THE NEW INEQUALITY: CONSTITUTIONAL DEMOCRACY
AND THE PROBLEM OF WEALTH

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In the last several decades, important steps have been taken in the United States to eradicate flagrant discrimination on the basis of race, ethnicity, and gender in a variety of arenas including voting, education, and employment opportunities. These gains in political equality are being threatened, however, by a dramatic increase in economic inequality. Numerous studies have shown that disparities in income, wealth, and opportunity are increasing more rapidly in the United States than in other developed countries.1

The increasing gap between the wealthy and the poor can be viewed as “the new inequality.”2 In addition to eradicating prejudice from our public and private spheres, the challenge of the twenty-first century will also be to diminish the gross discrepancies in the everyday socio-economic conditions of citizens. The devastation wrought by Hurricane Katrina revealed all too starkly the dramatic differences between the rich and the poor in the world’s wealthiest democracy. But, as a Newsweek article titled The Other America noted, it takes a catastro-

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1. Lawrence R. Jacobs & Theda Skocpol, American Democracy in an Era of Rising Inequality, in Inequality and American Democracy 1, 3 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) [hereinafter Era of Rising Inequality]. See generally Douglas S. Massey & Nancy A. Denton, American Apartheid 9–16 (1993) (examining the racial disparities that exist in American society); Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth 2–3 (10th anniv. ed. 2006) (same).

phe like Katrina to remind the world of a problem that is by no means new.  

The existence of the “two Americas” has long been and continues to be a matter of statistical fact. In 2001, for instance, the wealthiest fifth of the population received 47.7 percent of family income, while the poorest fifth received less than 10 percent. Although the most affluent have always had a larger share of income, patterns of income distribution since the 1970s have shown that income growth has been more rapid for the top fifth than for the rest of the population. According to a recent study, income inequality was particularly acute in 2005: the richest 1 percent of Americans received the largest share of family income since 1928. The new data also shows that the richest 300,000 Americans received as much income in 2005 as the poorest 150 million Americans. In addition, the most affluent have cornered an even larger share of the nation’s wealth. The top 1 percent controls 38.1 percent of the country’s wealth, while the bottom 90 percent controls 29 percent of the country’s wealth. The wealth gap is particularly acute when racial comparisons are made. Over 60 percent of black households have no net worth as compared to 25 percent of white households. The convergence of race and poverty, and the effects of that convergence, are painfully evident in the aftermath of Hurricane Katrina.

Research has also demonstrated a connection between economic inequality and political voice. The political process is far more responsive to the claims of the privileged, and the privileged are far better organized and engaged in the political process than are less affluent citizens. Recent studies show that government officials are far more likely to support the policy preferences of the wealthy than those of the poor. In short, there is considerable evidence to suggest that there is a growing divide between those who have wealth and political influence and those who do not.

While the new inequality is not new as a matter of objective fact, it has attracted far less political and constitutional attention than the

4. See *Era of Rising Inequality*, supra note 1, at 3.  
5. Id.  
7. Id.  
8. See *Era of Rising Inequality*, supra note 1, at 4.  
9. Id. at 6.  
10. Id. at 9.  
11. See id. at 11.
traditional inequalities of identity, status, and recognition. One notable exception to this general trend is to be found in Cass Sunstein’s pathbreaking work, *The Second Bill of Rights*. Sunstein argues that President Roosevelt’s proposal for an economic bill of rights is an integral, though at times neglected, aspect of the American political and constitutional tradition. The objective of the second bill is to “protect both opportunity and security, by creating rights to employment, adequate food and clothing, decent shelter, education, recreation and medical care.” In what Sunstein describes as the greatest speech of the twentieth century, President Roosevelt stated that “true individual freedom cannot exist without economic security and independence.” Although the second bill has had a dramatic influence on international conventions and foreign constitutions, its principal tenets have been only partially accepted in the United States.

While the wealth divide is only one of many underlying issues that fall within the general subject of economic rights, it poses a number of challenges for our understanding of the Constitution. In a provocative and compelling new work, *Our Undemocratic Constitution*, Sanford Levinson invites us to seriously reconsider the democratic pedigree of the Constitution’s hard-wired features. I shall take this invitation as one to reconsider as well the constitutional significance of the wealth divide. To what extent is the new inequality a matter of constitutional concern? Should it be? Did the Framers see the disparity between the wealthy and the poor as a problem? If so, how did the Constitution of 1787 handle the problem of the wealth gap, if at all? To the extent that the Constitution resolved the problem of the wealth gap, how successful (or not) has it been? How successful (or not) will the original Constitution be in the twenty-first century with respect to managing the wealth gap?

This Essay addresses these questions and explores the constitutional significance of wealth in a democracy. Part I argues that the wealth divide drove key features of the Constitution’s architecture and design. I claim that the Framers viewed the wealth divide as a critically important issue; indeed, it was a central feature of the Constitution’s political theory at the time of the founding. In particular, I argue that

13. See id. at 1–2.
14. Id. at 1.
15. Id. at 12 (quoting President Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), *reprinted in Sunstein, supra note 12*, at 235–44).
16. See *Sunstein, supra note 12*, at 231–34.
the wealth divide was treated as a matter of deep constitutional significance because such a divide was seen to threaten the very survival of the republic itself. Thus, for James Madison, the task of constitutional design was to neutralize the potentially devastating political effects of the wealth divide by institutional means (rather than to eliminate the wealth divide itself). I examine the reasons offered by Madison for why the Constitution embodied the best solution to this vexing problem. Finally, Part I shows how the Framers’ views on the political significance of the wealth divide are consistent with a long line of thinkers, including Thucydides, Plato, Aristotle, Machiavelli, and Rousseau.

Part II turns to a consideration of the scholarly response to the Constitution, in particular the claim that the Constitution is an elitist document. I consider the views of the Anti-Federalists and a wide range of modern commentators on the Constitution’s elitist thrust. I show that the elitist critique is actually composed of several strands, and furthermore that these strands are more concerned with the problem of unequal political participation than with the potentially dire implications of the wealth divide.

Part III contends that this focus on the issue of participation takes much-needed attention away from problems involving sustained economic inequality. Although Madison treated the wealth gap as a constitutional issue, his solution did little to ameliorate the underlying problem. In addition, I suggest that the new inequality could pose significant challenges for constitutional politics in the decades to come, particularly if the wealth gap follows current trends and continues to widen dramatically. To that end, I briefly discuss three aspects of this problem that are constitutionally significant: first, the wealth divide itself; second, the role of private wealthy citizens in a constitutional democracy; and third, the interplay between political inequality and economic inequality. Lastly, I consider whether the wealth divide should be treated as a constitutional matter at all.

I. PRIVILEGE, POVERTY, AND THE SURVIVAL OF THE REPUBLIC

The authors of The Federalist took great pains to underscore the dismal history of republican government. In Federalist No. 9, Alexander Hamilton confessed that it was . . . impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agi-

18. See infra Part I.A.
tated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.\footnote{The Federalist No. 9, at 39 (Alexander Hamilton) (Clinton Rossiter ed., 1999).}

James Madison was hardly more optimistic, noting that such governments have “been spectacles of turbulence and contention,” and “have in general been as short in their lives as they have been violent in their deaths.”\footnote{The Federalist No. 10 (James Madison), supra note 19, at 49.} He observed that the “instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished.”\footnote{Id. at 45.} According to the Framers, history’s verdict was clear: republican government unleashed a frenzy of turbulence, contention, distraction, instability, injustice, and confusion, only to succumb inevitably to revolution, anarchy, or tyranny, and certain to end in violent death.

No doubt this condemnation of republican government was partially strategic. The Framers were anxious to show that a large republic was an entirely different, and vastly superior, political entity than a small democracy. By lamenting the flaws of small democracies, the Framers not only disarmed potential critics, but also laid the basis for their claims about the need for constituting a new federal republic.

It would be a mistake, though, to dismiss their concerns as simply rhetorical. Republican governments were, in their view, prone to fatal instabilities. Such governments inevitably succumbed to revolution, anarchy, or tyranny for a simple reason: the wealth divide between the rich and the poor. Madison’s preoccupation with the gap between the rich and the poor formed the basis of much of his, and the Constitution’s, underlying political theory.\footnote{See id. at 46–48 (describing the dangers to republican government posed by warring factions organized around the unequal distribution of wealth).} As Jennifer Nedelsky’s landmark study demonstrates, a fundamental objective of the constitutional framework was to protect the property interests of a wealthy minority from the claims of a propertyless majority.\footnote{See Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 5 (1990) (explaining that Madison believed that one of the most difficult political problems in creating the Constitution was protecting the rights of persons and the rights of property in a manner consistent with republican principles).} I wish to advance a related, but slightly different, claim here. I suggest that the “distinction of rich & poor”\footnote{James Madison, Speech at the Federal Convention of 1787 (June 26, 1787), in 1 The Records of the Federal Convention of 1787, at 421, 422 (Max Farrand ed., 1966).} was constitutionally significant not only...
because of the protection of property but also because of its certain impact on the very survival of republican government itself.

A. The Challenge of Constitutional Design

Many years after his involvement in the Framing, Madison laid forth his mature views on republican government in a short but illuminating essay.25 What is significant about Madison’s Note of 1821 is the light it sheds on constitutional design. For Madison, a central challenge of constitutional design was thwarting, or at least containing, the inevitable clash between the rich and the poor.26 In the Note of 1821, Madison offered both a diagnosis of the problem and four possible constitutional solutions.27 According to Madison, the clash between the rich and the poor posed a particular problem for representative government because of the following dilemma:

Allow the right [to vote] exclusively to property, and the rights of persons may be oppressed. The feudal polity alone sufficiently proves it. Extend it equally to all, and the rights of property or the claims of justice may be overruled by a majority without property, or interested in measures of injustice.28

Madison believed that in a just and free government “the rights both of property & of persons ought to be effectually guarded.”29 The problem, though, was that the interests of the wealthy were in jeopardy in a system of universal and equal suffrage, while the interests of the poor were at risk in a system of restricted suffrage.30

The risk presented by universal suffrage was that power would eventually be held by the unpropertied majority. Madison believed that an “increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings.”31 He went on to observe that eventually the indigent will outnumber the wealthy, and

26. See id. at 394–96 (exploring Madison’s struggle to determine how to protect both the liberty of the poor and the property of the rich).
27. See id. at 398–400.
28. Id. at 395.
29. Id.
30. Id.
31. See Madison, supra note 24.
under “the equal laws of suffrage, the power will slide into the hands of the former.”

The problem with the propertyless gaining power was not simply the resulting threat to property, but the fact that republican government itself would cease to exist. In a letter to John Brown in 1788, Madison stated that whenever all power lies in the hands of the poor,

. . . one of two things cannot fail to happen; either they will unite against the other description and become the dupes & instruments of ambition, or their poverty & independence will render them the mercenary instruments of wealth. In either case liberty will be subverted; in the first by a despotism growing out of anarchy, in the second, by an oligarchy founded on corruption.

The important point here is not simply that Madison wished to protect property for its own sake (which he undoubtedly did want to do), but also, and more critically, that Madison thought that the absence of political protection for property would precipitate the collapse of the republic itself. He believed that once power was held by a propertyless majority, republican government would not long survive. It, and the liberty that it fostered, would be replaced by either a despotic or an oligarchic regime.

Madison’s fears were by no means unique. The idea that extreme inequalities between the wealthy and the poor inevitably lead to fatal instabilities in a republic has a long intellectual pedigree. Philosophers as diverse as Thucydides, Plato, Aristotle, Machiavelli, and Rousseau had strikingly similar views about the effects of a dramatic wealth gap on the body politic. Sustained economic inequality was thought to produce corruption, which, in its ancient sense, was understood as a corrosive force that destroyed the entire political and social system. For these philosophers, the term “corruption” did not refer narrowly, as it does today, to the exchange of political favors for cash; instead, corruption referred more broadly to the moral incapacity of

32. Id.
35. Id.
citizens and rulers alike to make reasonably disinterested commitments that would benefit the common welfare.\textsuperscript{36}

According to these philosophers, extensive inequalities in wealth and power would lead to self-centered and factional behavior on the part of the upper classes, who, in an effort to protect themselves from the envy of the lower classes, would subvert the law and public office to their own ends. The disempowered majority, meanwhile, would lose their loyalty to the community and act selfishly to gain what they could.\textsuperscript{37} Factional conflict would not only engulf governmental functions, but also the entire citizenry. Relations between wealthy and poor citizens would become increasingly marked by polarization and violence, leading to rapid cyclings between demagogic popular politics, uprisings, anarchy, and autocratic control.\textsuperscript{38} Ordinary citizens would mistrust the political system so severely that they would cease to voluntarily support the primary structures of governance or to make any commitments to the common welfare.\textsuperscript{39}

Madison’s familiar arguments about the violence of factions, their emergence from the “various and unequal distribution of property,” and the resulting threat of majority tyranny\textsuperscript{40} are significant not only for what they say about either the vulnerability of minority rights or the primacy of property in the constitutional scheme, but for the light they shed on the Framers’ conviction that republican government was highly susceptible to collapse. It was for this reason, too, that Madison expressed such concern about the risk of open revolt and armed insurrection against the government, such as had occurred in Massachusetts months before the Federal Convention. Shay’s Rebellion was, according to Madison, “distressing beyond measure to the zealous friends of the Revolution.”\textsuperscript{41} Jefferson, by contrast, felt that the “late rebellion in Massachusetts has given more alarm than I think it should have done.”\textsuperscript{42} He added, “[c]alculate that one rebellion in 13 states in the course of 11 years, is but one for each state in a century and a half. No country should be so long without one. Nor will any degree of power in the hands of government prevent insurrections.”\textsuperscript{43} For

\textsuperscript{36} Id. at 958, 960.
\textsuperscript{37} Id. at 959–60, 963–64.
\textsuperscript{38} Id. at 960.
\textsuperscript{39} Id. at 959–60, 963–64.
\textsuperscript{40} \textit{The Federalist No. 10} (James Madison), \textit{supra} note 19, at 46–48.
\textsuperscript{41} James Madison, To George Muter, \textit{in} 9 \textit{The Papers of James Madison} 231 (Robert A. Rutland et al. eds., 1975).
\textsuperscript{43} Id. at 431–32.
Madison, however, such rebellions were harbingers of the eventual collapse and failure of the state. At the Federal Convention, Madison stated that “[n]o agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit, as we have understood, have sufficiently appeared in a certain quarters to give notice of the future danger.” He asked: “How is this danger to be guarded agst. [sic] on republican principles?”

B. Madison’s Four Institutional Solutions to the Wealth Divide

In the Note of 1821, Madison outlined four institutional solutions to this critical problem. The first was to restrict the right to vote to those who own property. During the Federal Convention of 1787, Madison argued that “the freeholders of the Country would be the safest depositories of Republican liberty” because in the future “a great majority of the people will not only be without landed, but any other sort of, property.” In his notes, however, Madison repudiated his earlier suggestion that property qualifications should attach to the right to vote in federal elections, claiming that the “right of suffrage is a fundamental Article in Republican Constitutions.” Property qualifications violate the “vital principle of free Government that those who are to be bound by laws, ought to have a voice in making them.”

This option was not only unjust because it handed power to a minority, but it was also unstable because the minority in power would have to constantly suppress the disenfranchised majority.

Madison’s second solution was to reserve one branch of government for those with property and one branch of government for those without property. Although this arrangement would provide a “mutual defence,” it would not in practice lead to fairness or equality. Under a two-branch system, the rights protected on each side were unequal—on one side there would be the rights of property and the rights of persons, while on the other side there would be only the rights of persons. Madison believed that these two branches of government would ultimately clash, with the “have-nots” branch using a legislative veto to extort concessions at the expense of the “haves”

44. See Madison, supra note 24, at 422–23.
45. Id. at 423.
46. See Note of 1821, supra note 25, at 398.
47. See id.
48. See Observations, supra note 33, at 203–04.
49. See Note of 1821, supra note 25, at 395.
50. Id. at 398.
51. Id.
52. Id.
branch.\textsuperscript{53} The conflict between the two branches could eventually undermine the republic itself: “[t]he division of the State into the two Classes, with distinct & independent Organs of power, and without any intermingled Agency whatever, might lead to contests & antipathies not dissimilar to those between the Patricians & Plebeians at Rome.”\textsuperscript{54}

The third solution was a combination of the first and second options.\textsuperscript{55} Property owners would elect one branch of the legislature, and would share a “common right” with all other citizens to elect the other branch.\textsuperscript{56} In this way, the propertied would hold a “defensive power,” and the propertyless would do so once they became a majority in the other branch. Although the representation would not be equal because the holders of property would enjoy a two-fold share of representation, it was preferable to having the division made the other way with the propertyless holding an extra share of representation.\textsuperscript{57}

The fourth solution was the one achieved by the U.S. Constitution.\textsuperscript{58} The Constitution’s solution to the wealth divide—in Madison’s estimation the best solution—consisted of two key features: universal suffrage and large electoral districts.\textsuperscript{59} As described in the Note of 1821, the first part of Madison’s constitutional solution—universal suffrage—was necessary to ensure that the rights of the majority were protected.\textsuperscript{60} In his observations on Jefferson’s draft constitution for Virginia, Madison noted that a system of government must provide protection for “the rights of persons, and the rights of property,”\textsuperscript{61} otherwise injustice would ensue: “Give all power to property, and the indigent [will] be oppressed. Give it to the latter and the effect may be transposed. Give a defensive share to each and each will be secure.”\textsuperscript{62} In \textit{The Federalist}, he embraced universal suffrage, emphasizing that both voters and candidates are to “be the great body of the people of the United States,” excluding neither the poor, nor the ignorant, nor those of humble birth.\textsuperscript{63} Another important rationale for universal (white-male) suffrage was political stability. Madison warned

\begin{footnotes}
53. \textit{Id.} at 399.
54. \textit{Id.}
56. \textit{Id.} at 399.
57. \textit{Id.}
58. \textit{Id.}
59. \textit{Id.} at 399–400.
60. \textit{See id.} at 400 (explaining that all citizens must have a voice in the creation of laws that they must obey).
62. \textit{Id.}
63. \textit{The Federalist No. 57} (James Madison), \textit{supra} note 19, at 319.
\end{footnotes}
that "it cannot be expedient to rest a Republican Government on a portion of the society having a numerical & physical force excluded from, and liable to be turned against it; and which would lead to a standing military force, dangerous to all parties & to liberty itself."64

Madison’s understanding of universal suffrage was extremely narrow; while he did include all white males—propertied or not, educated or not—he excluded slaves, racial minorities, aboriginal peoples, and women.65 In short, universal suffrage was anything but universal. In addition, although Madison insisted in Federalist No. 57 that those who vote and those who rule consist of the same group of individuals in a system of universal (white-male) suffrage, his expectation was that the political structures would lead to the election of established and prominent men.66 Bernard Manin, in his description of the aristocratic effect of representative government, referred to this expectation as the "principle of distinction."67 For Madison, the superior social status of the representatives was important not only because such individuals would be more immune to corruption, but also because they would possess the necessary skills and characteristics to govern effectively.68 As Manin noted, Madison hoped that representation would elevate this "natural aristocracy" of talent and virtue to public office; while for the Anti-Federalists, it was precisely the prospect of a natural aristocracy in command that provoked the most concern.69

The second part of Madison’s constitutional solution to the wealth divide was to mask and ultimately bury these dangerous differences by increasing the diversity in society.70 In Federalist No. 10, Madison posited the now familiar thesis:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be

64. See Note of 1821, supra note 25, at 406.  
65. See The Federalist No. 57 (James Madison), supra note 19, at 322–23 (explaining Madison’s view that enfranchisement should be limited to citizens).  
66. The Federalist No. 10 (James Madison), supra note 19, at 50–51.  
68. See The Federalist No. 57 (James Madison), supra note 19, at 318 (explaining that the aim of the republic is to select representatives with the “wisdom to discern” the public good, and sufficient virtue to pursue it).  
70. See Martin Diamond, Democracy and The Federalist: A Reconsideration of the Framers’ Intent, reprinted in As Far As Republican Principles Will Admit 17 (William A. Schambra ed., 1992) (explaining Madison’s view that the existence of multiple narrow interests will prevent the masses from uniting behind one class-based interest).
more difficult for all who feel it to discover their own strength and to act in unison with each other.71

The likelihood of a clash between the rich and the poor is lessened in a large republic because the citizens share fewer interests in common and have greater difficulty in discovering and acting upon those that they do share.72 For Madison, such basic differences between citizens were a natural and inevitable aspect of society:

In all civilized Societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest. . . . In addition to these natural distinctions, artificial ones will be founded, on accidental differences in political, religious or other opinions, or an attachment to the persons of leading individuals.73

In essence, Madison’s extended sphere thesis calls for a social separation of powers.74 For instance, in Vices of the Political System of the United States, Madison urged that in an extended sphere, the “Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other . . . .”75 He argued in a letter to Thomas Jefferson that in “a large Society, the people are broken into so many interests and parties.”76 Only “by comprehending in the society so many separate descriptions of citizens”77 is it possible to defend society against the probability that any one group will gain undue power.

Another reason an enlarged republic would bury differences between the rich and the poor is that individuals would experience difficulties in communicating their ideas and coordinating their efforts.

71. The Federalist No. 10 (James Madison), supra note 19, at 51.
72. Diamond, supra note 70, at 33–34.
73. James Madison, To Thomas Jefferson, in 10 The Papers of James Madison, supra note 33, at 212–13 [hereinafter To Thomas Jefferson].
74. One of Robert Dahl’s main criticisms of the Madisonian framework is that it relied in large part on constitutional checks against the majority even though such checks, in Dahl’s opinion, would scarcely work without the necessary social checks and balances. Robert A. Dahl, A Preface to Democratic Theory 22 (1956). Dahl’s analysis, however, underestimates the extent to which Madison’s theory is based upon a social separation of powers.
75. James Madison, Vices of the Political System of the United States, in 9 The Papers of James Madison, supra note 33, at 356–57 [hereinafter Vices of the Political System of the United States].
76. See To Thomas Jefferson, supra note 73, at 214.
77. The Federalist No. 51 (James Madison), supra note 19, at 292.
Madison wrote that in an enlarged sphere, “the requisite combinations [are] less easy to be formed by a great than by a small number.”78 Similarly, in the Federal Convention of 1787, Madison argued that even if a majority has a common interest “they may not be apt to unite in the pursuit of it.”79 Madison concluded that a large republic “was the only defense agst. [sic] the inconveniences of democracy consistent with the democratic form of Govt [sic].”80

Not only did the extended sphere mechanism prevent the formation of possibly dangerous coalitions within society, it also ensured the election of a certain kind of representative.81 Madison assumed that the size of the legislature would remain relatively constant across small and large republics.82 If the number of representatives remained relatively constant, the size of the districts in a large republic would have to be larger than those of a small republic. To get elected from a large district, a candidate would need the support of a large number of citizens in a dispersed area, thereby lessening the chance that he could win the election by resorting to the use of fraud and corruption. The result, argued Madison, is that voters “will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.”83

Some commentators, such as Hanna Pitkin, argue that Madison did not place much faith in the filtering effect of wise representatives. His observation that “[e]nlightened statesmen will not always be at the helm”84 is said to underscore his preference for institutional constraints—such as the extended sphere—rather than human constraints—such as wise rulers—on the abuse of power.85 Pitkin’s

78. See Vices of the Political System of the United States, supra note 75.
80. Id. at 134–35.
81. See Nedelsky, supra note 23, at 53 (explaining that Madison believed that representatives elected by large electorates would be highly independent and less susceptible to undue influence). According to Dahl, Madison provided “an extremely dubious and probably false set of propositions purporting to show that representation in a large republic will provide ‘better’ politicians . . . .” DAIH, supra note 74, at 16. Madison, however, never purported to prove that a larger republic has better representatives, only that a larger republic has a greater supply of meritorious candidates than a smaller republic, assuming that the proportion of such candidates in any population is constant, and assuming also that the size of the legislature in a small and a large republic will be similar. In other words, an extended republic has a greater likelihood of supplying a higher number of superior representatives. See The Federalist No. 10 (James Madison), supra note 19, at 50.
82. See The Federalist No. 10 (James Madison), supra note 19, at 50.
83. Id. at 50–51.
84. Id. at 48.
position, however, understates Madison’s commitment to securing good representatives. He asserted that the “aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.” In any event, Madison saw a connection between institutional constraints and human constraints. The extended sphere, and the large districts that accompany it, would not only lead to the election of certain kinds of candidates, but would also protect representatives from the power of localized interests. In his recommendations to Jefferson on the constitution for Virginia, Madison advocated large districts as the “most effectual remedy for the local bias [sic]” because representatives would be forced to attend to the “interest of the whole Society.” Similarly, in Federalist No. 57, Madison wrote with respect to a large district that “in so great a number a fit representative would be most likely to be found, so the choice would be less likely to be diverted from him by the intrigues of the ambitious or the bribes of the rich.” Representation across a wider territory breaks powerful local relationships between candidates and voters, allowing for the election of national, general, and public-spirited representatives.

Madison’s support for these two constitutional structures was based on a sociological assessment of the interplay between poverty, wealth, and power in a republic. The original Constitution was designed in part to neutralize the potentially devastating political effects of the wealth divide. Universal suffrage provided protection for the poor, while the extended sphere and large electoral districts shifted political power to a select few who, at least in theory, would be insulated from the pull of localized interests. The clash between the rich and the poor was worrisome to Madison not only because it posed a threat to the rights of property, but also (and especially) because such a clash would threaten the existence of the republic itself. Madison’s constitutional solution did not touch the underlying problem of severe economic inequality; instead, it aimed to ensure that the

86. The Federalist No. 57 (James Madison), supra note 19, at 318.
88. See Observations, supra note 33, at 286.
89. The Federalist No. 57 (James Madison), supra note 19, at 322.
90. See Note of 1821, supra note 25, at 395–400 (exploring Madison’s views on the nexus between wealth and suffrage).
91. See supra text accompanying notes 25–45.
political effects of such economic inequality would remain muted. From a democratic standpoint, this solution is deeply troubling for any number of reasons, one of which is that it undermined any potential on the part of those less fortunate to use the political system to forward their own interests.

II. An Elitist Model of Government?

The Declaration of Independence, signed on July 4, 1776, heralded a new democratic era with its statement that “all men are created equal.” In contrast to the democratic principles of the Declaration, the Constitution has been viewed from the time of its inception as an elitist document. In this Part, I consider the criticisms of the Anti-Federalists and contemporary commentators.

A. The Anti-Federalist Critique

The Anti-Federalists criticized the proposed Constitution for erecting an aristocratic tyranny in which a powerful few would rule the people. They relied in great measure on Montesquieu’s observation that “[i]t is in the nature of a republic to have only a small territory; otherwise, it can scarcely continue to exist. . . . In a large republic, the common good is sacrificed to a thousand considerations . . . .” The Anti-Federalists believed that a small republic provided the only real security for liberty, and by extension, a large republic inevitably resulted in the abuse of power.

Brutus, a leading Anti-Federalist, contended that in a large republic “the great officers of government would soon become above the controul [sic] of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.” In addition, the small size of the proposed national assembly meant that power would be further concentrated at the center, thereby favoring the wealthy and powerful at the expense of the middle classes. For the Anti-Federalists, then, a large republic with a small national assembly

92. See supra text accompanying notes 58–83.
93. The Declaration of Independence para. 2 (U.S. 1776).
94. Storing, supra note 69, at 48–52.
96. See Storing, supra note 69, at 16–21.
98. See Brutus, Fair Representation Is the Great Desideratum in Politics, N.Y. J. (Nov. 29, 1787), reprinted in 1 The Debate on the Constitution, supra note 97, at 424.
would result in rule by a self-serving elite, rather than rule by the people.

By contrast, representation for the Anti-Federalists (and indeed for many political commentators at that time) meant the reflection in the legislature of all the classes, interests, and groups in society. Mirror representation requires that a representative assembly “be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them.”99 Similarly, for Brutus, the very definition of representation was that the representative resemble his constituents.100 He argued that in a large and extended nation, it was impossible for all the interests of the people to be represented in the assembly, “without having it so numerous and unwieldy, as to be subject in great measure to the inconvenience of a democratic government.”101 Reducing the size of the assembly was no solution either, because a small assembly could not be truly representative of the people. A true representative must also be personally known to the constituents so that they can entrust their affairs to him. Brutus argued that, given the extent of the proposed federation, “the people in general would be acquainted with very few of their rulers: the people at large would know little of their proceedings, and it would be extremely difficult to change them.”102 Brutus concluded that under the proposed Constitution, “representation is merely nominal—a mere burlesque.”103

B. The Contemporary Critique

In a similar fashion, modern commentators have claimed that the Constitution concentrates power in the hands of the elite. Charles Beard’s enormously influential economic analysis recast the Constitution as an undemocratic document designed to protect the interests of the privileged classes.104 Although Robert Dahl eschewed Beard’s economic analysis in favor of a pluralist reading of Federalist No. 10, he too concluded that Madison “wished to erect a political system that

100. See Storing, supra note 69, at 17–18 (describing how the Anti-Federalists sought “a sameness, as to residence and interests, between the representative and his constituents”).
101. See Brutus, supra note 97, at 172.
102. Id. at 174.
103. See Brutus, Representation is Mere Nominal—A Mere Burlesque, N.Y. J. (Nov. 15, 1787), reprinted in 1 The Debate on the Constitution, supra note 97, at 323.
would guarantee the liberties of certain minorities whose advantages of status, power, and wealth would, he thought, probably not be tolerated indefinitely by a constitutionally untrammeled majority."105

Jennifer Nedelsky noted with respect to the Madisonian model that "an approach that identified the 'people' as the problem could hardly be expected to foster the popular participation that, at one level, is the essence of republican government."106 For Joshua Miller, the Framers actually supported popular sovereignty, which creates power for a strong central government and discourages the active participation of the people.107 Along the same lines, Emery Lee argued that Madison favored an "elitist theory of self-government, one that greatly reduces the role of the people themselves in their own government."108 Hanna Pitkin also thought that Madison used representation to minimize the threat of popular participation. Pitkin contended that "it was almost inevitable that the authors of the Federalist should treat participation in government as a personal right; since they feared and opposed democracy, representation seemed a desirable way to allow such participation in safety."109 For many scholars, the Constitution establishes an elitist democracy that deprives the people of equal participation.

Contemporary commentators have also focused on the actual provisions of the Constitution, and not simply on the political thought of the founding era, in order to assess the democratic nature of the Constitution. In Our Undemocratic Constitution, Sanford Levinson invites his readers to engage in a hypothetical referendum on the need to call for a new constitutional convention to remedy the Constitution's significant democratic deficits.110 Levinson identifies and analyzes in considerable depth a host of structural ailments including unequal representation in the Senate,111 the Electoral College,112 an excessively powerful and unaccountable executive,113 life tenure for Supreme Court justices,114 and an amendment process that is unable

105. DAHL, supra note 74, at 31.
106. NEDELSKY, supra note 23, at 204.
109. PITKIN, supra note 85, at 191.
110. LEVINSON, supra note 17.
111. Id. at 50–54.
112. Id. at 82–89.
113. Id. at 102–09.
114. Id. at 128–33.
to remedy these structural deficits. Robert Dahl has also identified a number of the original Constitution’s democratic shortcomings, but Dahl is significantly more pessimistic about the possibilities for change. Like earlier critics, these scholars highlight the democratic deficiencies of the Constitution.

Some commentators have contested the elitist account by arguing either that Madison’s theory was not elitist, or that to the extent his theory was elitist, it was consistent with democracy properly understood. Martin Diamond, for instance, observed that it has been commonly accepted that the Constitution “embodied a reaction against the democratic principles espoused in the Declaration of Independence.” By contrast, Diamond insisted that the Framers intended a democratic order designed in such a way as to avoid the vices, and enhance the virtues, of the ancient democracies. Moreover, the so-called undemocratic features of the Constitution, such as the Electoral College, bicameralism, and the presidency, were not meant to stifle majorities so much as to ensure the formation of effective and moderate majorities. According to Lance Banning, Madison, while not a radical democrat, envisioned a constitutional structure that was ultimately controlled by and accountable to the people. By contrast, Gordon Wood readily characterized the Framers’ republicanism as “an elitist theory of democracy.” But the elitist position did not, in Wood’s view, constitute a rejection of democracy so much as a modification of its excesses.

115. Id. at 160–66.
117. See Diamond, supra note 70, at 17.
118. See id. at 17–21 (presenting the view that the Framers intended to form a democratic government by remaining faithful to the intent of popular government, while solving the problem presented by such a government by incorporating aspects of a republic government).
119. See id. at 23–24 (arguing that features of the Constitution that may seem undemocratic were designed to allow nationally distributed majorities).
122. Id.
III. Economic Inequality and the Constitution

The elitist critique of the Constitution is composed of several threads, which can be organized into the following clusters of ideas and claims:

1. The Constitution was designed so that power is in the hands of a few.
2. The Constitution was designed to ensure that the few who hold public office come from the wealthy and privileged classes.
3. The Constitution was designed so that those holding public office would protect elite interests.
4. The Constitution was designed to discourage popular participation.

Although each thread has a slightly different focus, they are all concerned with the idea that the few wield disproportionate political power, and, conversely, that the many are denied political representation and participation. The elitist critique is primarily concerned with political inequality, particularly with respect to the opportunity to hold public office.

What is interesting about this critique is that it pays less attention to what Madison considered to be a central issue for constitutional design—the problem that deeply rooted economic inequality could lead to the destruction of the republic. To be sure, the Anti-Federalists were concerned that an aristocratic tyranny would favor the interests of the wealthy; likewise, the progressive and pluralist interpretations asserted that the Constitution favored the interests of the privileged.123 There is also some discussion within the elitist critique, in particular by Jennifer Nedelsky, about the ways in which political power and economic power overlap and influence one another.124 While these assessments are persuasive—and to my mind correct—they do not fully wrestle with the validity, if any, of Madison’s concerns about the dire political implications of extreme economic inequality. These critiques show instead how the Constitution helps to maintain an existing wealth divide.125 Although we may disagree both with Madison’s diagnosis of the problem and with his constitutional solution, and while we may instead favor policies that eliminate rather than neutralize the wealth divide, we should consider the problem he raised—namely, that there are potentially severe political conse-

123. See supra text accompanying notes 104–105.
125. See supra text accompanying notes 104–109.
quences that flow from a dramatic wealth divide, and that part of the task of constitutional design is to address this problem.

To that end, I briefly discuss three areas in which economic inequality has constitutional significance, and for each area I raise some key questions and issues. My objective is not to provide an exhaustive treatment of these complex problems; instead, I aim to identify some lines of inquiry and to briefly sketch the implications of these issues for constitutional design. The first issue is the significance of the wealth divide itself; the second issue is the role of private wealthy citizens in a democracy; and the third issue is the interaction between political inequality and economic inequality. By calling them constitutionally significant I do not mean that these topics are necessarily relevant for judicial interpretation; instead, I mean that these topics have a constitutional dimension in addition to a strictly social or economic dimension.

A. The Wealth Divide

The first area of constitutional significance is the wealth divide itself. As discussed above, it is notable that this issue, which was important to Madison, has not been given the same weight by most commentators, apart from showing that the Constitution helps to maintain an existing wealth gap. This observation leads to two sets of questions. First, to what extent do we agree with the Framers’ diagnosis of the problem? Is the wealth divide constitutionally significant? Is a clash between the rich and the poor likely and, if so, would it threaten the survival of the republic? And second, to what extent do we agree with the Framers’ solution to the problem? Are institutional features such as universal suffrage and a large republic sufficient to prevent the negative consequences of the wealth divide? Should we be trying to neutralize the political effects of the wealth divide, or should we reduce the wealth divide itself?

In terms of the diagnosis of the problem, one significant issue is that Madison assumed that in the future the majority of the people would be living in poverty, or at least would be unpropertied. During the Federal Convention, Madison anticipated that society would be composed of a few wealthy individuals, perhaps a small middle class, and a very large percentage of poor people—a classic recipe for societal instability. In the 1820s, though, Madison acknowledged

126. See Madison, supra note 24, at 422–23.
127. Id.
that the gap between rich and poor would not rise to the level of Europe:

The United States have a precious advantage also in the actual distribution of property particularly the landed property; and in the universal hope of acquiring property. This latter peculiarity is among the happiest contrasts in their situation to that of the old world, where no anticipated change in this respect, can generally inspire a like sympathy with the rights of property. 128

Madison’s sociological assumptions were wrong: although there is a divide between the rich and the poor, the gap is not as wide as Madison predicted and it is partially offset by the existence of a significant middle class.129 It could be that the wealth divide is not constitutionally significant, or that it would be constitutionally significant only in the presence of certain specific conditions that have not yet come to pass.

Madison’s analysis is also at odds with Americans’ perceptions of wealth disparities. Opinion surveys in the United States have shown that economic inequality is tolerated and is viewed as legitimately reflecting innate differences in effort and talent.130 The tolerance of economic inequality can be undermined, however, in the following situations: (1) when people do not have the same opportunity to succeed, and (2) when economic inequalities deny citizens the opportunity to participate equally and have their concerns met by government.131 Americans are becoming increasingly concerned that citizens do not have an equal say in politics, and that the government is not responsive to the needs of all people.132 The greater concern being expressed about economic inequality suggests that the wealth divide may become a politically salient issue once a certain threshold has been reached in terms of denial of economic opportunity and political voice.

In terms of the constitutional solution to the wealth divide, the Framers relied on a number of measures designed to reduce the chance that the mass of the propertyless poor would control the republic’s political power.133 As discussed in Part II, many critics rightly

128. See Note of 1821, supra note 25, at 396.  
129. See Era of Rising Inequality, supra note 1, at 3–5 (demonstrating statistics to evidence that the middle class comprises two-fifths of the United States’ population).  
130. Id. at 7.  
131. Id. at 7–8.  
132. Id. at 8.  
133. See supra text accompanying notes 58–89.
condemn these structures precisely because they limit popular participation. From the Framers’ point of view, though, the constitutional solution may be seen as a success—albeit a success that from our perspective is distinctly undemocratic and morally repugnant. They were not interested in reducing the wealth gap through constitutional means, only in neutralizing its political consequences.134 The United States has not suffered from deep political instability since the Civil War, there are no overt clashes between the rich and the poor that threaten the survival of the republic, and the likelihood of a socialist party emerging is very low.135 Indeed, the Framers’ solution—assuming it is responsible for any of this—can be said to have been too successful. Despite the desperate poverty of so many Americans, the wealth divide is not treated as a major issue of public concern in everyday politics.

B. The Public Significance of Private Wealth

For the Framers, roughly speaking, the propertyless posed a threat to republican government, while the wealthy were viewed as the solution.136 It is not accurate, however, to say that the Framers saw no threat from the wealthy. The Framers’ support for universal suffrage was based in part on the fear that the majority could become oppressed by a powerful minority. Madison, for instance, expressed concern about the dangers to the poor: “It is nevertheless certain, that there are various ways in which the rich may oppress the poor; in which property may oppress liberty; and that the world is filled with examples. It is necessary that the poor should have a defense against the danger.”137

Even though Madison was concerned with the dangers the rich posed to the poor, he showed far less concern for the dangers that the rich posed to the republican system of government.138 Madison was cognizant of the general dangers posed by corruption. In addition, he

134. See supra text accompanying notes 25–33, 58–89.


136. An important exception to this general rule was those whose wealth lay primarily in landed property. As Madison observed, it was often these individuals who purchased their land on credit, secured public office, and then agitated in favor of debtor relief laws. See Morgan, supra note 87, at 875.

137. See Note of 1821, supra note 25, at 395–96.

138. Indeed, Madison viewed the wealthy as protecting, rather than endangering, republican government. In his notes, for instance, Madison observed that large districts are “manifestly favorable to the election of persons of general respectability, and of probable attachment to the rights of property.” Id. at 399.
thought that certain wealthy citizens could be a danger if they ran for public office. He noted that it was possible for an unscrupulous but distinguished candidate to “recommend himself to popular choice by espousing a popular though unjust object.”\textsuperscript{139} Large electoral districts, he hoped, would lessen the appeal of these kinds of factious demagogues. During the Federal Convention, Alexander Hamilton privately disagreed with Madison’s optimism, noting that “[a]n influential demagogue will give an impulse to the whole—Demagogues are not always inconsiderable persons—Patricians were frequently demagogues.”\textsuperscript{140}

Although Madison was aware of the potential dangers posed by wealthy citizens when they held public office, he did not adequately consider that private citizens could wield disproportionate political power by virtue of their wealth, even without holding formal political office. The Constitution has numerous protections against the concentration of political power through such mechanisms as the separation of powers, periodic elections, an independent judiciary, federalism, bicameralism, and so forth, but it does not have similar protections against concentrated private wealth. The Framers’ solution was to get the wealthy into power and then put controls on them so that they could not easily violate the public trust.\textsuperscript{141} The flaw with this model is that it does not place any constraints on the public influence of private wealth.

Two recent works have discussed this important issue. According to John McCormick, modern constitutions focus on controlling the power of public officials rather than the power of wealthy citizens.\textsuperscript{142} Yet modern republics are just as susceptible to having the wealthy corrupt governmental processes as were the ancient republics. Before the eighteenth century, republican theory held that the wealthy were among the greatest threats to liberty—a dramatic contrast to the Framers who viewed the people as a principal danger to the stability of the regime.\textsuperscript{143}

On a slightly different note, Stephen Elkin has argued in a landmark work, \textit{Reconstructing the Commercial Republic}, that James Madison did not anticipate that the propertied would become more influential in politics and, simultaneously, would narrow the scope of

\begin{itemize}
  \item \textsuperscript{139} \textit{Id.} at 399–400.
  \item \textsuperscript{140} See Madison, \textit{supra} note 79, at 146–47.
  \item \textsuperscript{141} \textit{The Federalist} No. 10 (James Madison), \textit{supra} note 19.
  \item \textsuperscript{143} \textit{Id.}
\end{itemize}
their interests. Elkin observes that “Madison’s men of landed property and standing have turned into capitalists. They are no longer the respectable men of affairs who might plausibly have a broad view of the interests of the country . . . .” In addition to narrowing their interests, the new capitalists have greater access to politicians than was originally anticipated. While attentive to the important implications of the unanticipated political role of the propertied in politics, Elkin is careful not to attribute the complexity of this issue to Madisonian constitutional design alone.

The concerns identified by McCormick and Elkin have been voiced for many years in an important contemporary debate: the constitutionality of campaign finance regulation. According to some people, campaign finance regulations are necessary to combat corruption. On this view, the electoral process must be protected from quid pro quo exchanges in which contributors provide cash to officeholders in exchange for political favors. Unlimited donations from wealthy citizens illegitimately allow these individuals to translate their personal wealth into political power and influence. As Cass Sunstein observes, restrictions on campaign finance “promote political deliberation and political equality by reducing the distorting effects of disparities in wealth.” Other commentators have argued, however, that campaign finance reform leads to undesirable democratic consequences as well. In any event, the debate over campaign finance reform is part of a larger question concerning the proper role of private wealth in democratic politics. As the wealth divide continues to

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145. Id. at 54.
146. Id. at 61–62 (discussing the privileged political positions of businessmen).
147. Id. at 69 (explaining that capitalism also propelled the business privilege).
149. See Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 291 (1992) (noting that some scholars justify campaign finance restrictions as a way to promote political deliberation by reducing the ability of the rich to use their money to buy influence).
150. Id.
151. Id.
widen in the United States, there is little doubt that the constitutional and political significance of private wealth will become an increasingly important topic for democratic theory and practice.

C. Interaction of Inequalities

The third area of inquiry is the interplay between political inequality and economic inequality. What are the political consequences of economic inequality? What are the economic consequences of political inequality? I suggest that these two phenomena are mutually reinforcing in both positive and negative directions. Wealth and power are mutually reinforcing with the result that wealth tends to entrench, rather than distribute, power over time. In the same way, political inequality and economic inequality are mutually reinforcing. Part of the difficulty in breaking these patterns is that while political power is viewed as public and therefore properly subject to constraint, wealth is generally viewed as falling within a sphere of private liberty and therefore not legitimately subject to governmental interference.

In the end, Madison may have appreciated the interaction between economic means and political means better than we do, and certainly better than we give him credit for. Although we should harbor serious reservations about his proposed constitutional solution, the fact remains that he saw the interaction between wealth, poverty, and power as being critically important for constitutional design. For Madison, wealth and poverty were not simply social issues, instead they were deeply and inescapably political and constitutional ones.

IV. Conclusion

For the last thirty years, the wealth divide between the rich and the poor has been increasing more rapidly in the United States than in other developed countries. Although this new inequality is not new as a statistical matter, it has generally received far less constitutional attention than the problem of political inequality. This Essay shows that at the time of the Founding, however, the wealth divide was treated as a matter of deep constitutional significance because such a

153. See Era of Rising Inequality, supra note 1, at 9–11 (explaining that politicians vote disproportionally for the policy preferences of their most privileged constituents).

154. Id.


156. See Era of Rising Inequality, supra note 1, at 3.
divide was seen to threaten the very survival of republican government itself. The Framers designed the Constitution specifically to neutralize the deleterious political effects of sustained economic inequality.157

This Essay examines a range of critiques of the Constitution, almost all of which have charged that the Constitution is an elitist document. I show that the elitist critique tends to focus more closely on the problem of unequal political participation than on the problem of the potentially dire political consequences resulting from severe economic inequality. After canvassing the elitist critique of the Constitution, I suggest that the new inequality could pose significant challenges for constitutional politics in the decades to come, particularly if the wealth gap follows current trends and continues to widen dramatically. To that end, I identify several aspects of the wealth divide that are constitutionally significant.

Although the eighteenth-century Constitution treated the wealth divide as a constitutional issue, it may well be that the wealth divide will be of less constitutional salience in our twenty-first-century world. Or it may be that growing economic inequality will eventually create the kind of societal disruptions and instabilities that so concerned the Framers. It is difficult to predict if the constitutional structure can withstand further increases in the wealth divide. In any event, Madison’s solution of simply neutralizing the wealth divide by constitutional means is not acceptable, either morally or democratically, for a twenty-first-century constitution.

Should the wealth divide be seen instead as a legislative issue? Although Madison responded to the wealth divide as a socio-economic fact to be managed by constitutional means, he also believed that the disparity between the rich and the poor should be minimized by legislation. He argued in favor 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 toward a state of comfort.”158 Political equality could be established by “withholding unnecessary opportunities from a few, to increase the inequality of property, by an immoderate, and especially unmerited, accumulation of riches.”159 To some extent, the New Deal ushered in a range of policies that protect lower-income individuals. Madison’s proposal has also been achieved with such programs as Medicaid and

157. See supra text accompanying notes 58–89.
159. Id.
social assistance. These programs, however, have had limited success in eradicating poverty.

The remaining challenge, of course, is that legislation will not reduce the wealth divide nor reflect the interests of the poor unless and until the wealthy view it to be in their long-term self-interest to do so. From a democratic perspective, it is deeply troubling to consider that American citizens have dramatically different economic opportunities and outcomes. It is also deeply troubling to consider that in a land of remarkable wealth, many citizens (many of whom are children) are living their lives in desperate poverty. Even if the wealth divide is no longer constitutionally significant, it is, or at least it should be treated as, democratically significant.
