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THE REPUBLICAN REVIVAL
DEBATE—PRIVATE ECONOMIC POWER, THE FORGOTTEN FACTOR

Walter J. Kendall III*

In a recent commentary, Richard Fallon asked “[w]hat is Republicanism, and is it worth reviving?” 1 Twice, in dismissing the possibility of a “republican revival,” 2 Fallon relied on an understanding of Republicanism that does not include Madison’s “republican remedy” for the diseases of historic republican governments. 3 At one place he said, “[i]t is old news that classical republicanism—the paradigmatic republicanism of Aristotle, Machiavelli, and arguably the patriots of the American revolution 4 — could most credibly promise to fulfill human nature through political action in the context of relatively small and homogeneous communities.” 5 Fallon stated,

Michelman & Sunstein could scarcely be further removed from a central assumption of classical republicans: that the degree of virtue and consensus that is necessary to make republican politics attractive and workable could come only within a small community of civic-minded citizens who are inculcated by the state with the appropriate virtues. 6

What would the answer to Fallon’s questions be if republicanism included Madison’s republican remedy of enlarging the sphere of republican government? Madison would agree with Fallon that classical republicanism assumes a small and homogeneous community. Madison also recognized that no such governments survive. They all died of the “inherent” republican diseases of faction, injustice, and instability. 7 In pondering how self-government could survive in the post-revolution pe-

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3. Fallon, supra note 1, at 1733.
4. See generally M. Egnal, A Mighty Empire (1988) (arguing that the makers of the American Revolution were territorial and economic expansionists).
5. Fallon, supra note 1, at 1733.
6. Id. at 1735.
period, Madison devised an "immunity" system for these diseases, recognizing that they could not be cured. The system required the enlargement of the sphere of self-government so that no faction could achieve the power necessary to create injustice and yet these factions would be such a substantial part of the decision-making process that they would be bound by the rules and laws that provide stability to government.

Did Madison assume, along with the classics, that homogeneity was also a requisite for republicanism? Certainly, that is the usual assumption about his views. As Jefferson's collaborator, Madison must have shared his commitment to a homogeneous, pastoral nation of free holders. Our modern heterogeneity, if not nihilism, would thus

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8. See Michelman, The Supreme Court 1989 Term- Foreword: Traces of Self-Government, 100 HARV. L. REV. 4 (1986); Sunstein, supra note 2, at 1539. Both authors seem to see a cure or cures for these diseases. Thus, similar to Robert Owen, they are not Madisonian realists. One commentator extends this medicinal metaphor to political parties, describing them as medicine for the virus of faction. McWilliams, The Anti-Federalists, Representative and Party, 84 N.W. L. REV. 12, 36 (1989).


10. In 1816, Jefferson wrote a letter to William H. Crawford, a leading Jeffersonian who became Monroe's Secretary of the Treasury and was a Presidential candidate in the disputed election of 1824, in which he said:

   Every society has a right to fix the fundamental principles of its association and to say to all individuals, that, if they contemplate pursuits beyond the limits of these principles, and involving dangers which the society chooses to avoid, they must go somewhere else for their exercise; that we want no citizens, and still less ephemeral and pseudo-citizens, on such terms. We may exclude them from our territory, as we do persons infected with disease. Such is the situation of our country. We have most abundant resources of happiness within ourselves, which we may enjoy in peace and safety, without permitting a few citizens, infected with the mania of rambling and gambling to bring danger on the great mass engaged in innocent and safe pursuits at home. In your letter to Fisk, you have fairly stated the alternatives between which we are to choose: I, licentious commerce and gambling speculations for a few, with eternal war for the many; or, 2, restricted commerce, peace, and steady occupations for all. If any state in the Union will declare that it prefers separation with the first alternative, to a continuance in union without it, I have no hesitation in saying, "let us separate." I would rather the states should withdraw, which are for unlimited commerce and war, and confederate with those alone which are for peace and agriculture.


11. Leo Marx explains this important term:

   Although the term Agrarian ordinarily is used to describe the social ideal that Jefferson is endorsing . . . to call it Pastoral would be more accurate and illuminating. This is not a quibble: a serious distinction is involved . . .

   . . . The chief difference is the relative importance of economic factors implied by each term. To call Jefferson an agrarian is to imply that his argument rests, at bottom, upon a commitment to an agricultural economy. But . . . he manifestly is repudiating the importance of economic criteria in evaluating the relative merits of various forms of society. Although the true agrarians of his day, the physiocrats, had demonstrated the superior efficiency of large scale agriculture, Jefferson continues to advocate the small, family sized farm.


12. See Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982) (one of several
not permit republicanism, even if size were not a problem. It really
does not matter that Fallon did not acknowledge Madison’s contribu-
tion to republican theory; the republican theory still cannot work. But,
suppose Madison had anticipated the passing of the Jeffersonian ideal\textsuperscript{13} and the current heterogeneity of American society?\textsuperscript{14} Then, maybe, re-
publicanism has something to offer.

This essay isolates private economic power as a factor to be con-
sidered in the current liberalism-republicanism debate. Madison’s views
are set out in the context of the larger anti-bellum debate about the
future direction of the country. In a sense, this essay is a look back-
ward to elaborate Madison’s views, rather than an advance. Neverthe-
less, clarity about the realism of Madison’s views strengthens republic-
anism as an option. Finally, regardless of theoretical labels,\textsuperscript{15} private
economic power must be acknowledged as real, requiring an answer to
Locke’s “great question” as to who should have power.

The debate between liberalism and republicanism is not easily
summarized. Both concepts are complex and difficult to define. Never-
theless, Fallon has provided a brief genealogy and outline which indi-
cates the breath and depth of the debate. Liberalism “is a philosophical
document associated with such thinkers as Locke, Kant, Mill, &
Rawls.”\textsuperscript{16} Republicanism traces its roots to Aristotle, Machiavelli, Har-

\begin{footnotesize}
\begin{enumerate}
\item See R. Matthews, supra note 10, at 15-16 (questioning whether Jeffersonianism repres-
tsents the real views of Jefferson himself).

\item He did. See infra notes 64-84 and accompanying text; see also The Federalist No. 41
(J. Madison); cf. R. Rutland, James Madison: The Founding Father 89 (1987). Regarding
Madison’s opposition to Hamilton’s assumption plans in the 1st Congress “Madison found it im-
possible to readjust his thinking when a new era arrived, swinging the country away from policies
favoring farmers and protecting commerce and industry instead.” Id.

Drew McCoy’s recent study of Madison’s retirement focuses on the impact on Madison and
his republican theory of the “momentous shift” from the 1780’s to the 1850’s which resulted in
what McCoy described as “two very different worlds of experience.” D. McCoy, The Last of
the Fathers 35 n.50 (1989) (citing R. Wiebe, The Opening of American Society: From the
Adoption of the Constitution to the Eve of Disunion (1984)). The Madison of history is a
Madison who died in 1817 when he left the White House. Id. at 35. McCoy’s book is important
precisely because it presents a Madison who influenced and was influenced by events for 20 more
years.

\item Modern language theory makes one aware of the manifold meanings in words. See Es-
kridge, Gadamer/Statutory Interpretation, 90 COLUM. L. REV. 609 (1990). See generally Yablon,
Law and Metaphysics (Book Review), 96 Yale L.J. 613 (1987) (summarizing the attempts of
legal scholars to understand the significance of the indeterminacy of language). See Eskridge,
Gadamer/Statututory Interpretation. 90 COLUM L. REV. 609 (1990). Translations or paraphrases
are always “disturbing” and distorting. Rabussa, No Two Snowflakes Are Alike: Translation as
Metaphor, in The Craft of Translation 12 (1989); see Kannarf, The Constitutional Catechism
of Antonin Scalia, 99 YALE L.J. 1297, 1316 n.100 (1990). The aphorism is Traduttore, Traditore,
the translator is a betrayer. Thus, the extensive use of quotations in this essay will let the reader
directly address the text and better assess its meanings.

\item See Fallon, supra note 1, at 1696.
\end{enumerate}
\end{footnotesize}
rington, and Arendt. Most versions of liberalism "insist that individual human beings are ultimate subjects of moral value, that they are capable of being oppressed by other human beings and by government, and that a society, in order to be just, must therefore recognize a system of individual rights and enforce those rights evenhandedly." Republicanism's core tenets would be "that human beings are essentially political animals, that they can fulfill their natures only by participating in self-government, and that the most important aims of the political community should be to promote virtue among the citizenry and to advance the common good." Having so defined the competing paradigms, Fallon then found republicanism unacceptable:

Too many of its central assumptions—that human nature has a uniform purpose or telos that can be fulfilled only through participation in political activity, that there exists an objective public good apart from individual goods, and that this objective good can be discovered through virtuous political debate—are highly uncongenial to modern ontology and epistemology. Most of us no longer believe that the good of the public could be anything other than some function of the good for individuals, we are skeptical that there is a uniform human nature capable of fulfillment only through politics, and the idea that republican politics would yield unanimity over the nature of the good strikes us as either delusive or tyrannical.

At a recent conference on Classical Philosophy and the American Constitutional Order at Chicago-Kent Law School, Cass Sunstein, one of the leading scholars of the Republican revival, described himself as a "liberal republican." This seems to end the debate. However, was the debate merely a pendulum swinging back from the methodological individualism of micro-economics, game theory and public choice theory, restoring a visible social or public dimension to that logic?

17. Id.
18. Id. at 1697.
19. Id. (footnotes omitted).
20. Id. at 1698-99 (footnotes omitted).
22. The debate is the debate between liberalism and republicanism. For a discussion of this debate, see supra notes 16-19 and accompanying text.
23. "Microeconomics deals with the economic behavior of individual units such as consumers, firms, and resource owners; while macroeconomics deals with the behavior of economic aggregates such as gross national product and the level of employment." E. Mansfield, Microeconomics I (4th ed. 1982).
24. "The theory of games studies in general terms the strategies that rational actors would follow in situations where . . . decisions are interdependent—in other words, where each party's outcome depends jointly on how he acts and how the other parties act." B. Barry, Economics & Democracy 6 (1978).
25. "Public choice is not a subject; it is a way of studying a subject. . . . It takes the tools
Have we then restored a political theoretic hegemony ending ideology?28

Sunstein, in his recent series of provocative and insightful articles27 and new book,28 offers what seems, at times, intended to be just such a new theoretic consensus. Rather, Sunstein’s emphasis on deliberation, acceptance, however reluctant of “Lochner’s Legacy,” and implicit attack on the legitimacy of politics, suggests a return to an earlier Wilsonian progressionism’s emphasis on rule by the elite.29

Sunstein finds a synthesis of classical republicanism and modern pluralism in Madison’s thinking. He adopts the term “deliberative democracy.”30 This model, which Sunstein says is consistent with many Supreme Court opinions, prohibits “raw exercises of power” by the government.31 The “rationality [deliberative] requirement may . . . be understood precisely as a requirement that regulatory measures be something other than a response to political pressures.”32

Sunstein brilliantly uncovers the conceptional assumptions underlying the Lochner29 holding.34 He shows that the Court assumed that the norm or baseline was government inaction, the pre-existing distribution of wealth and entitlement, and the Cokean or Blackstonian common law.35 Despite, or perhaps because of Holmes’ view that no baseline is natural, that they are all societal creations,36 Sunstein is not certain if we can or should abandon Lochner’s premises. He worries that, if neither the common law nor the status quo are accepted as the norm or baseline, the only alternative is some theory of justice.37 Sunstein’s remaking of regulation employs incentives and market pressures,

of economics and applies them to the material of politics.” I. McLEAN. PUBLIC CHOICE 1 (1987).


29. Sunstein’s emphasis on specific problems or cases, and his commitment to see the other side, clothe his preferences. The textual description and attribution are impressionistic, but I hope not unfair. Ultimately, of course, it doesn’t matter because it is the idea, not its author, that is of concern.


31. Sunstein, Interest Groups, supra note 27, at 51.

32. Id. at 49.


34. Sunstein, Lochner, supra note 27, at 874.

35. Id.

36. Id. at 904.

37. Id. at 907.
rather than centralized rule-making. In his view, "the problems are too particular, too dependant on the specific context, to allow for global prescriptions."  

While Sunstein consistently insists "we should be entirely unabashed by the use of government to carry out democratic aspirations and to promote economic welfare," his emphasis on deliberation and on quasi-adjudicatory decision-making suggest an implicit distrust of "popular politics." While he explicitly approves of efforts to "alter the existing distribution of wealth and entitlement" through what he calls the political process, he seems to disapprove of "democracy in the streets."

A recent illustration of the significance of the unquestioned acceptance of the common law as benchmark is Federal Trade Commission v. Superior Court Trial Lawyers Association. Lawyers who participated in the District of Columbia's Public Defender System refused to further participate until fees were increased from approximately $30 an hour to over $50 an hour. The Federal Trade Commission prosecuted them under section 5 of the Federal Trade Commission Act for restraining trade. The court of appeals vacated the lower court's decision and remanded for a determination of whether significant market power rested with the defendant attorneys. The court of appeals indicated that the boycott did contain elements of protected first amendment speech. The Supreme Court ignored the "power" of the judicial system as an employer and focused exclusively on the "coercive" activities of the attorneys as "striking" employees. It reversed the court of appeals and reinstated the determination of the Federal Trade Commission.

The only way the Court could have reached such a conclusion is by assuming 1) employers can pay whatever wages they want absent

38. Sunstein, Remaking Regulation, AM. PROSPECT. Fall 1990, at 72.
39. Id. at 82.
40. Id.
41. The concept is from the title of Michael McGerr's study of northern politics from 1865 to 1928. M. MCGERR, THE DECLINE OF POPULAR POLITICS (1986). But see Sunstein, Constitutional Politics and the Conservative Court, AM. PROSPECT, Spring 1990, at 60 (arguing that "political channels are often a better channel [than the courts] for sensible and effective reform").
42. Sunstein, Interest Groups, supra note 27, at 51.
43. The concept is from the title of James Miller's study of SDS. J. MILLER, DEMOCRACY IS IN THE STREETS (1987).
44. 110 S. Ct. 768 (interim ed. 1990).
45. Id. at 771.
46. Id. at 772-73.
47. Id. at 773-74.
48. Id. at 780-82.
49. Id.
legislative controls and there were none present here; 2) employees must accept the proffered wages or go elsewhere; 3) there is no right to collective bargaining absent a statute and the National Labor Rights Act was not applicable here; and 4) unprotected collective behavior is a restraint of trade. All four of these assumptions are well established common law principles.

Yet, clearly, employers have power, and even if the literal terms of a statute do not authorize employees to take to the streets, social and even religious\textsuperscript{50} sentiment has sanctioned peaceful self-help. The consumer movement, to say nothing of the civil rights movement,\textsuperscript{51} could not have succeeded through the political process as understood by Sunstein and the Court in \textit{Lawyer's Association}.

Finally, Sunstein's views cause one to wonder if he would overrule \textit{Fletcher v. Peck}'s\textsuperscript{52} refusal to look behind a statute at the economic motives of the legislators.\textsuperscript{53} Sunstein argues that the requirement that democracy needs an enforcer seems to necessitate an active role for the Supreme Court. Such judicial involvement in the deliberations of the legislative motive is inconsistent with the more restrained view of Chief Justice Marshall:

that impure motives should contribute to the passage of a law . . . [is] most deeply to be deplored . . . [But] [i]t may well be doubted how far the validity of a law depends upon the motives of its framers . . . [If the principle be conceded, that an act of the supreme sovereign power may be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect . . . Must the vitiating cause operate on a majority, or on what number of its members? Would the act be null, whatever might be the wish of the nation, or would its . . . nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the

\begin{itemize}
\item \textsuperscript{50} See \textit{Pope Leo XIII, Rerum Novarum} (1898); see also \textit{Pope John Paul II, On Human Work} (1981); cf. \textit{Moragne v. United States}, 398 U.S. 375 (1970) (model for an alternative and perhaps traditional approach to redefining the baseline). "Whenever something or other is introduced by law, the occasion is good for the introduction of other things which tend towards the same utility, either by the interpretation or by the certain administration of justice." This was described by Vico in 1725 as "the celebrated rule, the universal foundation of all interpretation, which the jurist has suggested to us in the wisest sayings." See \textit{Vico, Selected Writings} 100 (L. Pompa ed. & trans. 1982).
\item \textsuperscript{51} See \textit{NAACP v. Clairborne Hardware}, 458 U.S. 886 (1982).
\item \textsuperscript{52} 10 U.S. (6 Cranch) 87 (1810).
\item \textsuperscript{53} \textit{Id.} at 130. See generally C. Magrath, \textit{Yazoo: Law & Politics in the New Republic} (1966).
\end{itemize}
principle by which judicial interference would be regulated is not clearly discerned.\textsuperscript{54}

Sunstein’s expressed concern about measures that are “a response to political pressures” puts in doubt the propriety of congressional oversight, presidential direction,\textsuperscript{55} and informal contracts between agencies and the public, which have been called the “bread and butter” of the administrative process.\textsuperscript{56} Nevertheless, it may be that Sunstein’s syncretism does in fact restore a theoretic consensus. Another participant at the Kent conference, however, “begged” that the debate continue. Professor Ronald Beiner argued that there was more at stake, without quite identifying what that might be. It seems to me that the major matter at stake, both theoretically and practically, is that of private economic\textsuperscript{57} power.\textsuperscript{58}

Fallon’s criticism of republicanism as tending towards a stasis or totalism is fair enough, but he fails to recognize liberalism’s tendencies toward anarchy.\textsuperscript{60} Madison recognized both tendencies. He sought a system or structure of government that “might be immortal,” yet recognized “the primary source of political unrest lay in economic conditions.” Madison saw a contradiction, or at least a tension, between property rights and majority rule, in other words, a conflict within liberalism or democratic-capitalism\textsuperscript{62} itself. To escape from anarchy or the Hobbesian state of nature,\textsuperscript{63} without falling into monarchy, or in

\begin{itemize}
\item \textsuperscript{54} Fletcher, 110 U.S. at 130.
\item \textsuperscript{55} See Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).
\item \textsuperscript{56} See Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).
\item \textsuperscript{57} There is immense literature on private versus public and the proper boundary between them. For a recent summary with citations, see Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law, 96 YALE L.J. 1006 (1987).
\item \textsuperscript{58} What began as political-economy has become two separate disciplines. By definition economics deals with free, i.e., non-coercive markets, and politics deals with coercive power of the state. Noble Laureate James Buchanan put it this way: “I am simply proposing in various ways, that economics concentrate attention on the institutions, the relationships, among individuals as they participate in voluntary organized activity, in trade or exchange, broadly considered.” J. Buchanan, What Should Economics Do? 36 (1979) (emphasis added). Economics is the study of the whole system of exchange relationships. Politics is the study of the whole system of coercive or potentially coercive relationships. Id. at 34.
\item \textsuperscript{59} The consent of the governed precludes the notion of power at least in its coercive sense. For a discussion of consent theory, see D. Herzog, Happy Slaves (1989).
\item \textsuperscript{60} See B. Barber, Strong Democracy 6-11 (1984).
\item \textsuperscript{61} McCoy, supra note 14, at 172.
\item \textsuperscript{62} For a discussion of democratic capitalism, see M. Novak, The Spirit of Democratic Capitalism (1982).
\item \textsuperscript{63} See T. Hobbes, Leviathan 63-66 (E. Rhys ed. 1950).
\end{itemize}
today's terms authoritarianism, or worse, totalitarianism, there is a need for some degree of stability or order.\textsuperscript{64}

What compromises or structural mechanisms permit sufficient harmony for the pursuit of the good life under the inherent condition of conflicting rights? Bowles and Gintis recently suggested that "social stability in the face of the contradictory nature of rights has depended upon a series of historically specific institutional accommodations."\textsuperscript{65} These structural approaches are described in terms that are particularly relevant to the liberal or Lockean versus republican or Madisonian debate. Bowles and Gintis continue,

[these] might be termed the Lockean practice of limiting political participation to the propertied, the Jeffersonian vision of distributing property widely among the citizens, the Madisonian strategy of fostering a sufficient heterogeneity of interests among citizens so as to prevent the emergence of a common political program of the unpropertied, and the Keynesian model of economic growth through redistribution of income with the resulting communality of interests between the dispossessed and the wealthy.\textsuperscript{66}

Each of these structural approaches is unstable. While Bowles and Gintis view each as an evolutionary or dialectic advance, my view is more Crocean wherein each approach was, and is, always present in the political-economic mix of theory and practice.\textsuperscript{67} In either event, the accommodations, either through internal or external pressures, failed to provide the necessary degree of stability. In very brief summary, the logic of liberty was the downfall of the Lockean accommodation,\textsuperscript{68} the rise of cities and commerce the Jeffersonian accommodation, the failure of the market system the Madisonian accommodation, and international competition or "capital flight" the Keynesian accommodation.\textsuperscript{69}

This current post-Keynesian phase "seems likely to intensify the collision of rights and to make the economy a major terrain on which the competing claims of property and citizenship will clash."\textsuperscript{70} This is

\begin{itemize}
  \item \textsuperscript{64} See generally \textit{The Federalist} No. 10 (J. Madison).
  \item \textsuperscript{65} See S. Bowles \& H. Gintis, \textit{Democracy and Capitalism—Property, Community and the Contradictions of Modern Social Theory} 33 (1986).
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} The dialectic is progressive and discontinuous while Croce's view is one of growth and continuity. See D. Roberts, \textit{Bernevetto Croce and the Uses of Historicism} 125-27, 307-15 (1987).
  \item \textsuperscript{68} Just as it was in slavery. See D. McCoy, \textit{supra} note 14, at 260.
  \item \textsuperscript{69} S. Bowles \& H. Gintis, \textit{supra} note 65, at 60. On "capital flight," see generally T. Swanstorm, \textit{The Crisis of Growth Politics—Cleveland, Kucinich, and the Challenge of Urban Populism} (1985). "The central issue raised in Kucinich's experiment in urban populism, I soon realized, was the extent of power exerted by large corporations, not through traditional lobbying techniques, but through their control over investment." \textit{Id.} preface at XV.
  \item \textsuperscript{70} S. Bowles \& H. Gintis, \textit{supra} note 65, at 64. See generally R. Dahl, \textit{A Preface to Economic Democracy} (1985).
\end{itemize}
where liberal theory tends to become irrelevant. The terrain of private economic power is something liberal theory does not quite acknowledge. "Liberal political theory, which deals with power (the state conception of politics)\textsuperscript{71} does not deal with the economy, while liberal economic theory ignores politics\textsuperscript{72} . . . liberal theory thus renders the power of capital invisible.\textsuperscript{73}

Yet, there can be no doubt that "the modern corporation wields economic and social power of the highest consequence for the condition of our politics. Let us resist this conclusion or belabor it no further. Let us accept it as our first premise."\textsuperscript{74}

It is now appropriate to return to Madison’s views on these matters. During his retirement, Madison kept himself informed of day to day events, and increasingly recognized the impact of rising land ownership on the Jeffersonian republican ideal.\textsuperscript{75} As the number of people who farmed the vast and productive American expanse grew, the agricultural surplus increased.\textsuperscript{76} The resulting fall in farm prices and land values drove large numbers of people off the land as the only alternative to a subsistence life-style.\textsuperscript{77} "All political economists, including Madison, agreed that manufactures were the logical, indeed necessary, means of employing a surplus population whose labor was no longer needed on the land."\textsuperscript{78}

This being so, eventually the landless wage-earners would become a majority of the population. Madison believed majority rule was "the characteristic rule" of a republican system.\textsuperscript{79} But "the fundamental assumption of his political theory [was] justice was defined largely in terms of defending property rights."\textsuperscript{80} If a majority of voters were propertyless employees, what would be the fate of justice? Madison recognized that the economic power of employers would influence the

\textsuperscript{71} S. Bowles & H. Gintis, supra note 65, at 24.
\textsuperscript{72} See Coase, The Problem and Social Cost, 4 J. L. & Econ. 1 (1960). The theorem, which Coarse himself never quite states, is generally that "a competitive economy will allocate resources efficiently, even in the face of seemingly important external effects, if it is possible to carry out such negotiations at little or no cost," E. Mansfield, Macroeconomics 479 (4th ed. 1982). That is, the market if allowed to operate, will do so efficiently regardless of which participant has been assigned "rights" by the applicable legal rules. Or, in other words, the law is irrelevant. For a more complete (less polemical) understanding of Coase’s Theorem, see Ellickson, The Case for Coase & Against Coaseanism, 99 Yale L.J. 611 (1989).
\textsuperscript{73} S. Bowles & H. Gintis, supra note 65, at 65.
\textsuperscript{74} Id. (citation omitted).
\textsuperscript{75} D. McCoy, supra note 14, at 29. This was a period of fervent & diverse reform movements. See generally R. Walters, American Reformers 1815-1860 (1978).
\textsuperscript{76} D. McCoy, supra note 14, at 177.
\textsuperscript{77} Id. at 173-81.
\textsuperscript{78} Id. at 182.
\textsuperscript{79} Id. at 136.
\textsuperscript{80} Id. at 193.
political views of their employees.\textsuperscript{81} Liberals such as Mill choose to distort the franchise by giving extra votes to the better educated.\textsuperscript{82} Madison, perhaps as a leap of faith, opted for full enfranchisement (of white and freed black males).\textsuperscript{83} His faith that America’s experiment in self-government “might be immortal”\textsuperscript{84} was not without foundation. He saw two pillars. One was education.\textsuperscript{85} The other was a republican understanding of property rights.\textsuperscript{86}

To better understand Madison’s views, it is necessary to return to Hume.\textsuperscript{87} “Hume singled out one passion alone as socially destructive, if unchecked. ‘This avidity alone, of acquiring goods and possessions for ourselves and our nearest friend is insatiable, perpetual, universal and directly destructive of society.’”\textsuperscript{88} To Hume, “‘justice’ is technically a set of absolutely basic rules concerning property without which society is impossible and which government is set up to maintain, made necessary by this single passion.”\textsuperscript{89} Hume’s logic leads him to describe as “just” a society in which a poor man pays his debt to a millionaire, even if this results in starvation for him and his dependents.\textsuperscript{90} Madison, however, said,

that is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties and free choice of their occupations which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called.\textsuperscript{91}

This alone may not be as communitarian as the views of some Scottish Enlightenment figures “for whom the owner of property was ‘theoretically almost a trustee of his property on behalf of the commu-

\textsuperscript{81} Id. at 197.
\textsuperscript{82} See generally MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861).
\textsuperscript{83} While not direct evidence, approval of suffrage for former (male) slaves seems implicit in Madison’s views. See D. McCoy, supra note 14, at 233-38, 247.
\textsuperscript{84} Id. at 192.
\textsuperscript{85} Id. “Another point that America demonstrates is that virtue is not, as has been claimed for so long, the only thing that can maintain a republic. Enlightenment, more than anything else, makes this social state possible. The Americans are no more virtuous than other people, but they are infinitely more enlightened . . . than any other people I know . . . . The mass of people who understand public affairs, who are acquainted with laws and precedents, who have a sense for the interests, well understood, of the nation, and the faculty to understand them, is greater here than in any other place in the world.” A. JARDIN, TOCQUEVILLE: A BIOGRAPHY 162 (2d ed. 1989).
\textsuperscript{86} THE FEDERALIST No. 10 (J. Madison).
\textsuperscript{87} See Adair, That Politics May Be Reduced to a Science: David Hume, James Madison and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343 (1957) (the seminal article on a much debated question); D. McCoy, supra note 14, at 43 n.7. (summary of this debate).
\textsuperscript{88} D. FORBES, HUME’S PHILOSOPHICAL POLITICS 85 (1975).
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 89.
nity,' it goes far enough to distinguish Madison republicanism from the liberalism of Locke.

Madison recognized that a tax is distinct from a taking which requires indemnification, as long as the tax is not arbitrary. A tax is not arbitrary if the "haves" are not singled out with oppressive burdens — "where arbitrary taxes invade the domestic sanctuaries of the rich." Madison also explicitly recognized that the "have-nots" have a right to some leisure after work — "excessive taxes grind the faces of the poor . . . in violation of that sacred property which Heaven . . . kindly reserved to him in the small response that could be spared from the supply of his necessities."

Madison was also sure that "to provide employment for the poor, and support for the indigent, [was] among the primary and at the same time, not least difficult cares of the public authority." Thus, it can be argued that Madison recognized the need for positive liberty or an active government in a modern sense.

However, if Madison was not a democratic-capitalist, he was also not a democratic-socialist. Yet, the Madisonian emphasis on education and science, a mixed economy, and trade, suggest a communitarian dimension to Madison's thinking. The presence and limits of this communitarianism can be seen by considering Madison's views on Robert Owen and his New Harmony movement.

The essence of Owenism or what Anthony Wallace calls "Communal Industrialism" is contained in eight points:

92. D. Forbes, supra note 88, at 89 n.1 (quoting Stein, Law and Society in Eighteenth-Century Scottish Thought, in Scotland in the Age of Improvement (1970)).
93. The Mind of the Founder, supra note 91, at 188.
94. Id.
95. Id. See P. Kens, Judicial Power and Reform Politics - The Anatomy of Reform Politics (1990) (describing the eight hour day movement to see how advanced Madison's views were).
96. D. McCoy, supra note 14, at 203.
98. Owen visited Madison and Jefferson among others during his visit in 1825. See generally F. Harrison, Quest For the New Moral World (1969) (describing the history of Robert Owen and the movement associated with his name).
99. A. Wallace, Rockdale 293 (1980). This book is essential for understanding the political-economic views of Jacksonian and ante-bellum America. The subtitle is a good summary.

An account of the coming of the machines, the making of a new way of life in the mill hamlets, the triumph of evangelical capitalists over socialists and infidels, and the transformation of the workers into Christian soldiers in a cotton manufacturing district in Pennsylvania in the years before and during the Civil War.

Id.
1. Mutual agreement and cooperation, rather than selfish competition are the basic principles upon which to found the institution of a good human society.
2. Man is a product of learning in a physical and social environment; the community can produce good, or depraved, men and women, depending upon the education of children and the social conditions of adults.
3. Reason and experiment, not revealed religion, are man's only proper guide.
4. Rank, social class, and the bonds of matrimony are unimportant as a principle of social organization and in a good society can be dispensed with.
5. Local economic decisions, as well as political decisions at all levels, should be made by democratic procedures.
6. Real estate and machines should be owned and controlled by the community, not by individual proprietors.
7. Small rural communities, combining in a balanced way both agricultural and industrial pursuits, are the natural context of human economic, educational, and social institutions.
8. Such communities can be largely self-supporting insofar as food, fuel, and other necessities are concerned, but should also engage in specialized production and trade in a national and international system of exchange.¹⁰⁰

In spring of 1827, Madison wrote a letter to Nicholas Trist, who was married to Jefferson's granddaughter, which set forth his thoughts on Owenism. While the letter is not short, it is worth reproducing in its entirety to illustrate the seriousness with which Madison addressed the matter, the basis for his commitment to energetic government, and his intuitive understanding that the "frontier" was not a substitute for policy.

DEAR SIR,—The Harmony Gazette has been regularly sent me, but in the crowd of printed things I receive, I had not attended to the essays to which you refer me. The present situation of Great Britain, which gave rise to them, is full of instruction, and Mr. Owen avails himself of it with address in favor of his panacea. Such diseases are, however, too deeply rooted in human society to admit of more than great palliatives.

Every populous country is liable to contingencies that must distress a portion of its inhabitants. The chief of them are: 1. Unfruitful seasons, increasing the price of subsistence without increasing that of labour; and even reducing the price of labour by abridging the demand of those whose income depends on the fruits of the earth. 2. The sudden introduction of labour-saving machinery, taking employment from those who labour is the only source of their subsistence. 3. The caprice of fashion, on

¹⁰⁰ Id. at 293-94.
which the many depend, who supply the wants of fancy. Take, for a
sufficient illustration, a single fact: when the present King of England
was Prince of Wales, he introduced the use of shoe-strings instead of
shoe-buckles. The effect on the condition of the buckle-makers was such,
that he received addresses from many thousands of them, praying him,
as the arbiter of fashion, to save them from starving by restoring the
taste for buckles in preference to strings. 4. To the preceding occur-
rences, to which an insulated community would be liable, must be added
a loss of foreign markets to a manufacturing and commercial commu-
nity, from whatever of the various causes it may happen. Among these
causes may be named even the changeableness of foreign fashions. The
substitution of shoe-strings for shoe-buckles in the United States had a
like effect with that in England, on her buckle-makers.

Mr. Owen's remedy for these vicissitudes implies that labour will be
relished without the ordinary impulses to it; that the love of equality will
supersede the desire of distinction; and that the increasing leisure, from
the improvements of machinery, will promote intellectual cultivation,
moral enjoyment, and innocent amusements, without any of the vicious
resorts, for the ennui of idleness. Custom is properly called a second na-
ture; Mr. Owen makes it nature herself. His enterprise is, nevertheless,
an interesting one. It will throw light on the maximum to which the
force of education and habit can be carried; and, like Helvetius' attempt
to show that all men come from the hand of nature perfectly equal, and
owe every intellectual and moral difference to the education of circum-
stances, though failing of its entire object, that of proving the means to
be all-sufficient, will lead to a fuller sense of their great importance.

The state of things promising most exemption from the distress ex-
hibited in Great Britain, would be a freedom of commerce among all
nations, and especially with the addition of universal peace. The aggre-
gate fruits of the earth, which are little varied by the seasons, would then
be accessible to all. The improvements of machinery not being adopted
everywhere at once, would have a diminished effect where first intro-
duced; and there being no interruptions to foreign commerce, the vicissi-
tudes of fashion would be limited in their sudden effect in one country,
by the numerous markets abroad for the same or similar articles.

After all, there is one indelible cause remaining, of pressure on the
condition of the laboring part of mankind; and that is, the constant ten-
dency of an increase of their number, after the increase of food has
reached its term. The competition for employment then reduces wages to
their minimum, and privation to its maximum; and whether the evil pro-
ceeding from this tendency be checked, as it must be, by either physical
or moral causes, the checks are themselves but so many evils. With this
knowledge of the impossibility of banishing evil altogether from human
society, we must console ourselves with the belief that it is overbalanced
by the good mixed with it, and direct our efforts to an increase of the
good proportion of the mixture.

Even Mr. Owen's scheme, with all the success he assumes for it,
would not avoid the pressure in question. As it admits of marriages, and it would gain nothing by prohibiting them, I asked him, what was to be done after there should be a plenum of population for all the food his lots of ground could be made to produce. His answer was, that the earth could be made indefinitely productive by a deeper and deeper cultivation. Being easily convinced of this error, his resort was to colonizations to vacant regions. But your plan is to cover, and that rapidly, the whole earth [with] flourishing communities. What is then to become of the increasing population? This was too remote a consideration to require present attention—an answer prudent, if not conclusive.101

This letter emphasizes the commitment to "energetic" government that is a constant dimension of Madison's republicanism. Madison's reference to the "caprice of fashion" indicates less reliance on the market to determine value than under classic liberalism. This is reinforced by Madison's recognition of the evil effects of competition.102 Madison argued (hoped) there is more good than evil in the world. He viewed custom as second nature. This suggests a more organic, if not Burkean, rather than Lockean view. Madison's republicanism is clearly not a Jeffersonian idyll, rather it is a foreword looking and, in essence, a modern public philosophy. Thus, Fallon's dismissal of republicanism is a dismissal of a caricature or, at most, a dismissal of an ancient republicanism that predates Madison.103

While it seems clear enough that there is substance to republicanism and it is an alternative to liberalism,104 it is hard to escape the

102. Id.
103. Fallon argues Michelman is not really disputing liberals and liberalism, but rather libertarianism. I doubt the theoretic validity of the distinction. Locke, the quintessential classical liberal, viewed property as essential to liberty. Rawls, the modern liberal, premises the primacy of liberty. Contemporary libertarians assert "economic liberty is at least as fundamental a right as free exercise of religion and the right to be treated as equal." McCurdy, A Jurisprudence of Conceptions, 11 Geo. Mason L. Rev. 77, 80 (1988). Thus, even though liberals reject and libertarians accept methodological individualism, both accept the autonomy or integrity or completeness of the individual without or before society. But see Ellickson, The Legal Dimension of the Privatization Movement, 11 Geo. Mason L. Rev. 157, 163 (1988). Republicans do not. They view participation in society as a necessary constitutive aspect of humanity. C. Farrar, The Origins of Democratic Thinking 273 (1989). It is significant that liberalism developed separately from democracy and the welfare state was developed by an authoritarian regime. C. MacPherson, The Real World of Democracy 10-11 (1966); see also I. Shapiro, The Evolution of Rights in Liberal Theory (1986) (presenting Nozick and Rawls as typical of the "neo-classical and Keynesian moments" of liberal ideology).

feeling that the use of the labels liberalism and republicanism is confusing, if not a cover for the real debate. "Liberal" is, at least since 1988, a dirty word banished from electoral politics. There is no designation opposite to conservative in the electoral context. Barry Goldwater was fond of saying "[t]his is a republic, not a democracy." Yet in the current legal-academic debate, the liberals favor republicanism, and the conservatives, who obviously are not democrats, favor liberalism.

At the level of definition, in a recent article Robin West argued against Dworkin that while liberalism is about the size of the economic pie (efficiency) and how it is distributed (equity), it is also and importantly about the ingredients of the pie in that the meaning or definition of the good life or human happiness is implicit in liberalism itself.

A Kuhnian view would be that political-economic theory is in crisis and in need of a new paradigm. Maybe instead of a new paradigm or synthesis, we are headed for a "permanent" state of ideological nihilism. If words ultimately have fixed meaning, if at all, from context, and ideology is a context, then the same words in a single societal setting will mean different things to different people because of their differences in ideology. We would have political-economic duologues, rather than dialogues. As a result, society will have to develop institutions or forums in which translations across ideologies can take place, in order to provide the minimum of communication necessary for social order.

Tribe urges the bar and the bench to incorporate into its thinking a dynamic dimension based on the post-Newtonian theories of Heisenberg and Hawking. Just as print transformed how people viewed the world, so will, or has, the computer:

Print logic began to shape mental structures, imparting a sense of the world as a set of abstract ideas rather than immediate facts, a fixed point of view organizing all subject matter into an equivalent of perspective in painting, and the visual homogenization of experience. It also encouraged individualism, even solipsism, by the silent privacy in which the

109. For a review and application of modern theories of meaning and interpretations, see Eskridge, Gadamer/Statutory Interpretation, 90 COLUM. L. REV. 609 (1990).
printed book is read... [I]nevitably... as print logic changed mental structures, the social world was also changed by the increasing numbers of people whose minds were programmed by print logic. Rationalism, idealistic philosophy, consumerism, individualism, capitalism, and nationalism... are all... consequences of movable type.\textsuperscript{111}

Two recent issues of the Federal Reporter advance sheets contain over 1500 pages each; that is only one of over fifty sets of weekly advance sheets, to say nothing of statutes and administrative regulations. Prerogine's uncertainty principle says "that beyond a certain threshold of complexity, systems go in unpredictable directions; they lose their initial conditions and cannot be reversed or recovered."\textsuperscript{112} Prerogine's principle suggests there will be new societal structures, but the form they will take is unpredictable. Whatever form they take will have to reflect the centrality of private economic power. Madisonian republicanism does just that and will therefore survive even if the name or label does not.


\textsuperscript{112} J. Bridges & F. Peat, Turbulent Mirror 150 (1989).