, as the second equilibrium in designing government with economic conditions in mind. After presenting Aristotle’s discussion of the subject, this subpart moves to Donato Giannotti and James Harrington, who developed the theory. It briefly concludes with reference to theorists after Harrington—Cato, Hume, and Montesquieu—who recognized Harrington’s lesson that political power is linked to economic power.

For Aristotle, a constitution built on a strong, large middle class held the greatest promise for stability, and as a result, for human flourishing. “[I]n the multitude of citizens there must be some rich and some poor,” Aristotle wrote, “and some in a middle condition.”<sup>58</sup> This middle class held great promise as the core of a political community. A large middle class made it less likely that there would be “factions and dissensions”<sup>59</sup> that

53. NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 14 (Harvey C. Mansfield & Nathan Tarcov trans., 1996).

54. *Id.*

55. *Id.* at 16.

56. *Id.*

57. *Id.*

58. ARISTOTLE, *supra* note 14, IV.3.1289b30–.1289b31, at 94; *see also id.* IV.11.1295b1–.1295b2, at 107 (“Now in all states there are three elements: one class is very rich, another very poor, and a third in a mean.”).

59. *Id.* IV.11.1296a6–.1296a9, at 108.

could destabilize the community because the middle class would have a shared economic status and, as a result, a shared ethical and cultural worldview.<sup>60</sup> By disposition, the middle class was more likely to have less hubris and, therefore, greater aptitude for both ruling and being ruled.<sup>61</sup> Unlike the poor, the middle class was financially secure enough that they would not covet the wealth and property of the rich, nor turn into “petty rascals” or “rogues.”<sup>62</sup> Unlike the rich, the middle class would not constantly be involved in plots against each other to gain ever-greater power.<sup>63</sup> “[W]here some possess much, and the others nothing, there may arise an extreme democracy, or a pure oligarchy; or a tyranny may grow of either,” Aristotle said, “but it is not so likely to arise out of the middle constitutions.”<sup>64</sup> This is why Aristotle, who was no evangelist for democracy, still favored democracies over oligarchies. “[T]hey have a middle class which is more numerous and has a greater share in the government,” he wrote, “for when there is no middle class, and the poor are excessive in number, troubles arise, and the state soon comes to an end.”<sup>65</sup> In other words, a unified political community would be stronger than a divided one. The answer to class warfare was a society without extensive economic inequality.

A strong, large middle class meant greater stability not simply because there would be greater alignment of interests in the population, but also because stability was a by-product of political dynamics. When it came to middle-class stability, Aristotle engaged in what would be referred to today as game theory.<sup>66</sup> The premise of the game was that the rich and poor would never agree to be subservient to the other. As a result, if the rich or poor ever wanted to establish a different kind of government, one more favorable to their interests, they would have to unite with the middle class. But the middle class’s interests were not fully aligned with the rich or poor, so there was a limit on how far the middle class would be willing to go before it shifted its alliance to the other class. As a result, an equilibrium emerges in which the middle class is an arbiter between the rich and poor.<sup>67</sup> “[T]he best political community is formed by citizens of the middle class,”

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60. *Id.* IV.11.1295b24–1295b34, at 107–08; JILL FRANK, A DEMOCRACY OF DISTINCTION: ARISTOTLE AND THE WORK OF POLITICS 177 (2005).

61. ARISTOTLE, *supra* note 14, IV.11.1295b20–1295b22, at 107; MILLER, *supra* note 14, at 264–66.

62. ARISTOTLE, *supra* note 14, IV.11.1295b9–1295b11, at 107.

63. *Id.* IV.11.1295b31–1295b32, at 107.

64. *Id.* IV.11.1296a1–1296a5, at 108.

65. *Id.* IV.11.1296a15–1296a18, at 108.

66. MILLER, *supra* note 14, at 267–69.

67. *Id.* at 268 (developing the game theory idea); see also ARISTOTLE, *supra* note 14, IV.11.1295b38–1295b39, at 108 (“[T]he addition of the middle class turns the scale, and prevents either of the extremes from being dominant.”). For a discussion of the arbiter, see ARISTOTLE, *supra* note 14, IV.12.1297a5–1297a6, at 110.

Aristotle said.<sup>68</sup> “[T]hose states are likely to be well-administered in which the middle class is large, and stronger if possible than both the other classes . . . .”<sup>69</sup>

With so many benefits to the middle-class constitution, why didn’t Aristotle place more focus on it? And why did democracies and oligarchies predominate in the ancient world if the middle-class constitution was the best constitution? “[T]he middle class is seldom numerous,” Aristotle explained, and “whichever party, whether the rich or the common people . . . predominates, draws the constitution its own way.”<sup>70</sup> Most societies suffered from economic inequality. The middle-class constitution was elusive because a strong middle class was elusive.

After Aristotle, the most insightful theorists of the middle-class constitution were Donato Giannotti and James Harrington.<sup>71</sup> A generation younger than Machiavelli (and largely unknown today), the Florentine Donato Giannotti had two insights that challenged conventional thinking about the checks and balances theory of class-warfare constitutions. Giannotti argued that it would always be impossible to reach the stable equilibrium in checks-and-balances-based mixed government.<sup>72</sup> This is because the “pressures and counterpressures” between the forces “will be equal” in a mixed government that is at true equilibrium.<sup>73</sup> However, that means that there will never be a “resolution of the contest” when groups disagree.<sup>74</sup> In other words, the fact that someone must ultimately decide a contested question means that there can never be a truly equal balance between separated forces within government. There will always have to be a winner and a loser.<sup>75</sup> This point is not to be unimportant, as contemporary constitutional theorists have recently been critical of separation-of-powers and balance-of-powers theories in recent years.<sup>76</sup> Needing to choose a

68. ARISTOTLE, *supra* note 14, IV.11.1295b34–.1295b35, at 108.

69. *Id.* IV.11.1295b35–.1295b37, at 108.

70. *Id.* IV.11.1296a23–.1296a26, at 108.

71. There are also traces of the idea in the writings of Nicole Oresme, a distinguished fourteenth-century French scientist, economist, mathematician, and bishop. JAMES M. BLYTHE, *IDEAL GOVERNMENT AND THE MIXED CONSTITUTION IN THE MIDDLE AGES* 203 (1992). Oresme seems to have understood mixed government’s blend of democracy and oligarchy as implying that “the people of middle estate who are neither very rich or very poor hold the rule.” *Id.* at 228.

72. *Id.* at 298–99.

73. J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 308–09 (1975).

74. *Id.* at 309.

75. *Id.*

76. *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605 (2001) (arguing that “central commitments of contemporary separation of power law are a failure”); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1129 (2000) (asserting that the problems in separation of powers law exist because “we are arguing about the wrong questions”); Eric A. Posner, *Balance-*

winner in contested cases, Giannotti, like Machiavelli, threw his hat in with the people, rather than the aristocrats.<sup>77</sup>

Giannotti's reason for siding with the people was specific to Florentine social conditions, leading to his second insight. Giannotti rejected the paradigm that Florence was made up of rich and poor—the staple of mixed government thinking since ancient Greece.<sup>78</sup> Yes, the city was made up of the “rich and great” who desired command, and the many poor who wished not to be commanded.<sup>79</sup> But it also had a third group—the *mediocri*, the middle, who wanted liberty, but also had enough money to desire a share in command.<sup>80</sup> Looking back at Florentine history, Giannotti observed that the Medici allowed poor people to advance to office, and that they provided limited opportunities for aristocrats to show their greatness.<sup>81</sup> This resulted in the creation of a “new and growing class” that was not so great as the highest, nor as low as the poor.<sup>82</sup> This *mediocri* “[held] the balance of power and [made] a stable [government] possible in Florence.”<sup>83</sup>

The *mediocri* were the type who could rule and also be ruled in turn, and Giannotti theorized that it was possible for the *mediocri* to become so large in a city that they would “absorb the category of the ‘many poor’ altogether.”<sup>84</sup> Because this middle class would be less likely to have irrational desires to command others, Giannotti thought it might even be possible to have something approaching a pure democracy in a society where the middle class was big enough.<sup>85</sup> Although Giannotti didn't believe there was a society at the time with a big enough middle class for that—Florence certainly didn't have a middle class of that scope—he recognized that if the middle class were stronger than the rich and poor together, or at least equal to them in power, they could hold the balance of power in the city.<sup>86</sup>

Despite Giannotti's additions, the more influential theorist was the seventeenth century English thinker James Harrington. Harrington's central contribution was that property is the basis of political power and that the design of government must be attentive to the distribution of property in society. His second insight was even more creative: he showed that the

*of-Powers Arguments and the Structural Constitution* 5 (Chi. Inst. for L. & Econ. Working Paper No. 622, 2012).

77. POCOCK, *supra* note 73, at 309–10.

78. *See id.* at 272–73 (discussing Giannotti's construction of a model of Florentine government that differed from classical mixed-government thinking).

79. *Id.* at 298.

80. *Id.*

81. *Id.* at 302.

82. *Id.*

83. *Id.*

84. *Id.* at 298.

85. *Id.* at 300.

86. *Id.*



political transition from feudalism to the English Civil Wars to the establishment of parliamentary sovereignty under the Commonwealth was based on changes in the underlying social and economic structure of England. In other words, he rooted constitutional design in economic conditions, and he theorized that constitutional change could be the result of underlying economic changes. In the process, he revived Aristotle's lesson of the importance of a strong middle class for constitutional stability.<sup>87</sup>

Like previous constitutional theorists, Harrington recognized "the doctrine of the ancients"—that there were three pure types of government, a corrupted version of each, and a mixture of the three.<sup>88</sup> However, Harrington was the first theorist to make 'explicit—even more so than Aristotle—that the forms of government were based on property ownership.<sup>89</sup> "If one man be sole landlord of a territory," he wrote, "his empire is absolute monarchy."<sup>90</sup>

If the few or a nobility, or a nobility with the clergy, be landlords . . . the empire is mixed monarchy. . . . And if the whole people be landlords, or hold the lands so divided among them, that no one man, or number of men, within the compass of the few or aristocracy, overbalance them, the empire . . . is a commonwealth.<sup>91</sup>

Harrington's focus on property as land (rather than wealth) is certainly a limitation of his theory. A general theory would have linked political power to economic power more broadly. But given the context of the seventeenth century and the alignment of property with wealth and class, Harrington's narrower approach is understandable.<sup>92</sup>

Looking back at Rome, Harrington agreed with Machiavelli's view that a powerful nobility would destroy popular government.<sup>93</sup> But

87. For two scholars who emphasized the importance of Aristotle to Harrington, see J. R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 8 (1966) (noting Harrington's debt to Aristotle); H.F. RUSSELL SMITH, *HARRINGTON AND HIS OCEANA* 20 (1914) (writing that Harrington "revived the true Aristotle"). For the more conventional view that Machiavelli is the key to Harrington, see POCOCK, *supra* note 73, at 385 (discussing Harrington's reliance on Machiavellian theory); J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 129 (1987) (explaining that Harrington "was a Machiavellian").

88. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA*, reprinted in *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 1, 10 (J.G.A. Pocock ed., 1992).

89. See POCOCK, *supra* note 73, at 386–87 (describing Harrington's theoretical innovations that went even further than Aristotle's insofar as they connected types of government with property ownership).

90. HARRINGTON, *supra* note 88, at 11.

91. *Id.* at 11–12.

92. See POCOCK, *supra* note 73, at 386 (discussing the historical context of feudalism—where distribution of power and social hierarchies were tied to land—that led Harrington to adopt a more limited view of property).

93. See ERIC NELSON, *THE GREEK TRADITION IN REPUBLICAN THOUGHT* 109–10 (2004) (describing Harrington's agreement with a principle that Machiavelli suggested but did not fully

Harrington rejected Machiavelli's rosy view that a class-warfare constitution could create stability.<sup>94</sup> Like Giannotti, Harrington thought class-warfare constitutions were a problem. The structure of Rome's government "divide[d] it into parties" and led to "perpetual strife."<sup>95</sup> But if inequality between rich and poor created strife, Harrington reasoned, then relative economic equality should eliminate internal conflicts and create a stable government.<sup>96</sup> "[E]quality of estates causeth equality of power, and equality of power is the liberty not only of the commonwealth, but of every man."<sup>97</sup> In an "equal commonwealth," there would be no more strife "than there can be overbalance in equal weights."<sup>98</sup> Because class warfare would simply not exist, the equal commonwealth would, in the words of one scholar, "prove theoretically immortal."<sup>99</sup>

But how could a society achieve equality in the distribution of property? Harrington argued strongly for agrarian laws (laws on the use, distribution, and transmission of land)—so strongly in fact that he frequently turned the adjective into a noun, referring simply to a society's "Agrarian."<sup>100</sup> "The Agrarian" was necessary to organize the commonwealth. Without one, government "hath no long lease."<sup>101</sup> The Romans had failed because they did not enforce their agrarian law.<sup>102</sup> The nobility had, "by stealth[,] possessed" lands that the people should have had access to, and they grew "vastly rich" in the process.<sup>103</sup> Eventually, it was "too late."<sup>104</sup> Following Machiavelli, he thought Rome failed through "negligence committed in their agrarian laws."<sup>105</sup>

Having developed the doctrine that political power follows the balance of property, Harrington was poised to notice that if the balance of property changed, the political system could change as well. Looking back at English history, he argued that there had been a significant shift in the ownership of land since feudal times.<sup>106</sup> Under the "Gothic balance," there

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develop: that a commonwealth cannot exist where the distribution of wealth is not relatively equal, such as when there is a nobility).

94. On "English Machiavellism," see POCOCK, *supra* note 73, at 389. On agreement and disagreement with Machiavelli, see NELSON, *supra* note 93, at 110–12.

95. HARRINGTON, *supra* note 88, at 33.

96. NELSON, *supra* note 93, at 112.

97. HARRINGTON, *supra* note 88, at 20.

98. *Id.* at 33.

99. POCOCK, *supra* note 73, at 388.

100. See HARRINGTON, *supra* note 88, at 13 ("This kind of law fixing the balance in lands is called agrarian . . .").

101. *Id.*

102. *Id.* at 37.

103. *Id.* at 44.

104. *Id.* at 37.

105. *Id.* at 43.

106. See *generally id.* at 47–68 (detailing the development of English law respecting land ownership from the Roman era to the seventeenth century).

had been a monarch, wealthy landowning nobles, and the rest of the people.<sup>107</sup> This created a “mixed monarchy” which operated somewhere between aristocracy and monarchy.<sup>108</sup> Over time, kings worried about the power of the nobility, and successive Tudor monarchs pursued legal changes that expanded land ownership among the common people at the expense of the nobles.<sup>109</sup> The most important change, during the time of Henry VII, prohibited lords from evicting tenants holding twenty or more acres. This guaranteed widespread property ownership to “the yeomanry, or middle people, who . . . were much unlinked from dependence upon their lords.”<sup>110</sup> Together with other reforms by subsequent monarchs, the nobility became weaker and weaker. As the power of the “middle people” grew in politics, the Commons finally wrested power from the monarchy.<sup>111</sup> As one scholar put it, “when the land was in the possession of a few barons and dignitaries of the Church dependent on the Crown, the natural form of government was a regulated monarchy; but with the enormous increase in the number of landowners, monarchical institutions had finally become impossible.”<sup>112</sup>

Harrington’s property-based theory of the commonwealth explained not only the English Revolution, which overthrew King Charles and the monarchy in the 1640s, but also provided a foundation for a more equal form of government: one without a king altogether. A political system had to follow the distribution of property in society. The rise of the “middle people” in England meant that the ancient constitution was no longer viable, and a new constitution—one built on the foundation of the middle class—would be necessary.<sup>113</sup> Harrington concluded that “where there is equality of estates, there must be equality of power; and where there is equality of power, there can be no monarchy.”<sup>114</sup>

In the century between Harrington’s *Commonwealth of Oceana* and the American founding, Harrington’s ideas spread to some of the leading constitutional theorists of the age. In the 1720s, Thomas Gordon and James Trenchard, writing under the pseudonym Cato, took up Harrington’s themes in a series of pamphlets known as *Cato’s Letters*. Writing in the wake of the corruption and failure of the South Sea Company, Cato argued that a

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107. *Id.* at 48.

108. *Id.* at 59.

109. *Id.* at 54–56.

110. *Id.* at 55.

111. For a discussion, see POCOCK, *supra* note 73, at 388; SMITH, *supra* note 87, at 29–30; J.G.A. Pocock, *Introduction*, in *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS*, *supra* note 88, at vii, xix.

112. SMITH, *supra* note 87, at 30.

113. See POCOCK, *supra* note 73, at 388 (discussing the revival of republican thought in Puritan England); SMITH, *supra* note 87, at 30 (noting that, with the “enormous increase in the number of landowners, monarchical institutions had finally become impossible”).

114. HARRINGTON, *supra* note 88, at 60.

free republic was impossible without “an equality in the distribution of property and consequently of power.”<sup>115</sup> Cato accepted that England’s current circumstances meant that it could not have “a republican form of government” because property was not distributed in an “average” way among the people; as a result, he remarked, “it is impossible to settle a commonwealth here.”<sup>116</sup> The only way for England to become a commonwealth was with the adoption of “[a]n agrarian law, or something equivalent to it.”<sup>117</sup>

The leading philosopher of the Scottish Enlightenment, David Hume, commented on the widespread acceptance of Harrington’s views. He recognized that “most of our political writers” accepted that property is “the foundation of all government,” though Hume himself thought that other factors mattered more.<sup>118</sup> Hume also embraced a Harringtonian understanding of the dynamic relationship between power and property. He argued that if there is an imbalance between power and property, the “order of men who possess a large share of property” will find a way to “stretch their authority, and bring the balance of power to coincide with that of property.”<sup>119</sup> Channeling Aristotle and Harrington, Hume even wrote an essay in lavish praise of the “middle station.”<sup>120</sup> The middle station was best suited to “the calm voice of reason,” because the “great are too much immersed in pleasure, and the poor too much occupied in providing for the necessities of life.”<sup>121</sup> Only those in the middle station could exercise the virtues of “patience, resignation, industry, and integrity” in addition to those of “generosity, humanity, affability, and charity.”<sup>122</sup> They had more wisdom and ability than the rich or poor, and they would also be better suited to friendship because they had no jealousy of others (like the poor) or suspicion of others (like the rich).<sup>123</sup>

Perhaps most strikingly, Montesquieu, the celebrated French philosopher who is best known for his theory of the separation of powers, also incorporated elements of Harrington’s approach into his *Spirit of the Laws*. Montesquieu noted that some constitutions divided lands equally,

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115. POCOCK, *supra* note 73, at 468; see CATO, *Letter 84*, in 3 CATO’S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 150, 153–54 (1755).

116. NELSON, *supra* note 93, at 141; CATO, *Letter 85*, in 3 CATO’S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS, *supra* note 115, at 159, 160; see also POCOCK, *supra* note 73, at 474.

117. NELSON, *supra* note 93, at 141 (2006); CATO, *supra* note 116, at 160.

118. DAVID HUME, *Of the First Principles of Government*, in SELECTED ESSAYS 24, 25 (Stephen Copley & Andrew Edgar eds., 2008).

119. *Id.* at 27.

120. DAVID HUME, *Of the Middle Station in Life*, in SELECTED ESSAYS, *supra* note 118, at 5, 5.

121. *Id.* at 5.

122. *Id.* at 6.

123. *Id.* at 6–7.

but he advised that if founders do “not give laws to maintain” that balance of property, the constitution will be “transitory.”<sup>124</sup> “[I]nequality will enter at the point not protected by the laws, and the republic will be lost.”<sup>125</sup> This was what Montesquieu believed happened in ancient Rome:

The indefinite permission to make testaments, granted among the Romans, gradually ruined the political provision on the sharing of lands; more than anything else it introduced the ominous difference between wealth and poverty; . . . some citizens had too much, an infinity of others had nothing. Thus, the people, continually deprived of their share, constantly asked for a new distribution of lands.<sup>126</sup>

The answer, Montesquieu suggested, was to “regulate to this end dowries, gifts, inheritances, testaments, in sum, all the kinds of contracts.”<sup>127</sup> Passing on wealth to others in an unregulated fashion would “disturb the disposition of the fundamental laws.”<sup>128</sup> After a long discussion of innovative methods for regulating the transfers and concentration of wealth, Montesquieu recognized a practical reality: “Although in a democracy real equality is the soul of the state, still this equality is so difficult to establish that an extreme precision in this regard would not always be suitable.”<sup>129</sup> He therefore suggested establishing outer bounds of wealth and then passing laws that will “equalize inequalities” through the “burdens they impose on the rich and the relief they afford to the poor.”<sup>130</sup>

## II. The Intellectual Origins of America’s Middle-Class Constitution

For decades, intellectual historians have debated the philosophical influences on the revolutionary generation. Divided largely into two camps, some historians emphasized the republican tradition and, in particular, ideals of virtue and the public good.<sup>131</sup> In contrast to these “republicans,” the “liberal” historians focused on the inheritance of John Locke—individualism, the social contract, private property, and the absence

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124. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 45 (Anne M. Cohler et al. eds., Anne M. Cohler et al. trans., 1989) (1748).

125. *Id.*

126. *Id.* at 523.

127. *Id.* at 45.

128. *Id.*

129. *Id.* at 46–47.

130. *Id.* at 47.

131. The classic texts are BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); POCOCK, *supra* note 73; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969); and Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *WM. & MARY Q.* 49 (1972).

of feudalism.<sup>132</sup> More recently, historians have reached a *détente*, agreeing that the Founding Era cannot be defined by only one intellectual tradition.<sup>133</sup> The Founders drew on a wide range of sources, combining them in creative ways to forge the philosophical foundation for the new nation.

In this Part, I argue that the intellectual tradition of the middle-class constitution was alive and flourishing during the time of the American founding.<sup>134</sup> The founding generation knew well the history of constitutional thinking on economic issues, and perhaps surprisingly, they believed Harrington's insights had practical relevance for their new republic. The broader argument—that the founding generation was correct in its assessment of the economic distribution at the time and that this formed the foundation for the Constitution—is beyond the scope of this Essay. The more modest argument here is simply that the founding generation embraced the middle-class-constitutional theory that relative economic equality was necessary for republican government and that they believed the theory could be applied to their situation.

#### A. *Power, Property, and Republican Government*

In 1776, John Adams declared: "Harrington has shown that power always follows property."<sup>135</sup> He continued:

This I believe to be as infallible a maxim in politics, as that action and reaction are equal, is in mechanics. Nay, I believe we may

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132. The classic example is LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955). See generally JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992) (stating and comparing both the republican and the liberal traditions).

133. See generally Jeffrey C. Isaac, *Republicanism vs. Liberalism? A Reconsideration*, 9 *HIST. POL. THOUGHT* 349 (1988) (discussing the compatibility of early republican values and the ideas of Locke); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 *J. AM. HIST.* 9 (1987) (examining how liberal ideas fused with traditions of Protestant Christianity and classical republicanism at the time of the American Revolution and adoption of the Constitution).

134. There was once a robust tradition of Revolutionary Era historians who emphasized the importance of economic equality to American democracy. E.g., DOUGLASS G. ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY* (Mark E. Yellin ed., 2000) (discussing the agricultural context undergirding American democracy); J. FRANKLIN JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* 27–28 (1926) (“[P]olitical democracy came to the United States as a result of economic democracy, . . . this nation came to be marked by political institutions of a democratic type because it had, still earlier, come to be characterized in its economic life by democratic arrangements and practices.”); Robert E. Brown, *Economic Democracy Before the Constitution*, 7 *AM. Q.* 257 (1955); see also JACKSON TURNER MAIN, *THE SOCIAL STRUCTURE OF REVOLUTIONARY AMERICA* 42 (1965) (“The outstanding feature of northern society was not its small wealthy class but the very large proportion of substantial middle-class property owners.”). In constitutional theory and law, this tradition has been less influential than the republican and liberal theories.

135. NELSON, *supra* note 93, at 209.

advance one step farther, and affirm that the balance of power in a society, accompanies the balance of property in land. The only possible way, then, of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make a division of land into small quantities, so that the multitude may be possessed of landed estates. If the multitude is possessed of the balance of real estates, the multitude will have the balance of power, and in that case the multitude will take care of the liberty, virtue, and interest of the multitude, in all acts of government.<sup>136</sup>

Others followed Adams in embracing Harrington's lessons. In 1783 an anonymous Charleston writer channeled Harrington and Cato by noting that "men in moderate circumstances, are most virtuous."<sup>137</sup> "An equality of estate, will give an equality of power; and equality of power is a natural commonwealth."<sup>138</sup> Phillips Payson, in a 1778 sermon, argued that "free government and public liberty" was possible only "if there is a general distribution of property, and the landed interest not engrossed by a few, but possessed by the inhabitants in general through the state."<sup>139</sup> During the ratification debates in Pennsylvania, Anti-Federalist Samuel Bryan, writing under the pseudonym Centinel, echoed the sentiment in forceful terms: "A republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided . . . when this ceases to be the case, the nature of the government is changed, and an aristocracy, monarchy or despotism will rise on its ruin."<sup>140</sup>

The most thorough exposition of Harringtonian principles, however, came from Noah Webster, who is best known today as the author of the first American dictionary. Responding to Anti-Federalist arguments during the ratification debates, Webster asked where the source of power lay in

136. *Id.*

137. Anonymous, *Rudiments of Law and Government Deduced from the Law of Nature*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 565, 577 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

138. *Id.* The nameless writer also held that natural law "imparts an equality of property" and that "America has not yet departed far from the rule of right." *Id.* (emphasis omitted); see also NELSON, *supra* note 93, at 210–11 (quoting Phillip Payson's argument for the "benefits to be derived 'especially if there is a general distribution of property, and the landed interest not engrossed by a few'"). Federal Farmer agreed: "If there are advantages in the equal division of our lands, . . . we ought to establish governments calculated to give duration to them . . ." Letter from The Federal Farmer (Dec. 25, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 251, 251 (Herbert J. Storing ed., 1981).

139. Phillips Payson, *A Sermon: Boston, 1778*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, *supra* note 137, at 523, 531; NELSON, *supra* note 93, at 210–11.

140. Centinel, *Letter 1*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 138, at 136, 139; NELSON, *supra* note 93, at 221.

society. “The answer is short and plain—in *property*.”<sup>141</sup> Once this truth was understood, it became clear how to preserve freedom. A “general and tolerably equal distribution of landed property” was the “whole basis of national freedom.”<sup>142</sup> If property was equally distributed, so too would power be distributed. If property was unequal, then power would also be unequal—and freedom at risk.

In an economy primarily driven by land, the critical safeguard was to prevent an aristocracy from emerging through land inheritance. “Make laws, irrevocable laws in every state, destroying and barring entailments,” Webster wrote.<sup>143</sup> “[L]eave real estates to revolve from hand to hand, as time and accident may direct; and no family influence can be acquired and established for a series of generations—no man can obtain dominion over a large territory . . . .”<sup>144</sup> The result would be that “the laborious and saving, who are generally the best citizens, will possess each his share of property and power, and thus the balance of wealth and power will continue where it is, in the *body of the people*.”<sup>145</sup>

Webster’s explanation that property needed to remain with the people rested in part on ancient Rome’s experience with agrarian policy. “Rome,” he wrote, “exhibited a demonstrative proof of the inseparable connexion between property and dominion.”<sup>146</sup> Applying Harrington’s lessons to the ancient republic’s government, Webster had a different reading of Roman history. He argued that Rome’s monarchy and aristocracy—the governments before the establishment of the tribunate—could not possibly have succeeded because “they were not supported by property.”<sup>147</sup> Too many people, he thought, had property, and over generations political power was wrested from the kings and patricians and increasingly granted to the people.<sup>148</sup> It was not until “they established a commonwealth,” that property and power were aligned in the city.<sup>149</sup>

Webster’s conclusion could hardly have been more clear:

An equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very *soul of a republic*—While this continues, the people will inevitably possess both *power* and *freedom*; when this is lost, power departs,

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141. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (1787).

142. *Id.* at 47.

143. *Id.* at 46.

144. *Id.* at 46–47.

145. *Id.* at 47.

146. *Id.* at 44.

147. *Id.*

148. *Id.* at 44–46.

149. *Id.* at 44.



liberty expires, and a commonwealth will inevitably assume some other form.<sup>150</sup>

“Let the people have property,” he said, “and they *will* have power . . . .”<sup>151</sup>

### B. *America’s Economic Exceptionalism*

Luckily, America was well positioned to establish a commonwealth. In 1787, Webster wrote that America had “small inequalities of property . . . [and] every man has an opportunity of becoming rich.”<sup>152</sup> This fact distinguished “the governments of Europe and of all the world, from those of America.”<sup>153</sup> In the rest of the world, rights had to be protected from other classes of men. Americans often forgot, Webster said, that “the objects of the contest *do not exist in this country.*”<sup>154</sup>

Webster wasn’t unique in his belief that what made America exceptional was its economic equality. Throughout the founding period, Americans believed that they were uniquely suited to republican government precisely because the people were relatively equal and the middle class was strong.<sup>155</sup> Perhaps most striking was the Pennsylvania constitution of 1776. The most radical of all the revolutionary constitutions, the Pennsylvanian charter completely rejected the class-warfare model and instead adopted a unicameral legislature, “for we have not, and hope never shall have, a hereditary nobility, different from the general body of the people.”<sup>156</sup> An early draft of the new state’s declaration of rights went even further in seeking to preserve the equality of property. It announced “that an enormous Proportion of Property vested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness, of Mankind.”<sup>157</sup> The draft even gave the legislature the power to prevent such concentrations of wealth.<sup>158</sup> As Gordon Wood has described, Pennsylvanians believed that they

150. *Id.* at 47.

151. *Id.* at 48.

152. NOAH WEBSTER, *Remarks on the Manners, Government, and Debt of the United States*, in A COLLECTION OF ESSAYS AND FUGITIV WRITINGS ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 81, 88 (1790).

153. NOAH WEBSTER, *On Government*, in A COLLECTION OF ESSAYS AND FUGITIV WRITINGS ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS, *supra* note 152, at 59, 66.

154. *Id.*

155. They did not usually refer to the “middle class” per se. Instead they used a variety of terms: “*neither rich nor poor*,” “*middling*” class, “*honest sober men, who mind their business*,” “*middling*,” “*the middling Kind*,” “*middle sort*,” and “*middling Rank*.” For these and other class division terms from the era, see MAIN, *supra* note 134, at 230–33.

156. WOOD, *supra* note 131, at 231.

157. *Id.* at 89.

158. NELSON, *supra* note 93, at 213.

had an opportunity unknown to previous societies, which had never been able to form an equitable plan of government. Because the people of other societies had not been equal, they had been compelled to incorporate great social distinctions into their constitutions, thereby recognizing an “interest separate and distinct from, and inconsistent with, the general welfare of the people.”<sup>159</sup>

Pennsylvania was the most radical of the American states, but America’s economic equality was widely recognized in every region—and even in England. Federalist Jonathan Jackson of Massachusetts noted in 1788 the “small inequality of fortune throughout the country, compared with others which we know.”<sup>160</sup> A response to John Adams’s *Defense of the Constitutions of the United States* commented that “[w]e have no such thing as orders, ranks, or nobility; and . . . it is almost impossible they should ever gain any footing here.”<sup>161</sup> Even in South Carolina, the least equal of America’s jurisdictions, inhabitants saw that America was uniquely equal in comparison to the rest of the world.<sup>162</sup> In 1777, one South Carolinian noted that Americans were “a people of property; almost every man is a freeholder.”<sup>163</sup> Charles Pinckney believed that America could not have an aristocracy because “we neither have or can have the members to compose it.”<sup>164</sup> David Ramsay said that tyranny was unlikely in the new republic because America was composed of “free men all of one rank, where property is equally diffused.”<sup>165</sup> The English radical Thomas Pownall noted that America had “a general equality, not only in the Persons, but in the power of the landed Property of the Inhabitants.”<sup>166</sup>

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159. WOOD, *supra* note 131, at 230.

160. NELSON, *supra* note 93, at 219. Jackson noted that primogeniture laws were “gone or going, out of use” and that land could not be entailed, and so believed “the period must be distant, very far distant, when there can be such a monopoly of landed estates, as to throw the suffrages or even influence of electors into few hands . . . where is the risk of an *aristocracy* dangerous to liberty?” *Id.* (omission in original). Arthur Browne, an Anglican clergyman, held that Americans were “without nobility, or orders of gentry.” GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 20 (1992).

161. WOOD, *supra* note 131, at 583 (omission in original) (quoting John Stevens and discussing the topic further).

162. WOOD, *supra* note 160, at 170.

163. WOOD, *supra* note 131, at 100.

164. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 398–99 (Max Farrand ed., rev. ed. 1966); WOOD, *supra* note 131, at 555. Commenting on the other end of the wealth spectrum, Christopher Gadsden reported that “the poorest of [Americans] (unless some very uncommon instances indeed) but must find himself, in a very comfortable situation, especially when he compares his condition, with that of the poor of other nations.” WOOD, *supra* note 160, at 170.

165. NELSON, *supra* note 93, at 223.

166. WOOD, *supra* note 131, at 99.

Europe, in contrast, was striving for “that natural equal level Basis on which Ye, American Citizens, stand.”<sup>167</sup>

Nor did this sense of equality end in the constitutional period. In the decades after the Constitution, Americans continued to believe that they were exceptional precisely because of their equality. Speaking in Middlebury, Vermont in 1801, Jeremiah Atwater said that “property, in this country, is pretty equally divided among the people.”<sup>168</sup> Unlike in most European countries, “[t]he feudal distinctions of tenant and lord are here unknown.”<sup>169</sup> By the 1810s, Americans were even referring to themselves as “dominated by the ‘middling’ sort.”<sup>170</sup> Wood concludes that “in America, in the North at least, already it seemed as if the so-called middle class was all there was.”<sup>171</sup> Indeed, Charles Ingersoll could write in 1810 that “[p]atrician and plebeian orders are unknown . . . . What in other countries is called the populace, a compost heap, whence germinate mobs, beggars, and tyrants, is not to be found in the towns; and there is no peasantry in the country.”<sup>172</sup>

### C. *Preserving the Middle-Class Constitution*

How would America’s new republic maintain the levels of equality that Harrington suggested were necessary for republican government? Many of the Founders categorized the strategies for preserving America’s equal commonwealth similarly. Jefferson focused on land policies (entail and primogeniture) and education.<sup>173</sup> Noah Webster similarly focused on land policies and education, calling them “fundamental articles: the *sine qua non* of the existence of the American republics.”<sup>174</sup>

In a 1792 essay, James Madison provided a slightly different framework for thinking about the range of options. Much of it focused on what to do when “the existence of parties cannot be prevented,” to which Madison suggested that one party must check the other—akin to old ideas of the class-warfare constitution.<sup>175</sup> He also suggested ensuring that one group would not be favored “at the expence of another.”<sup>176</sup> But the more

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167. *Id.* Another English radical, Richard Price, commented that America was made up of “only a body of yeomanry supported by agriculture, and all independent, and nearly upon a level.” *Id.*

168. NELSON, *supra* note 93, at 230–31.

169. *Id.* at 231.

170. WOOD, *supra* note 160, at 347.

171. *Id.*

172. *Id.* at 347–48.

173. NELSON, *supra* note 93, at 203.

174. *Id.* at 217.

175. James Madison, *Parties*, NAT’L GAZETTE, Jan. 23, 1792, reprinted in JAMES MADISON: WRITINGS 504, 504 (Jack N. Rakove ed., 1999).

176. *Id.*

interesting advice was on how to prevent such divisions from emerging at all. Republicanism would be preserved first by “establishing political equality among all.”<sup>177</sup> Over time, this notion would lead to the expansion of the right to vote. Indeed, John Adams even endorsed the ancient Greek practice of paying for political participation to ensure that political power would not be skewed by economic power. He commented in the 1780s that unless there is pay for those holding political office, “all offices would be monopolized by the rich; the poor and the middling ranks would be excluded and an aristocratic despotism would immediately follow.”<sup>178</sup> With equal political influence, economic elites would not wield unequal political power.

Second on Madison’s list was “withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, accumulation of riches.”<sup>179</sup> With property as the dominant form of wealth at the time, many in the founding generation focused on restricting the transfer of property as a way to prevent the creation of an aristocracy.<sup>180</sup> Thomas Jefferson famously said that one of his proudest moments was Virginia’s abolition of entails (a legal device to pass on property to one’s descendants) and primogeniture (a legal rule by which property is passed on to the oldest son).<sup>181</sup> In a letter to John Adams in 1813, he remembered “[t]hese laws, drawn by myself, [which] laid the axe to the root of the Pseudo-aristocracy.”<sup>182</sup> Jefferson believed that while “an equal division of property is impracticable,” legislators “cannot invent too many devices for subdividing property.”<sup>183</sup> Indeed, the linkage between property-inheritance laws and preventing aristocracy was well understood throughout the colonies. James Kent held that the entail was “recommended in monarchical governments as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments.”<sup>184</sup> St. George Tucker wrote in 1803 that during the founding period the people believed “that entails would be the means of accumulating and preserving great estates in certain families, which would . . . be utterly incompatible with the genius and spirit of our constitution and government.”<sup>185</sup> In 1784, when North Carolina adopted a

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177. *Id.*

178. WOOD, *supra* note 160, at 289.

179. Madison, *supra* note 175, at 504.

180. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 14–25 (1977) (analyzing proposals to regulate inheritance to promote egalitarian ideals).

181. NELSON, *supra* note 93, at 201–02.

182. *Id.* at 203.

183. *Id.* at 204–05.

184. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 20 (John M. Gould ed., 14th ed. 1896) (1826).

185. 3 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 119 (1803).

bill restricting primogeniture and entails, the bill gave as its justification that “it [would] tend to promote that equality of property which is of the spirit and principle of a genuine republic.”<sup>186</sup>

Madison’s third strategy was to rely on “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>187</sup> This category included a wider range of policy options than the others and, in some ways, is the most surprising from a modern perspective because it shows that some of the founders thought redistributing wealth was critical to sustaining the republic. Commenting on Montesquieu in his *Commonplace Book* before the Revolution, Jefferson wrote of the importance of laws that might “equalise” people “by laying burthens on the richer classes, & encouraging the poorer ones.”<sup>188</sup> After the Revolution, Jefferson wrote that one way to “silently lessen[] the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions or property in geometrical progression as they rise.”<sup>189</sup> He also advocated that the unemployed should be free to take up uncultivated land,<sup>190</sup> and even proposed that every man who didn’t have fifty acres of property be given property so he met that minimum threshold.<sup>191</sup> An anonymous writer in Charleston in 1783 took a similar approach, arguing that if laws on transferring property were insufficient to maintain “portions not greatly dissimilar” then “further increase of property must be positively restricted.”<sup>192</sup>

In short, Americans at the time of the founding accepted Harrington’s theory that relative economic equality was necessary for a republican form of government, they believed America had the economic conditions to sustain such a government, and they thought seriously about how to preserve the republic as economic conditions changed over time. They were, in other words, inheritors of and adherents to the middle-class constitutional tradition.

## Conclusion

From 1829 to 1830, James Madison conducted a statistical assessment of population and land in America.<sup>193</sup> He concluded that America’s constitutional system had little to fear from economic inequality.<sup>194</sup> There

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186. NELSON, *supra* note 93, at 232.

187. Madison, *supra* note 175, at 504.

188. NELSON, *supra* note 93, at 204.

189. *Id.* at 205.

190. *Id.*

191. WOOD, *supra* note 160, at 179.

192. Anonymous, *supra* note 137, at 579.

193. ADAIR, *supra* note 134, at 160.

194. *Id.* at 161–62.

was, at the time, “precious advantage” in “the actual distribution of property.”<sup>195</sup> Americans remained “among the happiest contrast in their situation to that of the Old World,” he wrote.<sup>196</sup> “There may be at present a majority of the nation who are even freeholders, or the heirs and aspirants to freeholds.”<sup>197</sup> America, in other words, had a strong middle class. But Madison predicted that by 1930, the population would be so concentrated that the people would be “necessarily reduced by a competition for employment to wages which afford them the bare necessities of life.”<sup>198</sup> When “[t]he proportion being without property” increased, the father of the Constitution said, “the institutions and laws of the country must be adapted; and it will require for the task all the wisdom of the wisest patriots.”<sup>199</sup>

Throughout history, many of the great political and constitutional thinkers understood that there was a relationship between the distribution of wealth in society and constitutional structure. Economic inequality required a class-warfare constitution to give the rich and poor a share and stake in governing—and a check on each other. A relatively equal distribution of wealth in society would instead enable a middle-class constitution. And when economic changes took place, constitutional changes would follow. It was not sustainable for the economic reality of society to be disconnected from the constitutional structure of political power. Americans in the Founding Era were aware of these insights and they believed that America’s relative equality meant they could establish a middle-class constitution.

They were also aware of the risks. In 1814, John Taylor of Caroline identified two possible dystopian futures. The first, “by which the poor plunder the rich, is sudden and violent; the second, by which the rich plunder the poor, slow and legal.”<sup>200</sup> Today, with economic inequality widening and the middle class collapsing, we can no longer ignore the relationship between the distribution of wealth in society and our constitutional structure. The work ahead, the task for the wisest patriots, is to rebuild our economy and revise our laws to preserve America’s middle-class constitution.

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195. *Id.* at 160.

196. *Id.* at 160–61.

197. *Id.* at 161.

198. *Id.*

199. *Id.*

200. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 280 (1814).