

DEMOCRACY, EQUALITY, AND TAXES

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I. INTRODUCTION	416
II. PRINCIPLES OF TAXATION: A REVIEW	419
A. <i>Introduction</i>	419
B. <i>Progressive Taxation: The Debate</i>	422
C. <i>"Fairness" and "Equality"</i>	428
III. THE FOUNDERS' DEMOCRATIC CONSTITUTION	430
A. <i>Introduction</i>	430
B. <i>"No Taxation Without Representation"</i>	431
C. <i>The Declaration of Independence and Beyond</i>	432
1. <i>The Democratic Ideology of "The Pursuit of Happiness"</i>	432
2. <i>Democracy, Republicanism</i>	433
3. <i>Mixed Government Theory and the Classical Tradition</i>	434
4. <i>The Dangers of Independence</i>	436
D. <i>The Constitution</i>	437
1. <i>Goals of the Constitution</i>	437
2. <i>The Democratic Constitution</i>	438
3. <i>Democracy's Dilemma: Representation</i>	439
4. <i>The Natural Aristocracy</i>	440
IV. DEMOCRACY: ANCIENT AND MODERN	442
A. <i>Introduction</i>	442
B. <i>Athenian Democracy: Equality in Theory and Practice</i>	447
1. <i>Popular Assembly, Popular Sovereignty</i>	447
2. <i>Popular Participation: Sortition and Rotation</i>	448
3. <i>Accountability</i>	449
4. <i>Judicial Sovereignty: The Law Courts</i>	449
5. <i>Pay for Public Service</i>	450
V. ATHENIAN DEMOCRACY AND PUBLIC FINANCE	452
A. <i>The Historical Development of Athenian Democracy</i>	452
B. <i>Public Finance: From Tyranny to Democracy</i>	457
1. <i>The Ancient World: Rights and Responsibilities</i>	458

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2. <i>Athens: Taxes from Tyranny to Democracy</i>	459
VI. THE WEALTHY AS TAXPAYERS	460
A. <i>Liturgies</i>	462
1. <i>Festival Liturgies</i>	463
2. <i>Military Liturgies (Trierarchy)</i>	464
3. <i>The Taxpayers—The Liturgical Class</i>	465
B. <i>Property Taxes</i>	467
1. <i>Eisphora—Extraordinary Property Tax</i>	467
2. <i>Proeisphora</i>	468
VII. LITURGY AVOIDANCE	470
A. <i>Invisible Wealth</i>	471
B. <i>Antidosis (Exchange): Legal Challenge to Liturgy</i>	472
C. <i>The Ideology of Liturgy</i>	474
1. <i>Aristocratic Origins</i>	474
2. <i>Geometric Equality</i>	475
VIII. CONSEQUENCES OF TAXING ONLY THE WEALTHY	477
IX. CONCLUSION	478

I. INTRODUCTION

“No taxation without representation” is familiar to all Americans; it is a statement that is deeply embedded in our collective psyche, associated with the very origin of our revolution and the proclamation of our independence.¹ It is doubtful whether it accurately describes how a democracy routinely decides tax issues.² Representation, connected with our self-conception and self-definition as a democracy, brings with it connotations of equality and freedom.³ Expressive of our rights, does representation also entail responsibilities? In other words, if taxation requires representation, does representation require taxation?⁴ Does political equality, so essential to democracy and embodied in notions such as “one person, one vote” and “equality before the

1. See generally PAUL A. RAHE, *REPUBLICS ANCIENT AND MODERN* (1992); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* (1987). The American attitude to tax issues is best summarized by Edmund Burke, who noted that abstract notions were rather too illusive. RAHE, *supra*, at 444 (quoting and discussing Burke). While other constitutional struggles centered on issues of elections, Burke stated that “the great contests for freedom in this country were from the earliest times chiefly upon the question of taxing.” *Id.*

2. See, e.g., Kirk Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191 (2001) (discussing taxpayers’ right to vote on any taxes to be paid as reflecting libertarian philosophy); see also *infra* notes 91-142 (discussing consent and comparing relative philosophies reflected in the Declaration of Independence and the Constitution).

3. According to the Founders, representation is clearly linked with democracy. See *infra* note 130 and accompanying text (discussing Alexander Hamilton’s characterization of the Constitution).

4. Representation is regarded as a condition precedent for taxation; consent gives the sovereign legitimacy. See REID, *supra* note 1, at 112-13. As a logical matter, the truth of a universal statement “If X, then Y” does not require the truth of the obverse: “If Y, then X.” See JOHN NOLT & DENNIS ROHATYN, *SCHAUM’S OUTLINE OF THEORY AND PROBLEMS OF LOGIC* 98-111 (1988). For a discussion of the obligations associated with citizenship and representation, see Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: the Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. (forthcoming 2002).

law,” require correlative notions of equality in other areas, such as equal taxes paid by everyone or a flat rate of taxation?

Alternatively, we might ask if the almost universal aversion to taxes, despite their necessity (because civilized society has its costs), reflects their necessarily problematic and destructive nature.⁵ The allocation of society’s costs among its members reflects fundamental political and philosophical choices. Does our representative democracy, therefore, mandate or prefer certain distributions of the tax burden? If equal political rights (e.g., voting) do not mandate equal nonpolitical or economic rights (e.g., wealth), how should political obligations involving nonpolitical resources be addressed within our democratic system? In short, we might ask whether taxonomy or practice requires that we give our “democracy” normative content in taxation as well as voting rights.⁶

The theoretical foundations of taxation are increasingly subject to discussion, due to the recognition that taxes are the most important means by which the political system implements its version of distributive justice.⁷ Yet our discussion seems hampered by familiarity; we use common terms, but lack common understanding. Beginning from divergent viewpoints, lacking any unitary set of assumptions (about either our political or economic systems), it is hardly surprising that no one concordant vision of an ideal system of taxation has emerged. This diversity of viewpoints has fostered an increasingly strident rhetoric that is ultimately unhelpful in resolving an important topic: the appropriate burden individuals, especially those with disparate resources, should bear in a democratic society when contributing to the functioning of that democracy.

This Article proposes to examine the question of who should bear the tax burden in a democracy. Arguments abound that progressive tax rates, leading to an increased tax burden for the wealthy, are incompatible with our democratic system, which is devoted to equality. Undefined notions of equality and discussions of distributive justice not linked to our political system necessarily yield unsatisfactory results. The current discussion lacks

5. On the essential nature of, but difficult dilemma posed by, taxes for any society, compare the oft-quoted phrase of Justice Oliver Wendell Holmes, “Taxes are what we pay for civilized society,” Jeffery L. Yablon, *As Certain as Death—Quotations About Taxes (Expanded 2002 Edition)*, 95 TAX NOTES 395, 400 (Apr. 15, 2002), with Richard A. Epstein, *Taxation in a Lockean World*, in PHILOSOPHY AND LAW 49 (Jules Coleman & Ellen Frankel Paul eds., 1987) (“A world without taxation is a world without government; a world with taxation is a world with institutionalized coercion . . .”). See also CHARLES ADAMS, *FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION passim* (1993).

6. See *infra* notes 73-74 and accompanying text (discussing the difficulty of defining democracy). Despite any difficulties encountered with its definition, if we divest democracy of normative content, we are no better, but worse, off in advancing our discussion of important policy issues.

7. LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 3 (2002); see also KEVIN PHILLIPS, *WEALTH AND DEMOCRACY* (2002) (describing the growth of plutocracy in America). The importance and impact of taxes as a part of our economic system has long been recognized. See, e.g., DOES ATLAS SHRUG? (Joel Slemrod ed., 2002) (considering the economic consequences of taxing the wealthy); Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1 (1998).

any historical perspective about democracy, including a consideration of how our political system (representative democracy), as envisaged by the Founders or as practiced in twenty-first century America, should affect the debate or the result. Our representative democracy is best understood through a brief review of the political thought formative for the American Revolution and Constitution. It will be illuminating (because we lack one single definition of democracy) to examine an important model—Athenian democracy—available to both the Founders and present-day analysts. Athens occupies a unique position in history as the birthplace of democratic government, dedicated to popular sovereignty and the ideals of equality and freedom. An exploration of Athens's democratic ideals, their implementation, and the allocation of the tax burden to implement those ideals, may help us clarify from a distance our own analysis of equality for political rights and tax obligations.

In particular, it will be instructive to consider Athens's political development from tyranny to democracy and corresponding decision to abandon a universally applicable flat tax and shift the tax burden from the entire population to the wealthy. In contrast, other political systems in history have not concerned themselves with democratic ideals, although generally they distributed the tax burden equally. This Article starts from the premise that the allocation of the tax burden differs from one political system to another, from tyranny to democracy. While we all may not agree on one definition of democracy, failure to consider democracy's normative implications robs discussions regarding the allocation of tax burdens of important guidelines.

This Article will examine the question of whether the allocation of a greater tax burden to the wealthy is compatible with democracy and will demonstrate that there is a strong correlation between a commitment to political equality and the decision to allocate a greater tax burden to those with greater resources, the wealthiest of the wealthy. Part II examines the existing debate about progressive taxation, including the unsatisfactory analysis of its relationship to democracy and equality. The absence in this debate of any real analysis of the nature of our American representative democracy, including what constitutes democratic ideals, will become clear. Part III will then review the constitutional and political models debated by the Founders as they crafted the Constitution, in order to provide broad outlines for discussion and to illustrate the lack of authority for much of the preceding debate. The classical origins of the Founders' thought, so formative for our own political system, will become clear. Part IV will examine definitions of democracy, both etymological and as implemented, to demonstrate a shared understanding of that term and a shared devotion to common democratic ideals by both modern and ancient democracies. Removed from our all too intuitively familiar world, this discussion will then allow us to explore systems of taxation and their correlation with definitions of democracy.

Discussion of abstract ideals is ultimately insufficient. Part V will describe the historical context of democracy, as defined and practiced in Athens. The Athenians' commitment to strong principles of political equality in

democracy and their corresponding decision to allocate the tax burden to the wealthiest of the wealthy, in order to give effect to political equality, is striking. The conflict between wealth inequality and stable political systems (including democracy) is familiar at least as early as the time of Aristotle.⁸ What an examination of Athenian democracy demonstrates is the lack of any necessary correlation between political equality and equality of tax burden. By contrast, a comparison with other political systems will reveal a strong correlation between equal tax burdens and inequality in political rights. Part VI will show that the wealthy were synonymous with taxpayers in democratic Athens. Part VII will demonstrate that wealthy taxpayers in antiquity were no different from modern taxpayers in seeking to avoid their tax obligations. The reasons for their objection to the tax burden will reveal a strikingly modern aversion to taxes, as well as more explicit philosophical objections to democracy. Part VIII will then discuss the consequences of this allocation. Shifting the tax burden to the wealthy is a political decision not only consistent with, but necessary for, strongly held democratic ideals. The consequences of this political decision are clear: exemption from tax of all but the wealthiest permits general participation in democracy, a form of government that, by its very definition, rests political sovereignty with the majority. This Article will conclude that greater political power for the wealthy minority, while the tax burden is borne by the majority of citizens, does not describe a democratic government. This Article will show that progressive taxation is not only consistent with, but required for, democracy. Once it is shown that progressive taxation is consistent with equality, it may be possible for our debate about the appropriate tax system for American democracy to proceed more productively.⁹

II. PRINCIPLES OF TAXATION: A REVIEW

A. Introduction

The Founders invoked debate about taxes to make concrete the very question of government legitimacy. The current tax debate necessarily implicates the nature of government. Yet it often appears to focus more narrowly on specific issues (such as tax rates) that obscure the larger question:

8. See ARISTOTLE, THE POLITICS 255-63, 379-83, 497 (pts. 1286, 1302b5, 1318b1-5) (T.E. Page et al. eds., H. Rackham trans., G.P. Putnam's Sons 1932); *infra* notes 214-229, 243-251 and accompanying text (discussing wealth inequality within the context of earlier Athenian constitutional crises).

9. If democracy is consistent with progressive taxation and the entire tax burden is allocated to the top one-to-two percent of taxpayers, the question of base (consumption or income) and rate (flat or progressive) becomes a far different matter than if all income levels are subject to tax. The exact definition of the taxpayer class will thus shape the debate on both base and rate. Ultimately, the choice between a tax based on an individual's consumption or annual income is likely to depend on some critical assumptions and likely economic effects. See, e.g., COMPREHENSIVE INCOME TAXATION (Joseph A. Pechman ed., 1977); DOES ATLAS SHRUG, *supra* note 7; UNEASY COMPROMISE, PROBLEMS OF A HYBRID-CONSUMPTION TAX (Henry J. Aaron et al. eds., 1988) (discussing the economic consequences of taxing the wealthy). These questions are beyond the scope of this Article.

the proper allocation of our collective tax burden.¹⁰ Complexity, related to the nature and number of issues involved, seems to inhibit debate, as well.¹¹ Even where discussion of our political system occurs, it is too often cursory and full of unexamined assumptions. Because our tax debate raises many important issues of distributive justice, economic efficiency, and actual tax incidence, the absence of clearly stated premises, especially regarding the nature of our political system, is problematic precisely because it obscures fundamental principles.¹²

Although the promise of "equal" taxation often exceeds the reality of assurances of "equal treatment," the appeal of these messages surely suggests the importance of equality as a principle basic to American conceptions of government.¹³ Popular attention and attraction to a flat tax as the appropriate mechanism for the funding of public goods in a democracy, because of its dedication to equality, is evident in the political rhetoric.¹⁴ It is frequently assumed that "[t]he flat tax will restore fairness to the tax law by treating everyone the same."¹⁵

10. MURPHY & NAGEL, *supra* note 7, at 15, 25-26 (quoting Pigou). *But see* Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, "Globalization," and the New Millenium*, 4 FLA. TAX REV. 731, 755-56 (2000) (noting the tendencies of tax scholars to focus on minute, narrow issues without adequately addressing the larger context). Because of the complexity of the issues (involving empirical tax issues and political and philosophical principles), the focus frequently has been on narrow issues, such as tax rates, when larger issues of the combined impact of government expenditures and taxes should be considered.

11. Even if we could agree on the goal or goals of a tax system, there are numerous issues to address, i.e., the appropriate base (income or consumption) and rate (progressive or proportionate). Actual incidence (e.g., who bears the corporate income tax) of the choices of that system would also need to be addressed. Each of these topics would require its own article (and have generated many attempts thus far), and is not within the scope of this Article. *See supra* note 9.

12. For example, the focus on the importance of property rights or the related notion of economic efficiency, often *in vacuo*, begins from their acceptance as universally accepted goals. *See also infra* notes 36-45 and accompanying text (discussing Epstein's Lockean view of the Constitution); note 53 and accompanying text (discussing the political nature of distributive justice).

13. On the issue of the rhetoric in this discussion, see Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987) [hereinafter Kornhauser, *Anti-Progressive Income Tax Movement*]; Marjorie E. Kornhauser, *The Rise of Rhetoric in Tax Reform Debate: An Example*, 70 TUL. L. REV. 2345 (1996) [hereinafter Kornhauser, *Tax Reform Debate*]. On the importance of framing the debate surrounding "democracy," see M.I. FINLEY, *DEMOCRACY ANCIENT AND MODERN* 65 (Hogarth Press 2d ed. 1985) (1973) [hereinafter FINLEY, *DEMOCRACY*]. Finley quotes Eugene Genovese:

An essential function of the ideology of a ruling class is to present to itself and to those it rules a coherent world view that is sufficiently flexible, comprehensive, and mediatory to convince the subordinate classes of the justice of its hegemony. If this ideology were no more than a reflection of immediate economic interests, it would be worse than useless, for the hypocrisy of the class, as well as its greed, would quickly become apparent to the most abject of its subjects.

Id.

14. On the history of the flat tax, see Steven A. Bank, *Origins of a Flat Tax*, 73 DENV. U. L. REV. 329 (1996). Much scholarly attention has focused on the important, but narrower question of how to interpret the Constitution's requirement that "direct Taxes shall be apportioned among the several States." U.S. CONST. art. I, § 2, cl. 3; *see, e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999). The problems presented by the appropriate interpretation for that language are related to, but distinct from, the issue of who should bear the burden of taxation in any democracy and in particular American representative democracy.

15. *See* <http://flattax.house.gov/proposal/flat-sum.asp> (revised Mar. 9, 1999) (describing Ar-

Equality and fairness are thus linked by the rhetoric of “flat taxes.” However, it is not clear, in reality, whether “equality” and “fairness” are synonymous, or in fact antithetical, given that individual resources vary dramatically. If equality and fairness were coextensive in taxation, one would expect a correlation between political systems favoring equality and equality of tax burdens. Historically, as this Article will show, the opposite has been the case. Moreover, everyone may desire equity in tax treatment, but agreement on what constitutes “fair” treatment depends upon starting assumptions. Assessment of “fair” or “appropriate” tax burdens requires discussion of theories of justice coupled with empirical analysis of the actual effects of those burdens. However, when issues of equality of taxpayer treatment are raised, the discussion often flounders.¹⁶ For any discussion of distributive justice, a common understanding of the political and legal system is necessary at the onset. It is only possible to define the terms “equality” and “fairness” within the political context and, only then, is it possible to make progress in satisfactorily answering how this relates to questions of fairness in taxation.

In other words, if equality and, therefore, fairness simply required treating everyone identically, few should oppose a poll (head) tax. However, such a tax is inconsistent with most conceptions of fairness, equality, and democracy, even dissociated from its use in outright efforts of discrimination. Its problematic historical associations in America, including its use to disenfranchise African-Americans, might prompt additional hesitation.¹⁷ Therefore, few actually argue that every taxpayer should pay a flat head tax that is exactly the same regardless of individual economic circumstances.¹⁸

mey/Shelby proposal for flat tax). Murphy and Nagel note that Arney’s proposal is not “flat” because of its significant (\$25,000) exemption. MURPHY & NAGEL, *supra* note 7, at 130-31 (discussing 2001 tax changes promoted by President Bush because their reduced rates increase “fairness”).

16. Murphy and Nagel illustrate this difficulty and demonstrate the myopia of traditional analysis of issues of tax progressivity by referring to the seminal article objecting to progressivity authored by Blum and Kalven. MURPHY & NAGEL, *supra* note 7, at 131-32 (discussing Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 487 (1952)). According to Blum and Kalven, as soon as the problem of inequality is “dragged out into the open,” the authors no longer control the topic. *Id.* at 132 (quoting Blum & Kalven). Murphy and Nagel attribute this to a problem with Blum and Kalven’s analysis, not equality. *Id.*

17. See U.S. CONST. amend. XXIV (prohibiting infringement of voting rights by use of a poll tax or other means); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating a Virginia poll tax as inconsistent with the Equal Protection Clause). “Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized.” *Harper*, 383 U.S. at 686 (Harlan, J., dissenting).

18. But see Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL’Y 221, 224 (1995) (disputing philosophical arguments for differential tax treatment of individuals and arguing for “absolutely equal taxation . . . regardless of the amount of gross income earned”). Schoenblum seems to concur with Blum and Kalven’s conclusion that democratic majorities are problematic because they may tax the rich differentially (discussed *infra* notes 21-35). He states, “Nor should moral weight be given to decisions merely because they are reached by a transitory majority.” *Id.* at 271. But cf. LORD HAILEY, AN AFRICAN SURVEY 643 (1957). Hailey states that:

[T]he most typical form of tax applying to the African is the flat-rate tax, in the form of a hut or poll tax, which does not vary with the extent of the resources of the individual or his in-

As a result, most often, a proportionate tax is proposed as more consistent with democracy—where a flat rate is paid on whatever base is chosen.¹⁹ Indeed, opponents of progressive income taxation assert, and often its proponents even concede, that equality presupposes proportionate taxation. This conclusion is far from clear; further examination of the nature of our democratic constitution is necessary, so that we can define “equality” in taxation consistently with that political structure.²⁰ Whether political “equality” requires equality in taxation will be clearer upon historical examination. First, a review of objections to progressive taxation, especially those based on our political system, is necessary.

B. Progressive Taxation: The Debate

Progressive taxation, the system by which those taxpayers earning more income are subject to a greater tax burden through increasing graduated rates, has characterized the income tax since its beginning in 1913.²¹ Despite progressivity’s long history and generally settled constitutional status, it has been subject to much debate—generally full of rhetoric, but often lacking careful examination of why it is incompatible with our political system. Walter Blum and Henry Kalven in their seminal 1952 article marshal a long list of arguments against progressive taxation, arguments many presume also support proportional taxation.²² Ultimately, they conclude that the case for progressivity is “stubborn but uneasy.”²³ Their examination of both the negative and positive cases for progressive taxation reveals some sig-

come. It might almost be said that the African begins to be recognized as a member of civilized society when he becomes subject to the payment of income tax instead of poll tax

Id.

19. See *infra* note 32 (discussing the degressive, not “flat,” nature of these proposals which generally contain some level of exemption and more than one rate). Although the libertarians or social contractarians espouse proportionate taxation, most, in fact, have advocated a degressive version that exempts some income sufficient to cover basic needs. This concession is predicated on the same arguments proposed to support progressive taxation and are thus subject to the same criticisms. See, e.g., Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAP. L. REV. 157, 163-65 (1999).

20. For a review of the problematic nature of equality, see, for example, Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000) (discussing challenges to, but arguing for, the utility of “equality”).

21. See The Income Tax Act of 1913, Pub. L. No. 63-16, 38 Stat. 166 (1913); Vada Waters Lindsey, *The Widening Gap Under the Internal Revenue Code: The Need for Renewed Progressivity*, 5 FLA. TAX REV. 1 (2001) (discussing the history of progressivity, implemented through rate structures, exemptions, and other means, and arguing for a renewed commitment to progressivity). But see McMahon & Abreu, *supra* note 7, at 12-13 (noting that World War II’s revenue requirements prompted significant progressivity).

22. See Blum & Kalven, *supra* note 16. Progressivity is characterized by increasing rates as income (or whatever base is used) rises. Although not always clear in the public debate, progressivity of rates is separable from the appropriate base (e.g., income or consumption) that should be subject to tax. See *id.* at 427 (noting that the base, not the rate, originally subject to the most vigorous debate); *id.* at 425 (summarizing judicial discussions of progressivity). For discussion of the current debate on progressivity, see Fried, *supra* note 19, at 194-95 (noting that most anti-progressivity arguments are applicable to proportionate taxation); Lindsey, *supra* note 21, at 46.

23. Blum & Kalven, *supra* note 16, at 519.

nificant but little examined, and often contradictory, assumptions about our democratic political system.

Regardless of other justifications, Blum and Kalven object to progressivity because of its conflict with democratic ideals.²⁴ Detailed assessment or definition of these democratic ideals is lacking. Defining democracy simply as “majority rule,” Blum and Kalven note that a majority can easily vote a “distinctive burden,” including higher tax rates, for the minority.²⁵ Because a progressive tax system necessarily imposes a high rate on a minority, Blum and Kalven conclude that it is “a politically irresponsible formula.”²⁶ Because progressivity raises equity issues between taxpayers, it poses difficulties for majority rule.²⁷ Blum and Kalven further assume that democracy requires that the minority be protected from the majority; *a priori*, some decisions, including taxation, cannot be entrusted to any majority.²⁸ Since they are unable to cite any evidence of the majority imposing an undue tax burden on the minority, they concede that it is possible to overstate these political objections to progressivity. They, nevertheless, suggest that tax legislation could be so burdensome to the wealthier minority as to constitute a “taking of property without compensation.”²⁹

Blum and Kalven reveal the bases for their political objections when they discuss progressivity as a means of wealth redistribution.³⁰ Democracy, defined as majority rule, necessarily rests political sovereignty with the majority (who are the poor). If democracy must also protect the minority (who are the rich), the possibility of majority decisions effecting wealth redistribution poses the actual problem—the conflict inherent in majority rule and minority protection. Yet their analysis also reflects a concern with the paradox that wealth inequality may inherently conflict with democracy.³¹ Attributing progressivity’s success to its proponents’ failure to equate it openly with wealth redistribution, they themselves explain progressivity’s

24. *Id.* at 435 (arguing that progressivity is a “politically irresponsible formula”); *id.* at 520 (concluding that progressivity may be “the cardinal instance of the democratic community struggling with its hardest problem”).

25. *Id.*; see also *id.* at 436-37 (discussing the importance of protecting the minority). They note that their concern for the minority’s vulnerability is not borne out by history, because there is little empirical support for this objection. Blum & Kalven, *supra* note 16, at 436-37.

26. *Id.* at 435.

27. *Id.* at 436. Blum and Kalven quote McCulloch, regarding the dangers of imposing different rates on different taxpayers: “‘The moment’ . . . ‘you abandon . . . the cardinal principle of exacting from all individuals the same proportion of their income or their property, you are at sea without rudder or compass, and there is no amount of injustice or folly you may not commit.’” *Id.* at 461; see also *supra* note 18 and accompanying text (discussing the philosophical basis for a head tax).

28. Blum & Kalven, *supra* note 16, at 436. Without offering analysis or support for this proposition (other than quoting John Stuart Mill), Blum and Kalven seem to identify the need to protect the minority as a characteristic of democracy equally important as majority rule. *Id.* at 436 n.61.

29. *Id.* at 436-37. Taxation as a “taking” is explored at length by Richard Epstein. See RICHARD A. EPSTEIN, TAKINGS (1985); *infra* notes 36-45 and accompanying text (discussing Epstein’s arguments).

30. Blum & Kalven, *supra* note 16, at 487-90.

31. See *id.* at 488; HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 18-19 (1938) (“The case for drastic progression in taxation must be rested on the case against inequality—on the ethical or aesthetic judgment that prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely.”).

appeal by the fact that it addresses a need to redress income inequality, where it exists at a level inconsistent with “economic democracy.”³² Confronted by this paradox (progressivity’s anti-democratic and democratic nature), Blum and Kalven conclude that “a progressive tax is perhaps the cardinal instance of the democratic community struggling with its hardest problem.”³³

Blum and Kalven seem to advance an argument for a progressive tax system with a generous exemption, because it appears to promote democracy. If paying taxes is included in the definition of “democratic participation” (because more individuals pay tax by reason of a partial exemption), a progressive tax rate allows “wider democratic participation.”³⁴ In sum, Blum and Kalven use incompatibility with democracy to argue against progressivity, while, at the same time, supplying arguments in its favor. It is not surprising that Blum and Kalven fail to offer a consistent view of progressivity and democracy, not having considered in detail the nature of democracy.³⁵

Richard Epstein bases his entire analysis on a radically different understanding of our political system, i.e., that the Constitution is the embodiment of Lockean political theory.³⁶ Epstein concludes from his reading of Locke (his theories of consent and private property) that the organization of the state does not result in the surrender of all rights, including natural property

32. Blum & Kalven, *supra* note 16, at 488, 494. Rejecting economic equality as a justification for progressivity, Blum and Kalven then argue for a degressive tax by exemption, keyed to a minimum level of existence. See *id.* at 462 (“[I]t is rash to assume that the certain injustice of proportion is likely to be greater than the uncertain injustice of progression.”); *id.* at 510-12 (describing the inherent unfairness of progressivity because of an inability to know how to select a “just” rate). The amount of exemption introduces issues of fairness not noted by Blum and Kalven. Many of the classic criticisms apply equally to proportionate taxation. See Kornhauser, *Anti-Progressive Income Tax Movement*, *supra* note 13, at 474; see also *supra* note 22.

33. Blum & Kalven, *supra* note 16, at 520.

34. *Id.* at 515.

35. Professor Livingston explains that Blum and Kalven’s critique of progressivity, written at the height of the Cold War, is directed at progressivity “as an overt means of redistributing income.” Livingston, *supra* note 10, at 734. However, their objections, based on capitalist principles, to “socialist” principles of redistribution, are even more widely accepted in today’s conservative politics. *Id.* Livingston further notes the surprising relationship between America’s increasing wealth and political resistance to sharing that wealth. *Id.* at 740. Given this resistance, he advises progressivity’s supporters to note the changing nature of economic inequality, especially its concentration among women and minorities. *Id.* at 740-41. The fact that the concentration of poverty among discrete groups undermines the belief in the autonomous meritocracy of the marketplace suggests that the argument for proportionate taxation will similarly be undermined. *Id.* at 750-52 (noting that concepts like the “winner-take-all” society and the globalized society help to undermine the tenuous link between individual effort and reward in the market).

36. See EPSTEIN, *supra* note 29, at 14-15 (discussing Locke’s theories and the problems of actual government); Epstein, *supra* note 5, at 51 (“The American tradition of government has been heavily influenced by Lockean social contract theory.”); Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL’Y 85, 88 (1996) (“Epstein argues that the Constitution was an embodiment of Lockean political theory.”); *id.* at 104-05 (suggesting that Epstein’s views did not receive adequate consideration because they challenge the legitimacy of the welfare state and are unpalatable to the orthodoxy of the political left, disputing those who contest the application of the Takings Clause to taxation, and arguing unpersuasively for its application by reason of the “central purpose” of that clause).

rights, to the sovereign.³⁷ For Epstein, applying Locke's theories to actual government presents the question of how to substitute for the doctrine of consent "an explicit and rigorous theory of forced exchanges between the sovereign and the individual that can account both for the monopoly of force and for the preservation of liberty and property."³⁸ Conceding that government requires some level of taxation to support its function (maintaining order), Epstein agrees with Locke's cursory statement about taxation, that each should contribute proportionally to those taxes that are legitimate exercises of the state's police power and sovereignty.³⁹ Because Epstein analogizes the individual's relationship with the state in quasi-contractual terms, all exchanges require equivalence.⁴⁰ Taxation is then only permissible where there is a "[p]areto-superior pattern of forced exchanges."⁴¹ Under this test, most taxation will fall outside of an identifiable exchange of commensurable value.⁴² Although Epstein acknowledges that the Constitution is not "one eminent domain clause writ large," he concludes that the Bill of Rights is the embodiment of that doctrine.⁴³ Thus, the Takings Clause must be interpreted to classify "*all* taxes . . . [as] takings of

37. EPSTEIN, *supra* note 29, at 11-12; *see also id.* at 11 (stating that property rights are not derived from the sovereign); *id.* at 12 (declaring that Locke's argument "does not require the surrender of all natural rights to the sovereign"); *id.* at 13 (arguing that transactions between individuals and state are to be understood as transactions between individuals some of whom have sovereignty).

38. *Id.* at 15.

39. *See* Epstein, *supra* note 5, at 49, 54 (quoting and discussing JOHN LOCKE, OF CIVIL GOVERNMENT ¶¶ 140, 142). The problem then becomes how to identify necessary state functions and how to equate taxes with benefits. As Massey notes, to the extent that taxation is within the police power, Epstein's views on "public use" pose problems of coherence. *See* Massey, *supra* note 36, at 93 n.34 (discussing the problematic nature of this concession because the exercise of police powers "requires no compensation").

40. Fried questions the application of the pareto principle (every trade leaves no side worse off) from the voluntary markets to the provision by the state of public goods. Fried, *supra* note 19, at 163-65 (questioning the level of aggregation at which each exchange must be judged and questioning the utility of this model to the monopolist state); *see also id.* at 166 (questioning whether there is "any normative reason to preserve (or mimic) the haphazard distribution of gains from trade that happens to result from uniform, equilibrium pricing in competitive markets, when we move from the private market to the shadow market for public goods").

41. Epstein, *supra* note 5, at 54.

42. *Id.* at 54-55 (commenting on the difficulties that the political process poses for wealth redistribution, clearly prohibited in a Lockean universe); *see also id.* at 67-68. Analysis of permissible goals of taxation differentiates between those uses that are legitimately "public" (permissible) and those that are not. *See* EPSTEIN, *supra* note 29, at 295 (proper objects of taxation are limited); Massey, *supra* note 36, at 93 (agreeing). However, Epstein imposes limitations on the public use requirement that are at odds with current doctrine. *See* EPSTEIN, *supra* note 29, at 162, 170. Because benefits are difficult to trace or value, Epstein additionally disputes rough equivalence and argues that all compensation must be "constitutionally sufficient." *Id.* at 195-215; *see* Massey, *supra* note 36, at 124 (supporting Epstein's position and disputing the "fully compensated taking" notion, especially in the context of progressive taxation).

43. EPSTEIN, *supra* note 29, at 16-18 (noting the absence of individual substantive protections in the Constitution and describing the Bill of Rights as identifying the "ends" of government). Epstein bases his conclusions on the dominance of Locke (with his devotion to the protection of private property) at the time of the Constitution's adoption. *See id.* at 18 (noting the presence in state and federal constitutions of some version of the eminent domain clause). Epstein's analysis of Lockean philosophy's dominance in the political thought is cursory and conclusory. *See infra* notes 75-116 and accompanying text (describing Locke's theory of consent as the language of revolution, not the philosophy that permitted the adoption of the Constitution).

private property prima facie compensable by the state.”⁴⁴ The Lockean nature of the Constitution and Epstein’s conclusion that progressive taxation implicates the Takings Clause are both subject to challenge.⁴⁵

In sharp contrast, Professors Liam Murphy and Thomas Nagel propose an evaluation of taxation within the entire political and legal system, because they conclude that “there are no property rights antecedent to the tax structure.”⁴⁶ Hence, they dispute analyses of taxes based on traditional criteria: (i) fairness; (ii) vertical equity; (iii) the benefit principle; (iv) ability to pay (endowment theory); (v) ability to pay (equal sacrifice); (vi) ability to pay (egalitarian); (vii) “everyday libertarianism”; and (viii) horizontal equity.⁴⁷ According to Murphy and Nagel, these criteria are flawed, because they each originate from underlying rights-based libertarian assumptions: that no compulsory tax system is legitimate, that property and individual rights are pre-political, and, therefore, any government must be funded by voluntary contractual agreements.⁴⁸ Professors Murphy and Nagel dispute the elevation of property rights to pre-political natural rights and contest any understanding of Hegel and Locke’s theories of property rights and individual liberty as implying anything about the tax system.⁴⁹

44. EPSTEIN, *supra* note 29, at 95 (discussing taxes as takings); *see also id.* at 15 (discussing forced exchanges). The central question for Epstein becomes how to secure the substantive content of the Takings clause through institutional limitations. *See* Epstein, *supra* note 5, at 50-51, 57-70.

45. For a discussion of why Epstein’s assumptions are subject to challenge, *see infra* Part III (discussing the broader foundations of the Constitution). For a discussion of Locke that challenges some of Epstein’s conclusions, *see* Donna M. Byrne, *Locke, Property, and Progressive Taxes*, 78 NEB. L. REV. 700 (1999) (examining Locke and arguing for a philosophy derived from Lockean individualism compatible with “unequal” taxation). Moreover, Professor Fried effectively challenges Epstein’s analysis of permissible distribution of surplus from public goods and the tax costs of financing them on their own terms. Fried, *supra* note 19, at 172-81. First, Fried notes that it is Epstein, and not Locke, who imposes the “principled limits” on the sovereign’s appropriation of surplus value of civilization. *Id.* at 174. Second, Epstein and other libertarians appear to derive this conclusion from an “unexamined analogy” to private partnerships. *Id.* at 175. Epstein states:

Think of society as an n-person joint venture, in which we all bring to the table our SON [state of nature] assets, which we agree to pool in this collective venture called the state in return for our aliquot share of the returns to investment, or surplus, that our cooperation generates.

Id. Starting from this analogy, where partnership profits would be divided up according to the initial capital contribution, these libertarians see no modification necessary when moving from a two-person private partnership to an n-person public one. *Id.* Among the problems highlighted by Fried are (i) the difficulty of calculating the value of SON [state of nature] assets, *id.* at 174-75 (asking why people’s endowments would retain their relative values from SON to society and concluding that this assumption, although critical to Epstein’s analysis, is unfounded); (ii) deciding what portion of the surplus generated by civilization is subject to division, Fried, *supra* note 19, at 176-77 (arguably a much smaller portion than the entire surplus); and (iii) the difficulty of modifying the Lockean social contract that is really a multilateral monopoly to the model provided by competitive equilibrium. *See id.* at 178 (supplying game-theoretic analysis to propose some possible solutions and additional problems to the problem of “allocation-of-common-costs”).

46. MURPHY & NAGEL, *supra* note 7, at 12-40, 74.

47. *Id.* In their discussion of these traditional criteria, Murphy and Nagel note that fairness, like many of these criteria, is not uniformly defined. *Id.* at 12-13. They raise the issue of whether relevant differences exist between taxpayers that justify differential tax treatment. *Id.* at 14. Such differences might include the benefits received because of the existing political and legal system as well as differences in the initial distribution of resources and level of welfare. *Id.*

48. MURPHY & NAGEL, *supra* note 7, at 26, 41.

49. *Id.* at 45.

Professors Murphy and Nagel's analysis necessarily raises the following question: Within what political and legal structure must our system of taxation be evaluated?⁵⁰ While clearly articulating the question, they unfortunately provide little analysis of the important or essential elements of our political and economic system that necessarily bear on the question. Professors Murphy and Nagel ultimately conclude that "we have to evaluate the legitimacy of after-tax income by reference to the legitimacy of the political and economic system that generates it, including the taxes which are an essential part of that system."⁵¹ Although describing our economic and political system generally, by terms such as "capitalism" and "Western democracy," Professors Murphy and Nagel provide no definitions or descriptions that help suggest what tax system is suitable to such systems or how to evaluate a tax system within that context.⁵²

Many other analyses, including those providing alternatives to the current tax system, rely on various theories of distributive justice. These analyses do not link their theories with explicit discussions of our existing external political and economic system, except in the most abstract terms.⁵³ Some welfarist theories assume a notion of distributive justice wherein the state has an obligation to further the aggregate welfare of society.⁵⁴ For example, Professors Joseph Bankman and Thomas Griffith suggest that optimal tax models may help define the impact of taxes on the welfare of individuals.⁵⁵ Optimal tax models can assess normative gains of the tax struc-

50. *Id.* at 74. They acknowledge that the tax system raises some of the same important issues of public policy raised by Epstein, including questions about the legitimate ends of government and the proper limits of state authority *vis-à-vis* the individual. *Id.* at 73. Additionally, the individual's personal (economic and political) responsibility and desert, the individual's need for equality of opportunity, and the importance of freedom in general, are also implicated. *Id.* While they do not discuss how a modern Western capitalistic democracy addresses these questions, absent their discussion one can only assume that our economic and political system provides a satisfactory response.

51. MURPHY & NAGEL, *supra* note 7, at 33. They conclude that the libertarian arguments (i.e., property rights are prepolitical and thus natural or inherent) are wrong. *Id.* at 32-33.

52. *Id.* at 188-89 (describing the need for a conception of justice that is compatible with capitalism and realizable under democracy). No substantive definition of democracy (other than self-interested voters) emerges in their discussion. *See id.* at 181-88 (discussing "plausible politics").

53. But distributive justice requires an external framework, one that is inherently political. *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 988 (1988) (noting that an "external orientation" is possible and required in distributive justice). Weinrib notes that "[t]he home of the political is distributive justice," because any particular distribution is the product of political institutions with the capacity to evaluate and choose among any number of possible distributions. *Id.* On the difficulties posed by abstract discussion, see, for example, Alexis de Tocqueville, who stated, "An abstract word is like a box with a false bottom; you may put in what ideas you please and take them out again unobserved." RALPH LERNER, *THE THINKING REVOLUTIONARY* 1 (1987) (quoting Tocqueville).

54. Fried, *supra* note 19, at 182. Fried notes that "[t]he case for any tax structure on social welfarist grounds is purely derivative of prior moral commitments to a particular social welfare function" and an estimate of how any combination of tax and transfer schemes will best effect those commitments. *Id.* at 183. Generally, any social welfarist position begins from the assumption that the state has an obligation to increase the aggregate welfare of society. *Id.*; *see also* Blum & Kalven, *supra* note 16, at 491 (defining general welfare arguments as "economic welfare").

55. Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1966 (1987). Bankman and Griffith note that Blum and Kalven fail to offer substantive support for proportionate taxation while criticizing progressive taxation.

ture based on just distribution and economic effects, including labor supply incentives.⁵⁶ For Professors Bankman and Griffith, a combination of substantial demogrants and uniform marginal rates satisfy an egalitarian welfarist theory of distributive justice.⁵⁷

Seemingly motivated by similar egalitarian aims, John Rawls proposes a proportionate tax on consumption to raise the revenues that "justice requires."⁵⁸ Rawls is concerned with a system that implements the "first principle[s] of justice and fair equality of opportunity,"⁵⁹ so that his argument for proportionate taxation rests on its treatment of "everyone in a uniform way."⁶⁰ His proposal seems to accord primacy to property rights, yet Rawls's distributive system is generally in favor of redistribution to achieve "a democratic regime in which land and capital are widely though not presumably equally held."⁶¹ According to Professor Fried, this argument for proportionate taxation seems to stand as an "island of deontological rights swamped by a sea of redistribution."⁶²

C. "Fairness" and "Equality"

Although "fairness" is a traditional criterion for evaluating tax equity, one suspects that it lacks a single definition, at least as used by speakers of such wide-ranging views.⁶³ Beginning from quite diverse approaches (e.g., proportionate taxation or various welfarist systems), all of these analyses appeal to "fairness."⁶⁴ Because of the malleability of "fairness" and "equality," it is important to ask "equality of what?"⁶⁵ If the speaker means equal

See id. at 1910-45. Yet Blum and Kalven's arguments based on the progressive rate structure's addition to complexity and tax avoidance are unsubstantiated by empirical support. *Id.* Specifically, Bankman and Griffith criticize Blum and Kalven for failure to ground any argument for proportionate taxation on a theory of distributive justice. *Id.* As a result, the arguments for a proportionate tax must fail on efficiency grounds (the main argument against progressive taxation) because on efficiency grounds only a lump-sum tax should be adopted. *Id.* However, they note that most reject a lump-sum tax on fairness grounds. Bankman & Griffith, *supra*, at 1910-45.

56. *Id.* at 1945-66.

57. *Id.* at 1967.

58. JOHN RAWLS, A THEORY OF JUSTICE 278 (1971).

59. *Id.* at 279.

60. *Id.* at 278-79 (basing his preference for a consumption tax on the fact that it imposes a levy according to how much someone takes out of the "common store of goods"). Rawls seems to suggest that progressive rates may be necessary to "preserve . . . justice." *Id.* He further sees taxation of inheritance and income at progressive rates as necessary, along with a definition of property rights "to secure the institutions of equal liberty in a property-owning democracy." *Id.* at 279.

61. RAWLS, *supra* note 58, at 280.

62. Fried, *supra* note 19, at 185 (noting various problems with Rawls's approach). For example, the argument for proportionate taxation presupposes an initial just distribution. *Id.* at 186. To the extent of existing injustice, there is an argument for rectification. *Id.* As Fried notes, this "essentially Nozickean principle of rectification" is puzzling in an otherwise Rawlesian distributive system. *Id.*

63. *Id.* at 157-58. To illustrate the diverse individuals who subscribe uncritically to proportionate taxation on arguments of "fairness," Fried cites Epstein, Blum, and Kalven (discussed *supra* notes 21-35 and accompanying text), as well as Milton Friedman and John Rawls. Fried, *supra* note 19, at 157-58.

64. MURPHY & NAGEL, *supra* note 7, at 12 ("Fairness . . . is thought of specifically as a standard for evaluating differences in the tax treatment of different people: the principle that like-situated persons must be burdened equally and relevantly unlike persons unequally.").

65. Fried, *supra* note 19, at 187-88. While everyone is in favor of equality, the case for proportion-

proportionate sacrifice (measured by the utility of dollars paid), under most utility analyses, a progressive rate is implied; if the speaker means equal proportionate sacrifice (measured by dollars paid), then (and only then) a flat tax results.⁶⁶ Ultimately, based on “equality of burden,” coherence requires a head tax. The significant difficulties of a head tax within a democratic polity have already been noted.⁶⁷ Moreover, as Professor Barbara Fried notes, “no sensible theory of distributive justice” is predicated on rate structures as such, but rather, rate structures are only a means to put into effect “prior, moral commitments about the proper role of government.”⁶⁸ However, the proper role of government can only be defined by reference to the existing political structure, and by the choices inherent in that structure.

According to some, democracy exists where there is equal opportunity for those entitled to participate in the political process to elect those able to make choices about funding.⁶⁹ By this account, progressive taxation, wherein the wealthy are required to fund government, may be anti-democratic.⁷⁰ Equal taxation—i.e., imposing a head tax on all citizens, including the working poor, without regard to resources or the result of such taxes—may be inconsistent with an equality that permits democracy. By this account, even proportionate taxation may not be democratic, but tyrannical. A closer look at how taxes correlate with political systems over time,

ate taxation requires agreement that all should share the tax burden equally. *Id.* From this view of equal sacrifice (equal sharing of the tax burden), it is not clear whether “equal sacrifice” means equal absolute sacrifice or equal proportionate sacrifice. *Id.* If equal absolute sacrifice (as measured by dollars paid) is meant, the result is a regressive head tax; if equal absolute sacrifice (as measured by the utility of dollars relinquished) is meant, any rate system could be implied. *Id.* This difficulty is captured by an oft-quoted exchange between F. Scott Fitzgerald and Ernest Hemingway. See Joel Slemrod, *On the high-income Laffer curve*, in TAX PROGRESSIVITY AND INCOME INEQUALITY 179 (Joel Slemrod ed., 1994) (When Fitzgerald noted, “The rich are different from us,” Ernest Hemingway replied, “Yes, they have more money.”).

66. Fried, *supra* note 19, at 187-88 (setting forth this matrix). Because utility analysis, albeit imperfect, raises issues of individual autonomy and market distortion, it is subject to attack. On the validity—despite any level of imprecision—of the declining marginal utility for each dollar, see, for example, McMahon & Abreu, *supra* note 7, at 35-36. On the arguments against any tax system that results in distortion of individual choice or economic efficiency arguments against progressive taxation because it results in productive individuals choosing not to work (and so decreasing societal productivity), see, for example, Epstein, *supra* note 5; Slemrod, *supra* note 65. This argument loses its force upon examination. See, e.g., Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement*, *supra* note 13, at 474-75, 480-82 (summarizing the Hettich & Winer analysis of economic theories and concluding that no economic theory provides a normative theory of taxation); McMahon & Abreu, *supra* note 7, at 43-46 (discussing how market rewards at the top impede economic efficiency and productivity).

67. See *supra* notes 17-20 and accompanying text.

68. Fried, *supra* note 19, at 158. Fried also notes that the view that all should pay taxes equally assumes that beneficiaries of government expenditures cannot be traced with the result that a benefits analysis is impractical. *Id.* Fried also notes that once a proportionate tax includes an exemption, essentially a degressive tax, it is subject to the same criticisms leveled at progressive taxation. *Id.* at 194-95.

69. Compare, e.g., *supra* notes 25-35 (discussing Blum & Kalven’s definition of democracy as majority rule and paying taxes as democratic participation) with note 59 (discussing Rawls’ call for “equality of opportunity”).

70. Blum & Kalven, *supra* note 16, at 515 (discussing “democratic participation” by means of paying taxes and urging proportional taxation to preserve “wider democratic participation in government through paying taxes”).

as well as a review of how we define our own democratic system, will be helpful.

III. THE FOUNDERS' DEMOCRATIC CONSTITUTION

A. Introduction

A detailed discussion of the forces leading to the founding of the United States would be a significant undertaking. Definitively establishing the relative importance of any element contributing to the Founders' political philosophy is neither possible nor necessary.⁷¹ Nevertheless, it will be helpful to review the political and philosophical influences important to the Declaration of Independence and the Constitution, their similarities, and their differences. This will allow us to identify the democratic nature of our American political system, a necessary first step in evaluating our tax system's consistency with notions of equality as understood within that system.⁷² No comprehensive review is intended. It will be sufficient to show that American representative democracy represents a rich tradition with a complex understanding of equality, by which discussion of our tax system can be enlarged.

Because American democracy represents at once strong egalitarian (i.e., democratic) elements and aristocratic notions of who is best qualified to represent the public interest, no one satisfactory definition of democracy is likely to emerge. Representative democracy's essential principles, or *sine qua non*, can nevertheless be identified.⁷³ However, identifying abstract principles—whether equality or freedom—pose difficulties.⁷⁴ Examination of how these political principles came to be articulated in the course of the Revolution, and implemented in the crafting of the Constitution, may help

71. Compare Cecelia M. Kenyon, *Republicanism and Radicalism in the American Revolution: An Old-Fashioned Interpretation*, 19 WM. & MARY Q. 153, 155 (1962) (describing as "very complex" the political phenomena of the Revolutionary and Constitutional era), with *supra* notes 36-44 and accompanying text (discussing Epstein's view that the Constitution embodies Locke's philosophy).

72. On the debate regarding the relative natures of and sources for the Constitution and Declaration of Independence, see, for example, MARTIN DIAMOND, *The Declaration and The Constitution: Liberty, Democracy, and The Founders*, in AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT 224 (W.A. Schambra ed., 1992); RAHE, *supra* note 1, *passim*; Kenyon, *supra* note 71, at 153-54.

73. See FINLEY, DEMOCRACY, *supra* note 13, at 9 (justifying attempts although discussing difficulty of defining democracy). As an example of those who discount the utility of such efforts, Finley quotes Geraint Parry. *Id.* According to Parry, "democracy" and "democratic" are so "debased" that they have ceased to be of any use in distinguishing types of government. *Id.* (quoting GERAINT PARRY, POLITICAL ELITES 141 (1969)). However, "democracy" does imply societal approval of the institution thus described. *Id.* But see R.R. Palmer, *Notes on the Use of the Word "Democracy" 1789-1799*, 68 POL. SCI. Q. 203 (1953) (noting that "democracy" is a symbol of "widely held political and personal values" and used favorably by all).

74. See, e.g., M.I. FINLEY, *The Freedom of the Citizen in the Greek World*, in ECONOMY AND SOCIETY IN ANCIENT GREECE 77 (Brent D. Shaw & Richard P. Saller eds., 1982) [hereinafter ECONOMY & SOCIETY]; H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37, 49 (1954) (defining "rights" based on existing legal structure and correlative obligation that substantiates a "right"); *supra* note 53 (discussing the limitations of abstract words).

explain the nature of equality and its relationship to democracy in the United States.

B. "No Taxation Without Representation"

Tax issues have played a central role in American politics from the very beginning. The original debate about the legitimate basis of government, culminating in the American Revolution, is effectively made concrete by the slogan "no taxation without representation." The need or desire for revolution was unclear when Britain imposed the Stamp Act in 1765.⁷⁵ Even less predictable was the adoption of a system of government so radically different from English constitutional monarchy.⁷⁶ Independent and jealous of their liberty, Americans "augur[ed] misgovernment at a distance and sn[iffed] the approach of tyranny in every tainted breeze."⁷⁷ An Americanized version of Locke's theory of revolution, the colonists' experience in self-government, and the Founders' education in the classics (the ancient historians and political philosophers) provided formative influences.⁷⁸ The prevailing sentiment of the time favored extending power to the majority of the population.⁷⁹ In short, a strong democratic culture, with its "tradition of liberty," united a long tradition of classical and Whig thought in a peculiarly American way.⁸⁰

75. RAHE, *supra* note 1, at 554-55 (quoting Edmund Burke, who said, "Leave America to tax herself," and recognized the importance of any tax as indicative of larger principles). Britain chose to tax her colonies at the very moment when the colonies no longer depended on Britain for protection. *Id.*; see also *id.* at 553-56 (quoting Alexander Hamilton, who stated that "the origin of all civil government, justly established, must be a voluntary compact, between the rulers and the ruled . . . for what original title can any man or set of men have, to govern others, except their own consent?"). For the effectiveness of taxes as a current rallying cry, consider their prominence in the 2000 presidential race.

76. See Kenyon, *supra* note 71, at 157 (noting that the colonists wanted redress of their grievances, not revolution). More importantly, Kenyon notes that there was no particular opposition to monarchy, especially constitutional monarchy. *Id.* at 157-65; see also HARVEY C. MANSFIELD, JR., *THE SPIRIT OF LIBERALISM* 77 (1978) (describing the English as "bumblers," not ambitious tyrants, and describing American revolutionaries as "overreact[ing]," and the Bicentennial celebration as celebrating a "successful overreaction").

77. RAHE, *supra* note 1, at 551 (quoting Burke and his assessment that American sensitivity to this issue rested with their education, especially in the law). Burke attributed the Americans' inquisitive nature and their ability to judge from principles, rather than actual grievances, to their education in the law. *Id.* But see CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS* 118-19 (1994) (attributing the Founders' suspicion of tyranny to their grounding in the ancient historians and asserting that "[w]hatever his faults, George III was hardly Caligula or Nero; however illegitimate, the moderate British taxes were hardly equivalent to the mass executions of the emperors").

78. RAHE, *supra* note 1, at 556. However, Kenyon notes that Locke's views provided no simple justification for revolution, because Locke defined revolution as legitimate only if by the majority. Kenyon, *supra* note 71, at 169. Locke allowed for majority rights against monarchical or aristocratic infringement, not for the protection of the individual against the majority. *Id.* at 170. Parliament thus constituted legitimate government as an expression of majority will. *Id.* Kenyon concludes that Americans were aware from their own experience of the importance of creating a government that took into account their pessimism about man's capacity for governance. *Id.* at 173; see also *supra* note 77 (discussing the Founders' classical education); *infra* note 89 (discussing American understanding of Locke).

79. Kenyon, *supra* note 71, at 159 (describing this extension of "power and privilege" to the majority as constituting a "radical" evolution); see also *infra* notes 91-97, 125-28 (discussing increasing egalitarianism).

80. See RICHARD, *supra* note 77, at 82 (describing British authors' starting point in the classics); *id.*

Locke's assertion that "all legitimate government . . . rested on the consent of the governed"⁸¹ is commonly accepted as the basis for the revolutionary claim for independence.⁸² Consent alone provided a problematic basis for revolution.⁸³ Consent was not understood to be the means by which government (even one based on popular sovereignty) operated.⁸⁴ The colonists declared independence because they recognized that their interests diverged from England's and the British government was uninterested in redressing their grievances.⁸⁵ Revolution was not tantamount to a rejection of the English constitution, which was then regarded as the best form of government.⁸⁶ As a result, there was a need to justify revolution, to show that the current British government had corrupted that form and had degenerated into a tyranny.⁸⁷

C. The Declaration of Independence and Beyond

1. The Democratic Ideology of "The Pursuit of Happiness"

In addition to justifying the revolution, the Declaration of Independence focused on identifying the goals of government, neither proposing nor es-

at 123-68 (describing long history of mixed government theory). For example, Richard notes, among evidence for these overlapping traditions, that no one thought it strange that "Burke" should debate "Pindar." *Id.* at 83.

81. RAHE, *supra* note 1, at 574 (paraphrasing Locke).

82. *Id.* at 556-57; *see also supra* notes 36-45 (discussing Epstein's conclusion that the Constitution is a Lockean document). *But see* RAHE, *supra* note 1, at 582-83 (describing Montesquieu's influence as exceeding that of Locke in matters related to "the constitution of liberty").

83. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 182 (1969). Defenders of the right of Parliament to tax the colonists differed in their arguments, with some denying the need for consent as a basis for taxation. *Id.* at 173. Some British theorists countered that the Americans had "virtual representation." *Id.* The majority of the English, if representative of the colonies, could be said to have given its consent—binding on the colonists. *Id.* at 174; *see also supra* note 78 (reviewing Kenyon's assessment of the problematic nature of Lockean consent for the Americans). Virtual representation required a homogeneity of interests that the disparity between colonists and mother country denied. WOOD, *supra*, at 177-78. Disparity of interests could justify renunciation of British authority without rejection of the concept of representation itself. *Id.*

84. DIAMOND, *supra* note 72, at 224-40 (demonstrating that consent is limited to the establishment, not the operation, of government and tracing the doctrine before and after the revolution); *see also* Roy N. Lokken, *The Concept of Democracy in Colonial Political Thought*, 16 WM. & MARY Q. 568, 578 (1959) (noting that even if "the people" were the source of all political power, it did not extend to the continued exercise of that power once delegated to those chosen to govern). Nor was consent to be lightly withdrawn. *See* MANSFIELD, *supra* note 76, 75-76 (discussing the basis for revolution). Moreover, the consent required for government mandated no particular form of government. *Id.*

85. WOOD, *supra* note 83, at 177-78.

86. W. Paul Adams, *Republicanism in Political Rhetoric Before 1776*, 85 POL. SCI. Q. 397, 398-99 (1970) (noting the generally positive regard for the British constitution). Adams notes that the resistance to the Stamp Act reflected the colonists' resistance to what they regarded as their inferior, unequal position within the Empire. *Id.* at 398. However, they did not object to monarchy, at least constitutional monarchy. *Id.*; *see also* Lokken, *supra* note 84, at 573-76.

87. DIAMOND, *supra* note 72, at 234-35 (contrasting Paine's rejection of monarchy that needed no further basis for revolution and the Founders' efforts to demonstrate the illegitimacy of George III); RICHARD, *supra* note 77, at 131 (noting that it was the degeneration of the English constitution that formed the basis for revolution); WOOD, *supra* note 83, at 200-01 (same); *see also id.* at 201 (noting that "the Americans . . . justified their constitutional opposition to English policy not by abjuring the theory of mixed government but by using and affirming it").

tablishing any particular form of government.⁸⁸ By declaring the “pursuit of happiness” an identified and accepted goal of government, the Declaration makes no mere linguistic substitution, but an important egalitarian statement.⁸⁹ If “the pursuit of happiness” is a legitimate goal of government, then all men should have a voice in government and its policy.⁹⁰ Whatever philosophical tradition the Declaration reflects, it is a strongly democratized one.⁹¹

2. *Democracy, Republicanism*

British constitutional monarchy was then regarded as the ideal form of government. Thomas Paine’s attack on hereditary monarchy and his call for independence and a representative government in his *Rights of Man* and *Common Sense* marked a decisive and influential moment in American history.⁹² Until this time, few regarded republican government as desirable or possible in the vast expanse of America.⁹³ Opponents of republican government used the words “Republicanism” and “democracy” to bring to mind the ancient Greek city-states, and the civil war and strife associated with them.⁹⁴ With the decision to declare independence, republicanism—signifying the “public good” (*res publica*)—became the aim of government following the American Revolution.⁹⁵ A distinct “public” interest, not iden-

88. See MANSFIELD, *supra* note 76, at 76 (“The choice left open to a free people by the Declaration is nothing less than the most comprehensive choice that men can have or presume to have: how to govern themselves for their mutual safety and happiness.”).

89. Kenyon, *supra* note 71, at 171-73 (noting the deviation from the “Lockean trilogy of rights” by the substitution of “pursuit of happiness” in place of “property”). There is no denying the importance of property rights. *Id.* at 172 n.13. Where the protection of property is a fundamental goal of government, then men of property are its natural citizens (even justifying limited citizenry to that class). However, the substitution’s importance becomes clear upon reflection, that the Declaration is not a governing document, but an “ideological force.” *Id.*

90. *Id.* at 173.

91. *Id.* at 172-73 (noting the “dynamic and equalitarian implications” of the substitution). Kenyon also attaches to this substitution evidence of the “democratization” of Locke that thereby occurred. Kenyon, *supra* note 71, at 173.

92. See Adams, *supra* note 86, at 411-15 (detailing the arguments advanced against republican government); Lokken, *supra* note 84, at 572-73. Both authors link Paine’s treatises with an increased use of terms such as “republicanism” and “democratic” in their pejorative senses. Adams, *supra* note 86, at 411-15; Lokken, *supra* note 84, at 572-73.

93. On the ideal nature, generally, of the British system, see WOOD, *supra* note 83, at 10-11 (noting that the Age of Enlightenment was the age of the English constitution). Montesquieu termed the English constitution “this beautiful system.” *Id.* at 11; see also Adams, *supra* note 86, at 398-99 (noting the prevailing pro-British sentiment), 398-400 (noting the objections to republicanism based on size and its unsuitability as a form of government for empires).

94. Adams, *supra* note 86, at 397-98 (noting the defamatory uses of terms related to “republicanism” before 1776); see also Kenyon, *supra* note 71, at 166-67 (describing shift in the view of “republicanism” before and after 1776); Lokken, *supra* note 84, at 570-72 (describing “democracy” as understood in colonial America).

95. WOOD, *supra* note 83, at 55-56 (noting that “the public good,” the people’s welfare, became the “Polar Star,” and quoting Thomas Paine, who said, “The word *republic* means the *public good*, or the good of the whole, in contradistinction to the despotic form, which makes the good of the sovereign, or of one man, the only object of the government”); see also *id.* at 224 (quoting Paine to the effect that by engrafting representation onto simple democracy, America would thus surpass Athens); Kenyon, *supra* note 71, at 166 (associating good government with republicanism after 1776); Palmer, *supra* note 73, at

tical with the sovereign one (or few), and ultimately a commitment to democratic self-governance, is now identified as the basis on which the United States was founded and represents its unique contribution to modern government.⁹⁶

With monarchy challenged as the best form of government, the debate became one principally between the relative merits of democracy and aristocracy.⁹⁷ Because democracy meant actual administration by the people, applying any simple, republican form of government to the vast reach of America seemed to pose an insurmountable problem.⁹⁸ Because of their superior wealth and education, there seemed to be a special role for the Founders, the new "natural aristocracy." Moreover, mixed government theory presupposed a system representing the various political or social elements by its components (i.e., monarchy, aristocracy, or democracy). Ultimately, the decision to engraft representation onto direct democracy satisfied mixed government theory and provided a solution to the problem of America's vastness.⁹⁹ In a sense, America's size supplied the solution to democracy's difficulty. If geography made actual participation in government difficult, representation would allow democracy, but with a strong aristocratic twist.

3. *Mixed Government Theory and the Classical Tradition*

The Founders were well-versed in classical political philosophy, the three simple forms of government (monarchy, aristocracy, and democracy), and the long tradition of mixed government theory.¹⁰⁰ Based on the belief

223-24 (noting that "democracy" suddenly appears multiple times in Paine's *The Rights of Man*).

96. On the nature of "republican" government creating a public sphere distinct from mere "private pecuniary interests," see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 252 (1992) [hereinafter WOOD, *RADICALISM*], noting that republics are different from monarchy or tyranny, because they embody a "distinct public interest to which people would willingly surrender some of their private pecuniary interests." See also Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247 (2002) (describing the Constitution as creating a framework for "democratic self-government"); Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1685 (1988) ("After all, if being a republican means having a commitment to some version of democratic self-governance, combined with an aspiration for collective decisionmaking that goes beyond the mere aggregation of individual preference into some vector of 'public' decisions, most of us can easily view ourselves as republicans.").

97. See WOOD, *RADICALISM*, *supra* note 96, at 241 (noting that by the 1780s the principal antagonists in society were not "patriots vs. courtiers," but "democrats vs. aristocrats"); Palmer, *supra* note 73, at 203 (describing the "revolutionary agitation" of the period as reflecting the conflict between democracy and aristocracy); *infra* notes 105-106 (discussing Jefferson's views).

98. See RICHARD, *supra* note 77, at 114-15; WOOD, *supra* note 83, at 222-23. Generally, this view supported the maintenance of thirteen separate states, each as a separate republic. This conformed to Montesquieu's belief that the ancient republican model was only workable for a small space. *Id.* at 356. No example of a republic covering the extent of the United States had ever existed; certainly, all the ancient republics were small geographically. See *id.*

99. See *infra* notes 128-141 (discussing elements of democracy with which the Founders found fault and their solutions).

100. Mixed government theory was both well known and well accepted. See THE FEDERALIST NO. 39 (James Madison); RICHARD, *supra* note 77, at 123; WOOD, *supra* note 83, at 197-98. Its tradition begins with Plato and continues at least to the Founders. See generally KURT VON FRITZ, *THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY* (1954).

that no simple form of government is stable, mixed government theory assumes that a balance of the three simple forms of government will prevent their natural and automatic corruption over time (monarchy into tyranny, aristocracy into oligarchy, democracy into ochlocracy).¹⁰¹ If the appropriate balance is achieved, political stability and longevity is believed possible.¹⁰² As modern day lawgivers, the Founders undertook to craft the best stable government, deliberately incorporating elements of republicanism and democracy not seen since antiquity.¹⁰³ Further, American innovations to mixed government theory were incorporated in the Constitution. However, it was the ancient models that were most influential for the Founders.¹⁰⁴

As heirs to the ancients, adopting such classical personae as the "Publius" of the *Federalist Papers*, the Founders identified themselves as members of a natural aristocracy.¹⁰⁵ As such, the Founders alone were capable of identifying the elements of, and bringing into effect, the ideal government. They recognized that they were not simply copying classical models, but were poised to implement a republican government because of advances in

101. See PLATO, THE LAWS OF PLATO 142-43 (bk. VI, pts. 756e-757a) (Thomas L. Pangle trans., Univ. of Chicago Press 1988). Aristotle identifies mixed government as the ideal. ARISTOTLE, *supra* note 8, at 228-41 (pts. 1282b14-1284a3). The most detailed analysis can be found in Polybius, who identified Rome as the ultimate example. See 1 POLYBIUS, THE HISTORIES 17-49 (bk. I, chs. 6.5-18) (T.E. Page et al. eds., W.R. Paton trans., Harvard Univ. Press 1922). If a mixed constitution assigned power to all three orders of society, the expected cycle of discord could be avoided. See RICHARD, *supra* note 77, at 126 (explaining the dubious nature of Polybius's characterization of Rome as a mixed government). Mixed government theory received attention from Thomas Aquinas, Machiavelli, and remained the dominant view until the seventeenth century, when absolutism gained approval. See *id.* at 127.

102. See RICHARD, *supra* note 77, at 125; WOOD, *supra* note 83, at 198 (noting that reciprocal sharing of power allowed the desirable qualities to be preserved and quoting John Adams, who said, "Liberty depends upon an exact Ballance [*sic*], a nice Counterpoise of all the Powers of the state. . . . The best Governments of the World have been mixed").

103. RAHE, *supra* note 1, at 575. On the Founders' perception of themselves as modern lawgivers, see, for example, THE FEDERALIST NO. 38 (James Madison) (noting that ancient history is replete with examples of individuals cast in the role of choosing and establishing governments without assemblies, even in Athens).

104. For a discussion of other innovations, including the separation of powers, see RAHE, *supra* note 1, at 543-616; RICHARD, *supra* note 77, at 123-168. The Founders benefitted by others' adaptations. For example, James Harrington adapted mixed government theory with the belief a natural aristocracy, useful to the Founders, who so identified themselves. RICHARD, *supra* note 77, at 129-30; see also *id.* at 88 (discussing Jefferson's view that America represented the third, and final, of the three epochs in history); RAHE, *supra* note 1, at 580 (discussing the importance of antiquity to the Framers of the Constitution).

105. On the ancients providing models of government for the Founders, see RAHE, *supra* note 1, at 580 (describing the Framers' belief that a pure republic "would have to be constructed on the model of the direct democracies of classical antiquity"). See also RICHARD, *supra* note 77, at 74-75 (quoting Jefferson on his belief that consensual government had not been seen since Rome, and quoting James Wilson's assignment of the doctrine of popular sovereignty to the Greeks and Romans). On the Founders' use of classical symbolism generally, see RICHARD, *supra* note 77, at 34-52. Classical pseudonyms and symbols functioned on many levels for the Founders. First, they served to identify and qualify the Founders as members of the "aristocracy," by education, if not by birth. *Id.* at 50-51. They made use of symbols and models neither common nor arcane, but ones accessible to anyone with a copy of Plutarch's *Lives*. *Id.* at 43. Additionally, they chose classical heroes associated with republicanism and republican virtue. *Id.* at 42-43. For example, their choice of "Publius" was important, because Publius Valerius is credited with establishing republican government in Rome following the expulsion of the last Roman king, Tarquin, in 509 B.C. *Id.* at 41.

political science made since antiquity.¹⁰⁶ On the one hand, the utility of ancient history depended on a general perception of similarity between current and past events. On the other hand, untainted by feudalism, classical models were preferable to more recent examples.¹⁰⁷ The immediacy of the ancients is clear: By comparing the British to the Roman emperors, the threat of tyranny (including any level of tax) required immediate action.¹⁰⁸ Tyranny's danger was twofold; it deprived individuals of both liberty and virtue. The loss of virtue itself made the loss of liberty more likely.¹⁰⁹

4. *The Dangers of Independence*

Following the Revolution, the independent operation of the thirteen colonies demonstrated the difficulties of self-government.¹¹⁰ The Declaration of Independence was soon seen as more appropriate to revolution than conducive to governance.¹¹¹ Congress lacked the power to compel cooperation among the states, and so voluntary agreement rarely occurred. With no one body authorized to compel cooperation among the independent republican states, the very possibility of self-governance was called into question. Central to the Confederation's failure was Congress's decision, undertaken to foster cooperation, to deny itself the right to impose and collect taxes, a decision that crippled the war effort.¹¹² Ultimately, the Founders' real fear became the dissolution of the Union.¹¹³

106. See RAHE, *supra* note 1, at 581 (discussing correspondence between George Washington and Alexander Hamilton on the value of the *Federalist Papers*, because they candidly discuss "the principles of freedom & the topics of government"); RICHARD, *supra* note 77, at 83. Richard quotes Jefferson's assessment that he was participating in a universal struggle:

The same political parties which now agitate the U.S. have existed thro' all time. Whether the power of the people or that of 'the aristoi' should prevail were questions which kept the states of Greece and Rome in eternal convulsions, as they now schismatize every people whose minds and mouths are not shut up by the gag of a despot.

Id. Rahe notes Jefferson's belief that the *Federalist Papers* compensated for the lost works of classical antiquity. RAHE, *supra* note 1, at 581.

107. RICHARD, *supra* note 77, at 87 n.5 (quoting John Adams on the immediacy of the ancient authors: "When I read [the ancient historians, Thucydides and Tacitus] . . . I seem to be only reading the History of my own Times and my own Life").

108. *Id.* at 99-100 (noting that Adams regarded liberty as dead in Great Britain as it was in imperial Rome). The dangers of tyranny and the Roman Empire were also invoked by the Anti-Federalists because of the concentration of federal power in the Constitution. *Id.*

109. *Id.* at 120 (noting that the classical republican fear of tyranny signified not just fear of the loss of liberty, but of the loss of virtue, as well). Hence, the goal of educating the citizenry was to increase its virtue and to ensure the avoidance of tyranny. See *id.* at 85 (discussing Jefferson's view that elevating the minds of the people would help defeat tyranny).

110. Lokken, *supra* note 84, at 573-74 (noting that most colonists praised the English mixed constitution and believed that colonial governments were a copy of that constitution, "the ideal mixed government").

111. See RAHE, *supra* note 1, at 575 (quoting Hume on the difficulties of self-governance: "When we assert, that all lawful government arises from the consent of the people, we certainly do them a great deal more honour than they deserve, or even expect and desire from us"); *id.* at 587 (discussing the contributions of Montesquieu and Hume); Kenyon, *supra* note 71, at 171, 173-74 (discussing the American experience with self-government and human defects as pivotal in shaping contemporary American political views).

112. RAHE, *supra* note 1, at 577 (quoting Washington, who expressed great distress because of these

D. The Constitution

The years following the Declaration of Independence proved the truth of Hume's assessment that the dissolution of government is a terrible thing.¹¹⁴ The revolution had dissolved America's bonds with England, but had not found an adequate new form of government. Madison complained that detractors of the Constitution failed to recognize the difficulties inherent in the predecessor form of government during the chaotic years following the Declaration of Independence.¹¹⁵ To create stability and uniformity in government, the Constitution guaranteed to each state the right of "republican government," but denied the states those rights, e.g., to issue money or impair contracts, with which they were not to be trusted.¹¹⁶

1. Goals of the Constitution

The Constitution boldly establishes representative government to ensure the goals articulated in the Declaration.¹¹⁷ However, the Preamble of the Constitution underscores both the similar goals and some important differences between the two documents. The Constitution's aim is "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty."¹¹⁸ Liberty was still a central concern, but within the context of a union capable of addressing issues of general welfare.

defects, especially those that affected the army). As Rahe notes, victory over the British reduced the urgency, but not the need, for reform. *Id.* Creditors were in doubt about their ability to collect, and concerns about pensions prompted disturbances by Army officers. *Id.* at 577-78.

113. *Id.* at 578. According to Hamilton, the Articles of Confederation, stitched together in a haphazard fashion owing to accident, stood as a testament to the failure of human reflection. *Id.* at 577. Washington wondered "whether the Revolution must ultimately be considered as a blessing or a curse." RAHE, *supra* note 1, at 577; *see also id.* (discussing Madison's view of the perilous situation that would decide the result of the American experience).

114. *Id.* at 575-76. While Hume's pessimism generally proved ill-founded, his assessment that the dissolution of government was a terrible event proved to be entirely accurate, as the years between the Declaration of Independence and the ratification of the Constitution were to show. Rahe notes that the state legislatures were not to be trusted (quoting Madison on the injustice of the states' actions). *Id.* at 579. Ultimately, the states' actions merely reinforced the inadequacy of the Confederation and the need for reform. *Id.*

115. Madison asserted that the Constitution need not be perfect, because it replaced something quite imperfect. *See* THE FEDERALIST NO. 38 (James Madison) (comparing America to a patient, steadily growing worse, who chooses physicians and a course of action, only to be confronted by those arguing for a different regimen, and urging adoption of the Constitution as the appropriate course of action).

116. RAHE, *supra* note 1, at 579 (noting how much injustice was the result of the mutability of the states). These frequent and flagrant abuses by the states served to prepare the public for the need for reform. *Id.* (discussing entrenched interests in the state governments); WOOD, RADICALISM, *supra* note 96, at 250 (discussing the democratization of state legislatures following the revolution).

117. DIAMOND, *supra* note 72, at 231 (comparing and contrasting the goals of the Declaration of Independence with the Constitution); *see also* WOOD, RADICALISM, *supra* note 96, at 231-32 (discussing the Founders' reaction to increasing democratization of America following the revolution).

118. U.S. CONST. pmbl.; *see also* RAHE, *supra* note 1, at 579-80 (describing the Framers' belief in the inadequacy of the Confederation and the superiority of the Constitution).

2. *The Democratic Constitution*

The Founders' bold and novel formulation of our representative democracy is not always appreciated.¹¹⁹ The models of antiquity provided examples of republican and democratic governments for the Founders, but examples replete with danger. Moreover, the difficulty of applying any simple form to the vast territory of the United States precluded their duplication and required the Founders to be innovative and creative.¹²⁰ Being educated in the classics and equipped with the most recent advances in political science allowed the Founders to be optimistic in their belief that in America it would be possible to realize classical republican ideals within a new system of mixed government.¹²¹

The Founders crafted a Constitution comprised of the elements of mixed government, but one that we accurately describe as representative democracy.¹²² Starting from an intellectual climate rooted in the Enlightenment and a "preexisting democratic culture,"¹²³ Madison asserted that no other form of government was possible or consistent with both the principles of the revolution and the "capacity of mankind for self-government."¹²⁴ At issue increasingly was the ability or right of all citizens to share in actual participation in that government.¹²⁵ Although the issue of representation

119. Ellen Meiksins Wood, *Democracy: An Idea of Ambiguous Ancestry*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 59, 62 (J. Peter Euben et al. eds., 1994) [hereinafter Wood, *Democracy*] (noting that the novelty of the Founders' creation is often forgotten).

120. See RAHE, *supra* note 1, at 578-79 (quoting Washington's belief in the unique position of his compatriots. Washington asserted that never before had the "rights of mankind" been better understood; the "researches of the human mind after social happiness" had been carried to a greater extent; the collected wisdom of philosophers collected for their use).

121. RICHARD, *supra* note 77, at 82-83. John Adams regarded classical training as important, because the republics of Greece and Rome were unsullied by feudalism. *Id.* Similarly, America, "unsullied by the stain of feudalism," seemed to offer possibilities. *Id.* at 83; see also RAHE, *supra* note 1, at 582 (discussing Hamilton's view that the improvements in political science formed the basis for America's ability to surpass the ancients).

122. DIAMOND, *supra* note 72, at 236-37 (discussing the Founders' concerns with the defects inherent in democracy as directly related to effecting democratic government, that form of government thought most likely to secure personal liberty). The anti-democratic tradition was replete with the dangers of democracy turning into mob rule. RICHARD, *supra* note 77, at 116 (describing the general view that participatory democracy was generally composed of "ungovernable mobs" incapable of deliberation).

123. RAHE, *supra* note 1, at 586 (discussing Madison's sensitivity to the "increasingly populist tenor" of the era); WOOD, *RADICALISM*, *supra* note 96, at 231 (noting that nothing could restrain the popular social forces, i.e., the egalitarianism, unleashed by the revolution); see also W. Robert Connor, *Civil Society, Dionysiac Festival, and the Athenian Democracy*, in *DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN* 217-18 (Josiah Ober & Charles Hedrick eds., 1996) [hereinafter *DEMOKRATIA*] (explaining the phrase "preexisting democratic culture" as describing the consensus in colonial America that discussion and decision-making was open to members of the community). On the English Enlightenment as the impetus behind the sentiments expressed in the Declaration of Independence, see Martin Ostwald, *Shares and Rights: "Citizenship" Greek Style and American Style*, in *DEMOKRATIA*, *supra*, at 50.

124. RAHE, *supra* note 1, at 575 (quoting Madison's and other Founders' comments about their unique endeavor).

125. See WOOD, *RADICALISM*, *supra* note 96, at 244 (noting the alarm occasioned by the demand of ordinary people to participate in government); *id.* at 271-86 (describing the popular "assault" on the

initially was understood to implicate government legitimacy, the growing egalitarian sentiment ultimately understood it to mean actual representation, in short, a democracy.¹²⁶

Emergence of democratic government depends, above all, on acceptance of the belief that no member is better qualified to rule than any other. More accurately, democratic government depends on the belief that all are equally qualified to participate in government.¹²⁷ For proponents of democracy, the right of ordinary laborers to participate in government is essential. To many Founders and non-populists, the ability of the common people to represent the larger public interest, rather than the narrow self-interest, was questionable.¹²⁸ Another problem presented by a democracy that permitted actual participation was imprudent action prompted by popular passion.¹²⁹ Accepting the prevailing egalitarian and democratic sentiment in America, the Founders sought to create a democratic government with the innovations necessary to increase its stability, including a natural aristocracy to limit popular excesses.

3. *Democracy's Dilemma: Representation*

Representation, required by America's geography, solved the dilemma of democracy—the danger posed by supremacy of the people. According to Alexander Hamilton, participation in government through elected representatives “constitute[d] the democratical part of the government.”¹³⁰ Yet, representation allowed the Founders to temper the democratic political process.¹³¹

Representative democracy resulted in the transfer—the alienation—of power from the people to their representatives.¹³² Representation thus per-

aristocracy's claim of disinterestedness as the basis of a superior right to decide issues of the public good).

126. *Id.* at 244 (describing the reaction to the Stamp Act and the demands for popular representation as implying popular participation in government, i.e., democracy, more than classical republican ideas).

127. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 31 (1989) (describing this idea as “the Strong Principle of Equality”); *see also* WOOD, *RADICALISM*, *supra* note 96, at 244-76 (describing the growing egalitarian belief in America following the Revolution).

128. WOOD, *RADICALISM*, *supra* note 96, at 244-70 (noting that, if the members of the aristocracy were seen to represent their own individual interests, and not uniquely capable of being disinterested representatives of the public good, then their claim of superior right to serve as representatives was subject to attack). Wood notes that the aristocracy was increasingly subject to attack for the very leisure which gave its members the time and responsibility for public service. *Id.* at 271-76.

129. DIAMOND, *supra* note 72, at 239 (quoting Henry Cabot Lodge at the Constitution's Centennial: “The makers of the Constitution . . . knew that what they were establishing was a democracy”). The issue that confronted Lodge was whether the correct posture towards democracy was self-restraint or whether government should more immediately effect popular will. *Id.*; *see also* WOOD, *RADICALISM*, *supra* note 96, at 230-32 (describing the increasingly “democratic” nature of American society and its erroneous attribution to the French Revolution).

130. WOOD, *supra* note 83, at 197. *But see infra* note 135.

131. WOOD, *supra* note 83, at 185. Wood notes that “[b]ecause the doctrine of representation was the foundation of all of men's ideas about their relation to government, explaining it was difficult and complicated.” *Id.*

132. Wood, *Democracy*, *supra* note 119, at 62-63 (noting that the Federalist argument was that

mitted the operation of democracy in America, too geographically vast to permit actual participation in government. It also permitted the limitation of popular participation and ultimately elevated the interests of those whose wealth derived from property, not simply labor. Representative democracy served to limit interest group factionalism. It did more than protect the property rights of the wealthy; it substituted for the common craftsman his wealthy better as representative.¹³³ For the Founders, discussions of representation do not focus on "equality" but on "tempering" the people.¹³⁴ Madison captures both sentiments in *Federalist No. 10*.¹³⁵ The result, according to Professor Ellen Meiksins Wood, is "no incompatibility between democracy and rule by the rich."¹³⁶ But, it is important to note that this substitution of the wealthy for the humble craftsmen is justified by ability as much as wealth, the two functioning essentially as synonyms.

4. *The Natural Aristocracy*

American innovations in mixed government theory also included the doctrines of separation of powers and other institutional safeguards against problems inherent in participatory democracy.¹³⁷ Although such dangers were especially noteworthy, the dangers posed by other political and social elements were also noted. A judicious balance was necessary, based on the recognized, inherent dangers in the power of each group, according to both mixed government theory and Madison's multiplicity of interests in the modern commercial nation.

representation was no mere concession to America's size, but actually constitutive of democracy).

133. Ellen Meiksins Wood, *Demos Versus "We, The People": Freedom and Democracy Ancient and Modern*, in DEMOKRATIA, *supra* note 123, at 122-23 [hereinafter Wood, *Demos*]. Representative government was necessary to protect property rights, but, more importantly, to act as a "filter" for the people, to dilute the power of the people. *Id.* at 123, 127; *see also* RAHE, *supra* note 1, at 585 (discussing the view that representative democracy would be more workable than the classical models and direct democracy); WOOD, *supra* note 83, at 221, 410-11, 503 (noting the tension between property rights and individual rights, distinguished in America when they had previously been identical); *see generally* ELLEN MEIKSINS WOOD, *DEMOCRACY AGAINST CAPITALISM* (1995) [hereinafter WOOD, *DEMOCRACY/CAPITALISM*].

134. *See, e.g.*, THE FEDERALIST NO. 35 (Alexander Hamilton) (describing merchants as the natural representative of his social inferiors).

135. THE FEDERALIST NO. 10 (James Madison) (noting that delegation to a smaller number of representatives, by a greater number of citizens spread over a larger geographical area, would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens," so that their voice would be more consistent with the public good). Ellen Meiksins Wood notes that there were important ideological advantages to redefining democracy, in an era becoming increasingly more mobilized in favor of "mass democracy." Wood, *Democracy*, *supra* note 119, at 63. This alienation of power was antithetical to Greek conceptions of democracy, but essentially allowed the Federalists to dissociate "democracy" from the *demos*. *Id.* at 65; *see also* RAHE, *supra* note 1, at 584 (discussing the Founders' view that the doctrine of representation would allow the United States to surpass antiquity).

136. Wood, *Demos*, *supra* note 133, at 127; *see also id.* at 131 (noting that modern definition of democracy is as compatible as Hamilton's); *see also* PHILLIPS, *supra* note 7, *passim* (describing America as a plutocracy).

137. RAHE, *supra* note 1, at 582-85; *see also* DIAMOND, *supra* note 72, at 238 (identifying Montesquieu's important influence in recognizing the need for institutional safeguards, not simply relying on ethical training or mixed government theory). *But see* ROBERT A. DAHL, *DEMOCRACY, LIBERTY, AND EQUALITY* 131-34 (1986) (discussing these institutional systems as impediments to democracy).

If certain elements of mixed government were absent from colonial America, such a system might not seem feasible. For example, there was no obvious monarchy nor was there an established aristocracy. A “natural aristocracy” was soon identified with men of property who could adequately represent the public interest.¹³⁸ A strong executive (the monarchical aspect of government) would check the tendency of the “natural aristocracy” to dominate. In short, the framers designed a system that would both embody and curtail popular power.¹³⁹ The judicious balance of these unavoidable interests would serve as natural checks and balances. The Founders emphasized the importance of not exacerbating natural distinctions.¹⁴⁰ For example, the natural aristocracy of property owners would replace the people’s voice in the assembly, tempering democracy with aristocracy.¹⁴¹ Yet Adams recognized that wealth was also a “[m]onster to be subdued.”¹⁴²

The Founders justified the need to vest a greater stake in the members of the natural aristocracy in order to ensure the public good and to temper perceived sources of democratic problems. This “natural aristocracy,” whose membership was in part derived from wealth, but was synonymous with ability, was not intended to function solely to protect its wealth. Their superior claim originated in membership in a natural aristocracy, based on

138. RICHARD, *supra* note 77, at 131 (“Americans had decided that since education and talent often accompanied wealth, and since wealth (unlike either talent or virtue) could be easily quantified, property was the most appropriate criterion for identifying the ‘natural aristocracy’ which would provide their governments with the necessary senatorial stability.”).

139. Wood, *Democracy*, *supra* note 119, at 77 (noting recognition of anti-democratic intentions of characteristic U.S. institutions, including a large federal republic, a strengthened federal government, and a system of checks and balances that limits the power of representatives accountable to the electorate).

140. Although Madison clearly sought to limit popular control and privilege men of property, these goals had to be accomplished without exacerbating wealth inequality. See, for example, the writings on wealth inequality of both James Madison and Thomas Jefferson (discussing the importance of reducing wealth disparity). For example, compare the following with *infra* note 143 and accompanying text. James Madison reasoned thus on managing the inevitable parties:

The great object should be to combat the evil [associated with factionalism]: 1. By establishing a political equality among all. 2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited accumulation of riches. 3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort. . . . If this is not the language of reason, it is that of republicanism.

141. THE PAPERS OF JAMES MADISON, 6 APRIL 1791—16 MARCH 1793, at 197 (Robert A. Rutland et al. eds., 1983). Therefore, in framing a government to be administered by men over men, Madison identifies the difficulty as twofold: enabling the government to control the governed and in turn to control itself. THE FEDERALIST NO. 51 (James Madison). This included inhibiting the propertied classes from exceeding their appointed sphere, as well as limiting popular control. *Id.*

142. See also WOOD, DEMOCRACY/CAPITALISM, *supra* note 133, *passim*; Wood, *Demos*, *supra* note 133, at 124. This natural aristocracy was to perform the salutary function of tempering the untutored masses. There is evidence from the Founders’ own writings that this elevation of the natural aristocracy of property owners was to achieve the goal of instituting an oligarchy, in place of a democracy. See *supra* note 140 (discussing Madison’s views); *infra* note 143 (discussing Jefferson’s views).

143. RICHARD, *supra* note 77, at 150 (noting the prevalence of the rich to achieve power over the good); Jennifer Roberts, *The Creation of a Legacy: A Manufactured Crisis in Eighteenth-Century Thought*, in ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY 59, 90-91 (J. Peter Euben et al. eds., 1994) (commenting on Adams’s fear of the turbulence of democracy and the threat of popular sovereignty). Roberts notes that “Adams’s works make plain that Adams had a large amount of enthusiasm for a small amount of democracy.” Roberts, *supra*, at 90.

their superior wealth and education. If Madison recognized wealth as signifying a superior right to govern, he also recognized the importance of not exacerbating wealth inequality. Jefferson too recognized the utility of taxation in limiting wealth inequality: "Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise."¹⁴³

The Founders aimed to form a democratic government, using representation to satisfy the need for consent, but intended to temper the views of the many and give predominant voice to the natural aristocracy of property owners. The "equality" reflected in our representative democracy is, as a result, more complex than simple notions exemplified by "one person, one vote." Therefore, a comparison may be useful. Perspective gained by reviewing Athenian democracy, dedicated to political equality, may help clarify our understanding of American democracy, its views of political equality, and any corresponding equality of obligation to pay for the fruits of our democratic society.¹⁴⁴

IV. DEMOCRACY: ANCIENT AND MODERN

A. Introduction

What is democracy and why does it matter that we regard ourselves as a democracy? *Democracy* can be readily defined by its etymology: its roots include *demo** (people) plus **kratein* (to rule, to govern), and so is commonly translated as "*rule by or of the people*."¹⁴⁵ Hence, we feel comfortable describing ourselves as a democracy with our Constitution that begins "*We, the People*."¹⁴⁶ Although the Founders originally displayed some ambivalence toward participatory democracy, the successful years following the drafting of the Constitution led Thomas Jefferson to proclaim in 1816: "We in America are constitutionally and conscientiously democrats."¹⁴⁷ It is clear that the ideals of democracy (freedom, liberty, equality) are valuable to us.

Cross-cultural comparison will show that both ancient Athenian democracy and modern U.S. representative democracy assign the ideals associated

143. 8 THE PAPERS OF THOMAS JEFFERSON 682 (J.P. Boyd ed., 1953) (Letter to James Madison dated Oct. 28, 1785); see also 11 WORKS OF THOMAS JEFFERSON 196-205 (1904-05) (discussing relative merits of various taxes and urging the adoption of a tax on imports because it falls "exclusively on the rich").

144. On different definitions of democracy, see *supra* note 13. See also *infra* notes 148-150, 168-171; WOOD, *supra* note 83, *passim*.

145. See *infra* notes 150, 168-171, and accompanying text (discussing alternate definitions of democracy).

146. U.S. CONST. pmbl.; see *supra* notes 114-144 (discussing the nature of the debates leading up to and the nature of the Constitution).

147. Roberts, *supra* note 142, at 99 (quoting Jefferson and discussing the increasing acceptance of democracy).

with democracy similar importance.¹⁴⁸ As our intellectual and democratic model, an examination of Athenian democracy, its democratic institutions, and allocation of tax burden that made democracy possible for over two centuries (the late sixth through fourth centuries, B.C.), is justified.¹⁴⁹ A cross-cultural comparison of a democracy, that form of government most dedicated to political equality, will more importantly sharpen our analysis of familiar terms (equality) and familiar problems (tax allocations) within the context of a less familiar ancient world.¹⁵⁰ Unburdened by our too intuitively familiar world, we will gain a clearer understanding of how to correlate democratic political equality with tax allocation among those with unequal resources. This review will show that democratic political development in Athens corresponded with a decision to shift the burden of taxation onto the wealthy, thereby incorporating uneducated peasant-citizens into the political community as full members.

Fundamental to all forms of democracy are “equality” and “freedom,” key words for defining democracy in both the ancient and modern worlds.¹⁵¹ Although different permutations of democracy exist, due to differences in people and particular combinations of constitutional forms, *freedom* and *equality* are inherent in democracy, as Aristotle’s definition shows.¹⁵²

148. See, e.g., Ostwald, *supra* note 123, at 49 n.3 (describing differences between liberty and freedom). Modern definitions of democracy, when stripped of content, do not always include notions of civic responsibility, political participation, or even liberty and equality. See, for example, M.I. Finley’s discussion of notions of democracy, ancient and modern. FINLEY, *DEMOCRACY*, *supra* note 13, at 5-10. Finley discusses Joseph Shumpeter’s definition of democracy as a *method* designed to produce a strong, authoritative government. *Id.* at 5. In this view of democracy, political ideals are not necessary, indeed they are not wanted. *Id.* at 5-6. In one view, “government of the people, by the people, for the people” is not only naive but misguided. Either experts or an elite should govern, not the populace. There is semantic confusion about the very nature of “democracy,” when it has been emptied of content, incapable of distinguishing forms of government, and is a term used merely to signify societal approbation. *Id.* at 6-9. If left here, democracy is debased as a word and becomes analytically useless. *Id.* at 10.

149. Although some would question the importance of origins, the importance of Athenian democracy for the political philosophers and the Founders, who were well schooled in ancient history and philosophy, can hardly be overstated. See RAHE, *supra* note 1; RICHARD, *supra* note 77; Ian Morris, *The Strong Principle of Equality and The Archaic Origins of Greek Democracy*, in DEMOKRATIA, *supra* note 123, at 19 (observing that “[o]rigins are out of fashion”).

150. For justification of the value of cross-cultural analysis, see, for example, DANIELLE S. ALLEN, *THE WORLD OF PROMETHEUS* 15 (2000), describing the value of “sharpen[ing] our thinking about punishment on the stone of the unfamiliar ancient world.” See also David Miller, *The Resurgence of Political Theory*, 38 POL. STUD. 421, 427 (1990) (describing the value of conceptual history for helping us develop clearer thinking about features of our own environment because their “very familiarity” makes it harder to “bring them into view”); Morris, *supra* note 149, at 19 (“to understand why people live within one social system rather than another, we have to look to historical factors”).

151. Ostwald, *supra* note 123, at 50. The interrelated nature of freedom and equality becomes clear from any attempt to define them as distinct or separable ideas. Whether in antiquity or modern political thought, freedom and equality overlap. To a question of “[e]quality of what?”, often the answer is equality of freedom (liberty). Mogens Herman Hansen, *The Ancient Athenian and The Modern Liberal View of Liberty as a Democratic Ideal*, in DEMOKRATIA, *supra* note 123, at 92; see also U.S. CONST. pmbl. (identifying “the Blessings of Liberty” as goal); THE DECLARATION OF INDEPENDENCE (“We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness . . .”).

152. See ARISTOTLE, *supra* note 8, at 487-89 (pts. 1317a24-a23). For purposes of this analysis, the distillation that Aristotle offers in THE POLITICS will be useful in describing the particular democracy present in fifth and fourth century Athens, although the two are obviously not identical.

The fundamental idea underlying a democratic form of government is *freedom* It is commonly asserted that only those participating in such a constitution share in freedom, for they say this is the aim for which every democracy is structured. Freedom means one thing, to rule and be ruled in turn. For this is democratic justice, for there to be an equal share according to number, not according to worth (no citizen being better than any other). The multitude necessarily is sovereign according to this form of justice; and whatever seems proper to the majority this [is] final and must constitute justice, for they say that each of the citizens must have an equal share. As a result in democracies, it follows that the poor enjoy greater authority than the well-off, for their number is greater and authority goes with majority decisions.¹⁵³

Because a democracy is a government of all citizens, their participation in debate, from the routine to the momentous, presupposes the ability of every individual to participate fully in collective decisions. In short, each individual is deemed to possess political ability. Although expertise is acknowledged, a political elite is fashioned by public performance; on matters of public concern, no one stands above any individual.¹⁵⁴ Thus, democratic ideals (both ancient and modern) are generally thought to include: (i) the right of self-determination through participation in the creation of social order; (ii) collective decision-making and guarantees of personal liberty; (iii) individual rights (including criminal procedural rights and the security of person and property); and (iv) freedom and autonomy (both public and private).¹⁵⁵

153. ARISTOTLE, THE POLITICS pts. 1317a40-b10 (author's translation modifying ARISTOTLE, *supra* note 8, at 489-91; Ostwald, *supra* note 123, at 53); see also Hansen, *supra* note 151, at 91 (describing democracy, liberty, and equality as a triad, three points on a triangle). Aristotle continues his description of democracy: "This is the second principle of democracy, and from it has come the claim not to be governed, preferably not by anybody, or failing that, to govern and be governed in turns; and this is the way in which the second principle contributes to equalitarian liberty." ARISTOTLE, *supra* note 8, at 489-91 (pts. 1317a40-b17).

154. Ultimately, this is the judgment that "democracy" makes—i.e., that all are capable of participating and knowingly contributing to democratic government. It is not the opinion of the anti-democrats, especially Plato. See *infra* note 354 (discussing Plato's *Protagoras*, the only defense of democracy in the Platonic corpus). On the long anti-democratic tradition, see *infra* note 156. See also Eric Havelock, *Plato's Politics and the American Constitution*, 93 HARV. STUD. CLASSICAL PHILOLOGY 1 (1990) (concluding that whatever value Plato and Platonism have elsewhere, it is wholly negative in public affairs).

155. These are the rights associated with Athenian democracy. See Breyer, *supra* note 96, at 245-47 (discussing the democratic nature of the American Constitution and identifying these ideals); Hansen, *supra* note 151, at 96 (disputing the notion that the Athenians had no developed concept of "rights" and asserting that the Athenians understood the privileges and liberties that flowed from their democratic constitution and the resulting belief that a democratic constitution was therefore the best). On "rights" in any society, it is helpful to remember Finley's assessment:

The rights recognised in a given society constitute a bundle of claims, privileges, powers and immunities, unevenly distributed among the individual members, even among those who are called "free", so that a definition of freedom encompassing them would be either a tautology or a misrepresentation of the reality. A man who possessed claims, privileges and powers in all matters against the whole world would be a god, not a man, to paraphrase Aristotle.

FINLEY, *supra* note 74, at 77.

“Democracy” is better understood by disentangling its elements. *Demos* is a protean word with more than one meaning, a word that can mean “the people as a whole” (i.e., the entire citizenry) or “the common people” (meaning ordinary citizens, i.e., the lower classes).¹⁵⁶ Aristotle’s definition highlights a key distinction between democracy (rule by the *demos*) and oligarchy (rule by the few), because the distinction is more than just one of numbers, it is a division based on economics.¹⁵⁷

The argument seems to show that the number of the governing body, whether small in an oligarchy or large in a democracy, is an accident due to the fact that the rich everywhere are few, and the poor numerous. Therefore . . . the real difference between democracy and oligarchy is poverty and wealth. Wherever men rule by reason of their wealth, whether they be few or many, that is an oligarchy, and where the poor rule, that is a democracy.¹⁵⁸

By definition this taxonomic description contains normative content: in a democracy there is rule by the whole citizenry, i.e., rule by ordinary citizens, those who must work and cannot rely on existing wealth to support a claim of right to participate in government.¹⁵⁹ Although the anti-democratic tradition might equate this group simply with the rabble, it is important to understand that for the Greeks, as well as for us, democracy depended on a citizenry who as a whole identified itself as a community of “middling” citizens—neither poor nor rich, restrained and sensible people who share common interests.¹⁶⁰

156. In both antiquity and in revolutionary America, “democracy” was a word that evoked strong emotions, frequently disapproval. For a discussion of the “anti”-democratic sentiment common in antiquity, see JENNIFER TOLBERT ROBERTS, *ATHENS ON TRIAL* 49 (1994); Roberts, *supra* note 142, *passim*. For divergent views of democracy in revolutionary America, see, for example, RAHE, *supra* note 1; RICHARD, *supra* note 77; Kenyon, *supra* note 71; Lokken, *supra* note 84; Palmer, *supra* note 73.

157. See ARISTOTLE, *supra* note 8, at 493 (pts. 1317b38-39).

158. FINLEY, *DEMOCRACY*, *supra* note 13, at 13 (translating and quoting ARISTOTLE, *THE POLITICS* pts. 1279b34-80a4).

159. See *id.*

160. Morris, *supra* note 149, at 21-22 (using Whitman’s phrase “middling man” to describe the development of democracy as dependent on the citizens’ conception of themselves as “middling men” who had an equal share in the community). Morris is careful to distinguish this from a “middle class” in an economic sense, because even the wealthy could be described as “middling men” if they used their wealth sensibly for the benefit of the community. *Id.* at 22. But see Josiah Ober, *How to Criticize Democracy*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 151-52 (J. Peter Euben et al. eds., 1994) (disputing view that Athenian democracy depended on middle-class citizens). Ober defines democracy as a system where the ordinary citizens (the *hoi polloi*) achieve political equality and restrain the power and privileges of the elite (the wealthy). *Id.* at 152. How we define “rich” and “poor” clearly matters in this context. As this Article will show, the Athenians regarded only the wealthiest of the wealthy as the appropriate taxpayers. “The wealthy” could be limited to only the wealthiest 300 (or one percent) of the citizenry, with all others described as “poor.” See EDWARD E. COHEN, *ATHENIAN ECONOMY AND SOCIETY* 195 (1992) (discussing classifications of the wealthy and the poor); DEMOSTHENES, *On the Crown*, in *DEMOSTHENES: DE CORONA AND DE FALSA LEGATIONE* 85-89 (§§ 102-108) (E. Capps et al. eds., C.A. Vince & J.H. Vince trans., G.P. Putnam’s Sons 1926) [hereinafter DEMOSTHENES, *On the Crown*] (defining only the wealthiest 300 individuals (the top one percent) as “the wealthy” and describing everyone else as “poor”).

If all men are by nature equal, the conclusion that follows, according to Aristotle, is that all men should have a share in ruling—ruling and being ruled in turn.¹⁶¹ In a democracy, poverty is no bar to individual success that is based on ability to contribute to public (political) life as well as permitting a private life that suits the individual.¹⁶² *Equality before the law* and *equality through the law (isonomia)* are the chief characteristics that distinguished democracy as the fairest of constitutional forms.¹⁶³ Striking is the frequent appearance of these important democratic ideals, especially legal equality, in the tragedies performed in the state-sponsored dramatic festivals, as Euripides's *Suppliant Women* illustrates:

People of few resources and the rich
Both have the same recourse to justice. Now
A man of means, if badly spoken of,
Will have no better standing than the weak;
And if the lesser is in the right, he wins
Against the great.¹⁶⁴

A discussion of democratic ideals at such an abstract level is at best a convenient starting point.¹⁶⁵ Because “democracy” denotes both political ideals and political institutions, it is helpful to consider how “equality” translates into actual institutions, i.e., how government by ordinary citizens is implemented.¹⁶⁶

161. ARISTOTLE, *supra* note 8, at 489 (pts. 1317b4-8).

162. Freedom includes not only equality before the law, but also the freedom to live as one pleases. See THUCYDIDES, THE COMPLETE WRITINGS OF THUCYDIDES: THE PELOPONNESIAN WAR 104 (bk. II, ch. VI, para. 37, ll. 1-3) (Crowley trans., Random House, Inc. 1951) (Pericles's *Funeral Oration* describing political and personal freedom as characteristic of Athens at its apogee); see also Breyer, *supra* note 96, at 272 (discussing contemporary importance of values identified by Pericles).

163. See HERODOTUS, THE PERSIAN WARS 252 (bk. III, ch. 80) (George Rawlinson trans., Random House, Inc. 1942) (describing the debate about the relative merits of different political systems: “The rule of the many, on the other hand, has . . . the fairest of names, equality before the law; and further it is free from all those outrages which a king is wont to commit”). The Persian advocate of democracy essentially describes Athenian democracy with offices distributed by lot, magistrates subject to accountability, and popular sovereignty. See *id.* Herodotus's account, although historically improbable (set as it is among a group of Persian nobles), is still important for what it offers—a reflection of the political debate then current in fifth century Athens on the relative merits of different types of government. See *id.* at 252-54 (bk. III, chs. 80-84); Breyer, *supra* note 96, at 245-47 (identifying these same characteristics).

164. FINLEY, *supra* note 74, at 84 (translating and quoting EURIPIDES, SUPPLIANT WOMEN II. 433-37); see also AESCHYLUS, EUMENIDES 680-710 (Herbert Weir Smith trans., 1926) (justifying the recent political changes in the judicial system); ALLEN, *supra*, note 150, at 19-21 (discussing *Eumenides* and punishment); KEVIN CROTTY, LAW'S INTERIOR 68-72 (2001) (discussing various interpretations of *Eumenides* and law's development).

165. See *supra* note 53 (discussing Tocqueville's views on abstract words).

166. See Connor, *supra* note 123, at 218 (describing democracy as “practice, not taxonomy”); Hansen, *supra* note 151, at 91 (stating that democracy is both a “set of political institutions and a set of political ideals” and noting that democratic ideals are furthered by democratic political institutions).

B. Athenian Democracy: Equality in Theory and Practice

Athenian institutions fully implemented democracy, as defined by Aristotle to mean “[t]o govern and be governed in turns.”¹⁶⁷ Citizen participation was necessary for the participatory democracy to function as structured.¹⁶⁸ Political institutions were open to all; no property or other qualifications were generally required. Pay for public service made the necessary political participation possible.¹⁶⁹ Hallmark characteristics of democracy, according to Aristotle, include pay for public service and popular control of the law courts.¹⁷⁰ Three other characteristics of democracy ensured popular sovereignty: (i) selection of officials by lot; (ii) accountability of officials; and (iii) situating all decision-making authority in the assembly consisting of all citizens.¹⁷¹ These characteristics describe the key institutional features of Athens as a democracy and illustrate the markedly egalitarian nature of Athenian democracy.

1. Popular Assembly, Popular Sovereignty

Commitment to popular sovereignty is evident in the choice of the Assembly, comprised of all citizens and charged with all matters of state, as the decision-making body in democratic Athens.¹⁷² To be effective in this

167. ARISTOTLE, *supra* note 8, at 491 (pts. 1317b13-18).

168. Modern critics usually respond to discussions about ancient participatory democracy with charges that the system was dependent on slavery. *See infra* note 212. The wealthy, or taxpayer, class would have had the wealth, including slaves, sufficient to afford them leisure time to engage in the political life of the city. The vast majority of the citizenry (90-95 percent) would have worked to support themselves and their families. JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS* 129 (1989). What is remarkable about Athenian democracy, including its system of taxation, is that it permitted participation even by the working poor.

169. Although property classifications remained part of the Athenian constitution, they did not serve to restrict office holdings to these propertied classes in fifth century Athens. Without state pay for public service, property qualifications could have continued *de facto* to apply despite their *de jure* inapplicability. *See, e.g.*, ARISTOTLE, *CONSTITUTION OF ATHENS AND RELATED TEXTS* 120 (ch. 47, pt. 1) (Kurt von Fritz & Ernst Kapp trans., Hafner Publ'g Co. 1950) [hereinafter ARISTOTLE, *CONSTITUTION*] (treasurers of Athens could be poor). The introduction of pay is attributed to Pericles. *See infra* note 347. Gradually extended to cover all magistracies, council membership, and duty in the law courts, the regularity of the support provided by the Athenian state is given credit for Athens's ability to fully implement a democratic constitution. The amount of pay which jurors could expect to receive accounts in part for the law courts' more democratic composition. *See R.K. SINCLAIR, DEMOCRACY AND PARTICIPATION IN ATHENS* 127-33 (1988). Old men without other sources of income could look to the law courts as a modest livelihood. *Id.*

170. *See* ARISTOTLE, *supra* note 8, at 491-92 (pts. 1317b33-38); *infra* notes 187-192 (discussing the importance of popular control of the law courts).

171. *See* SINCLAIR, *supra* note 169, at 17; Edward M. Harris, *Pericles' Praise of Athenian Democracy: Thucydides 2.37.1*, 94 *HARV. STUD. IN CLASSICAL PHILOLOGY* 157, 164 (1992) (defining “democracy” as “power of the people” because it alone “placed the power of decision in the hands of the majority”).

172. As the sovereign body, the Assembly was the legislative body responsible for foreign affairs, war, administration of the Empire, dealings with Athens's subject states, and more mundane administrative operations. Meeting frequently (at least thirty times per year), it allowed for significant popular involvement. Such frequent meetings resulted in varying attendance. If some significant action was intended, e.g., ostracism, a quorum of 6000 citizens was required. SINCLAIR, *supra* note 169, at 19, 67. Ostracism (the procedure allowing the assembly to exile a preeminent individual deemed a threat to

capacity, the Assembly relied on the Council to prepare its business and individual magistrates, in conjunction with the Council, to effect its decisions.¹⁷³ The democratic nature of the entire system can be seen from the selection and composition of these branches of government.

2. Popular Participation: Sortition and Rotation

To be democratic, selection of the magistrates and 500 Council members (*Boule*) was by lot, or sortition, from the entire citizen body.¹⁷⁴ Eligibility to hold office, the key privilege to which citizenship entitled the individual, is “merely the logical corollary of natural equality.”¹⁷⁵ Selection by lottery, not individual election, is a mechanism that limits any advantages of wealth or birth that might affect the democratic operation of the political system.¹⁷⁶ Sortition and term limits also operate to increase participation by significant numbers of citizens and generally ensure that no one could benefit from advantages of birth and wealth.¹⁷⁷ Selection by lot assumes that all citizens are equally qualified to serve and stands as the ultimate expression of commitment to equality.¹⁷⁸ Indeed, election is regarded as aristocratic, not democratic.¹⁷⁹ The large numbers of individuals required to fill offices with term limits necessitated significant citizen participation.¹⁸⁰

political stability) was another institutional mechanism to limit the power of individuals, thereby maintaining the supremacy of the *demos*. See *id.* at 17.

173. See *id.* at 74 (describing the *Boule*'s coordinating and supervisory role in implementing the Assembly's decisions).

174. *Id.*

175. Ostwald, *supra* note 123, at 53. The most democratic form of allocation of offices and functions was considered to be distribution by lot, not election, which was regarded as undemocratic. The distribution of offices and hence the participation expected by the citizenry was the defining feature of Athenian democracy. Aristotle's conclusion that “man is by nature a [social and] political animal” seems understandable, if still remarkable. ARISTOTLE, *supra* note 8, at 9 (pts. 1253a1-3). Alone, the usual translation “political” neglects the social aspect of mankind's political nature.

176. SINCLAIR, *supra* note 169, at 18.

177. *Id.*

178. *Id.* at 17. Beginning early in the fifth century, almost all Athenian officials were selected by lot. Only those officials requiring special qualifications, i.e., military officials, were not. Even the Council of 500 (*Boule*) that performed critical functions (both preparing legislation in advance of the Assembly's hearing and implementing Assembly directives), allowing the Assembly (consisting of all citizens) to operate as the chief legislative body, was filled by lot. *Id.* at 74-75. Certainly by the fourth century, and probably by the fifth century, citizens could only serve two non-consecutive one-year terms in the *Boule*. *Id.* at 66. As a result, at least half of the *Boule*'s membership consisted of new members. See SINCLAIR, *supra* note 169, at 66. Because of the heavy administrative function served by the *Boule*, citizens necessarily occupied an active role in the functioning of Athenian democracy. *Id.*

179. See FINLEY, DEMOCRACY, *supra* note 13, at 19 (discussing ARISTOTLE, THE POLITICS pts. 1300b4-5).

180. See ARISTOTLE, CONSTITUTION, *supra* note 169, at 94 (ch. 24, pt. 3). The exact number of magistracies is in dispute. Aristotle counts 700 state officials in Athens and 700 abroad. *Id.* The duplication of the same number has raised doubts about its accuracy. *Id.* app. at 169 n.71 (stating that the duplication of the number 700 is likely due to the mistake of a copyist); see also SINCLAIR, *supra* note 169, at 223-24 (citing various sources questioning the reliability of Athenian population data). Even without an exact total, the significant number of individuals required is obvious. See ARISTOTLE, CONSTITUTION, *supra* note 169, at 94 (ch. 24, pt. 3). Except for military offices, which were filled by election, no magistracies could be held twice; however, council members could serve two (non-consecutive) terms during their lifetime. *Id.* at 140 (ch. 62, pt. 3). The skills of any one individual were not likely to be problematic,

3. Accountability

Popular sovereignty also required accountability.¹⁸¹ This accountability far exceeded the level of accountability to which our representatives are subject, scrutinized only periodically, at election. Mandatory evaluation (prior and subsequent to holding office) of those selected to serve helped to ensure accountability.¹⁸² Selected for office by lot (or even, in limited cases, election), an initial evaluation (*dokimasia*) confirmed not only citizenship status, but also whether all other obligations, including the payment of taxes or the performance of military service, had been fulfilled.¹⁸³ After leaving office, officials were once again subject to examination (*euthyna*).¹⁸⁴ If applicable, financial accounts were scrutinized.¹⁸⁵ Failure to render an adequate account (or accusation of another serious offense) resulted in prosecution.¹⁸⁶

4. Judicial Sovereignty: The Law Courts

Judicial control was regarded as key to the sovereignty of the *demos*.¹⁸⁷ Corresponding to their ultimate legislative authority as members of the Assembly, the *demos* exercised complete judicial authority as members of the juries required for the popular law courts.¹⁸⁸ According to Aristotle: "For when the people have a right to vote in the courts, they become the masters of the state."¹⁸⁹ Drawn from a citizen list of those available for frequent

since he generally served as a member of a board whose obligations were circumscribed. C. HIGNETT, A HISTORY OF THE ATHENIAN CONSTITUTION 232 (1952).

181. SINCLAIR, *supra* note 169, at 77.

182. *Id.* at 77-78.

183. See Martin Ostwald, *Public Expense: Whose Obligation? Athens 600-454 B.C.E.*, 139 PROC. AM. PHIL. SOC'Y 368, 375 (1995) [hereinafter Ostwald, *Public Expense*]. Ostwald notes that the word used to describe "office" and "obligation" was the same: *telos*. *Id.* He concludes that, as a result, property classifications did not denote *rights* (based on property), but rather, *obligations* to the community or state. *Id.* In these examinations then, the purpose was to see whether the individual had fulfilled all of his obligations to the state—financial or personal service. *Id.* For the history of the word *telos*, see F.M.J. WAANDERS, THE HISTORY OF *TELOS* AND *TELEÓ* IN ANCIENT GREEK 3-20 (1983). At these examinations, other charges were permitted; if none, suitability for office was immediately voted. If any charges were preferred, at the appropriate hearing, accusations and defenses thereto would follow. ARISTOTLE, CONSTITUTION, *supra* note 169, at 131 (ch. 55, pt. 4); SINCLAIR, *supra* note 169, at 77-79. Notable officials were not immune from prosecution during office. SINCLAIR, *supra* note 169, at 79.

184. See ARISTOTLE, CONSTITUTION, *supra* note 169, at 128 (ch. 54, pt. 2).

185. SINCLAIR, *supra* note 169, at 18-19, 78-79. Sinclair describes the increased financial scrutiny to which officials were subject in the fourth century. Financial records were submitted to auditors, while the hearing for the individual official allowed any citizen to lodge a complaint. *Id.* at 79; see also ARISTOTLE, CONSTITUTION, *supra* note 169, at 128 (ch. 54, pt. 2) (stating that all holding public office must render account to the auditors).

186. SINCLAIR, *supra* note 169, at 79; see also ARISTOTLE, CONSTITUTION, *supra* note 169, at 122 (ch. 48, pts. 3-4) (describing various judicial proceedings that might arise from charges (public and private)).

187. To hear most judicial matters, Athenians (probably 6000) were selected by lot to serve on jury panels comprised of varying numbers, ranging from 500 to 6000 members. SINCLAIR, *supra* note 169, at 19-20.

188. *Id.* at 19-20.

189. ARISTOTLE, CONSTITUTION, *supra* note 169, at 77 (ch. 9, pts. 1-2) (ascribing to Solon's judicial

meetings, jurors were more likely to represent the poor and be democratic in sentiment than the Assembly, where citizens of property might attend to protect their interests.¹⁹⁰ Protected by the secret ballot, jurors exercised great freedom.¹⁹¹ Thus, the sovereignty of the people was reinforced by its primacy in both the legislative and judicial branches.¹⁹²

5. Pay for Public Service

Pay for public service, whether holding office or sitting on juries, enabled the majority of Athenians, who otherwise would not have had the resources, to participate.¹⁹³ Political equality thus included mechanisms to permit general participation in government.¹⁹⁴ Familiar institutional mechanisms, eliminating property qualifications and instituting pay for office, ensured the sovereignty of the people.¹⁹⁵ Athens's decision to allocate only to the wealthiest of the wealthy the obligation to contribute financially to the democracy was also critical to the operation of the democracy.¹⁹⁶ The financial obligations of the wealthiest Athenians included tax assessments and participation in the liturgical system that included financial and personal responsibility for state-sponsored functions.¹⁹⁷ To objections by the aristocracy that popular sovereignty was neither wise nor fair, defenders of democracy countered that while the rich were the best guardians of wealth, the people were the best judges of what was best.¹⁹⁸

changes significant for the development of democratic constitution).

190. See ARISTOTLE, *supra* note 8, at 509 (pts. 1320a17-29); SINCLAIR, *supra* note 169, at 134-35 (describing the differences between the less frequent meetings of the Assembly, which were likely to address issues (including tax levies) of concern to those with resources, and the more frequent and unpredictable nature of jury duty, which was more attractive to those with no other employment).

191. The law courts were in session approximately 150-200 days per year. SINCLAIR, *supra* note 169, at 129. Even with pay for jury service, men of property were far less likely to be represented on juries than in the Assembly. *Id.* at 133; see also 1 ARISTOPHANES, *The Wasps*, in ARISTOPHANES: IN THREE VOLUMES 560-61 (E.H. Warmington ed., Benjamin Bickley Rogers trans., Harvard Univ. Press 1924) [hereinafter 1 ARISTOPHANES, *The Wasps*].

192. The development of Athenian democracy is linked with the *demos* assuming ever greater control over judicial matters. Reforms that limited the power of the Areopagus, comprised of ex-archons (members of the aristocracy before lot became universally applicable to all magistracies) is intimately connected with increasing democratization in the fifth century. See AESCHYLUS, EUMENIDES 680-710; MARTIN OSTWALD, NOMOS AND THE BEGINNING OF ATHENIAN DEMOCRACY 5, 161-73 (1969) (discussing democratic reforms in the judicial system); SINCLAIR, *supra* note 169, at 17, 132.

193. See *supra* notes 168-192 and accompanying text.

194. See *supra* notes 168-192 and accompanying text.

195. See *supra* notes 168-192 and accompanying text.

196. See *supra* note 183; *infra* note 207.

197. See *supra* note 183; *infra* note 207.

198. See OBER, *supra* note 168, at 194; THUCYDIDES, *supra* note 162, at 362 (bk. VI, ch. XIX, para. 39). Regarding the relative merits of Athenians and their government, Thucydides recounts the following from one debate:

It will be said, perhaps, that democracy is neither wise nor equitable, but that the holders of property are also the best fitted to rule. I say, on the contrary, first, that the word *demos*, or people, includes the whole state, oligarchy only a part; next, that if the best guardians of property are the rich, and the best counsellors the wise, none can hear and decide so well as the many; and that all these talents, severally and collectively, have their just place in a democracy.

Political equality, the dominant political ideology of Athenian democracy, did not require economic equality.¹⁹⁹ Because the ancient (as the modern) world was characterized by significant disparity in resources among individuals, the challenge for advocates of popular sovereignty was to prevent this gulf between political and economic equality from resulting in destabilizing class conflict. Significant social and political upheavals characterized Athens's early history because of extreme wealth and political inequality.²⁰⁰ With the adoption of democracy, which ensured political equality but allocated the tax burden to the wealthy, there was no need to redistribute wealth to achieve an economic equality commensurate with political equality.²⁰¹ The inviolability of private property, attested in the Athenian constitution, was reaffirmed each year when the chief magistrate proclaimed that whatever a person possessed before the start of the year, he would possess at the end.²⁰² While many wealthy Athenians regarded democracy as seriously misguided because wealth and birth constituted the basis for their claim to greater positions of preeminence, including political prominence, they had no reason to fear redistribution.²⁰³ It was well recognized that the wealthy were safe when Athens was a democracy. Only when democracy was overthrown and an oligarchy put in its place, at the end of the fifth century, were political rights lost and the wealthy found themselves at risk.²⁰⁴ The stability of Athenian democracy was due to its decision that the wealthy were obligated to put their resources to use for the community.²⁰⁵ Because the resources of the wealthiest made democracy and politi-

Id. See *infra* note 354 (discussing the critical philosophical question presented by Plato's *Protagoras*, viz., whether civic virtue can be taught).

199. See ARISTOTLE, *supra* note 8, at 489-493 (pt. 1317b).

200. SINCLAIR, *supra* note 169, at 3.

201. Proposals for wealth equalization were not unknown in antiquity, but were not widespread. Aristotle reports that the Chalcidonian Phaleas proposed equalizing the wealth of all citizens. ARISTOTLE, *supra* note 8, at 111 (pts. 1266a39-41); see also M.I. Finley, *Utopianism Ancient and Modern*, in *THE USE AND ABUSE OF HISTORY* 178, 187 (Hogarth Press 1986) (1975) (describing Phaleas as "marginally Utopian" because he wished only to equalize land, not all property).

202. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 132 (ch. 56, pts. 2-3) ("As soon as the Archon enters upon his office, he proclaims through the public herald that whatever a person possessed before he entered upon his archonship he will have and possess until the end of his term."). The judicial oath, in addition to its oath to judge according to the statutes and decrees of Athens, included an oath not to subvert the democracy and not to allow any private debts to be cancelled or property to be redistributed. See, e.g., DEMOSTHENES, *Against Timocrates*, in DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 469 (bk. XXIV, §§ 149-51) (T.E. Page et al. eds., J.H. Vince trans., Harvard Univ. Press 1935) [hereinafter DEMOSTHENES, *Against Timocrates*].

203. See SINCLAIR, *supra* note 169, at 209.

204. See OBER, *supra* note 168, at 198 (discussing the cataclysmic events following the overthrow of the democracy described by the orator, Lysias). Lysias spoke against the excesses of the oligarchic regime known as the Thirty. See LYSIAS, *XII. Against Eratosthenes*, in LYSIAS (T.E. Page et al. eds., W.R.M. Lamb trans., G.P. Putnam's Sons 1930). Lysias's account of his brother's and his own arrests, the seizure of all their property; his own escape and his brother's condemnation and execution (without trial) presents a horrific picture of this short-lived oligarchy at the end of the fifth century B.C. See *id.* The horror of the events is clear from Lysias's description. He notes that the Thirty took aim at wealthy men who had done no wrong, but who had contributed significantly during the democracy through liturgies and the payment of special levies (*eisphora*). *Id.* at 229-31. The oligarchs condemned these men to death purely for the sake of their money. *Id.* at 233-35.

205. OBER, *supra* note 168, at 198 (noting that economic inequality was not per se anti-democratic,

cal equality a reality, Athenian democracy was remarkably free of conflict.²⁰⁶

In describing the essential constituent groups within any constitutional system, Aristotle specifically designates one class—the rich—to serve the community by means of its property.²⁰⁷ This naturally follows from Aristotle's description of democracy as the constitutional form that most aims at equality, a government where the poor are more powerful than the rich.²⁰⁸ In contrast, a government controlled by the well-to-do, those having property, is an oligarchy.²⁰⁹ To give effect to the decision to situate political authority with the majority required minimizing the overt political advantages enjoyed by the wealthy because of that wealth, while not reducing the corresponding financial (tax) obligation that originated in their superior wealth. Allocating the tax burden to the wealthiest of the wealthy was seen as a political decision necessary to permit democracy. The wealthy accepted this obligation and undertook responsibility for financing and carrying out a variety of activities critical for the success of the democracy.²¹⁰

If Athenian democracy was characterized by both political equality and economic inequality, what developments led to this extraordinary commitment to political equality? A brief historical review of the development of Athenian democracy will allow us to explore how political equality and allocation of the tax burden to the wealthiest of its citizens are historically and philosophically related.

V. ATHENIAN DEMOCRACY AND PUBLIC FINANCE

A. *The Historical Development of Athenian Democracy*

A review of the development of democracy within its historical context will underscore Athens's remarkable achievement and the reason for its importance as a model for the Founders. The success of Athenian democracy is often minimized by attributing it to events external to the political decision to implement political equality. Political events, including Athens's

but that Athenian democracy encouraged the wealthy to put their resources to use for the common good).
 206. The historical and philosophical tradition is entirely composed of aristocrats who had additional, personal reasons to object to democracy. See, e.g., OBER, *supra* note 168; RICHARD, *supra* note 77; Roberts, *supra* note 142, *passim* (describing the anti-democratic tradition). Based on a reading of the anti-democratic tradition, Athens's significant success at avoiding actual conflict—in contrast to the rest of the Greek world—is not apparent.

207. ARISTOTLE, *supra* note 8, at 297 (pts. 1291a33-40) (discussing the classes needed in addition to the four proposed by Socrates in PLATO'S REPUBLIC bk. ii, pts. 369b-371e; the weaver, farmer, shoemaker, and builder.) Aristotle adds the following: a military class, a judicial class to judge claims, and a class of public servants. *Id.*

208. *Id.* at 209-11, 435, 489-91 (pts. 1279b17-1280a4, 1309b38-1310a2, 1317b7-10). Aristotle goes further, stating that even if the majority of the citizens were wealthy, the government would still be a democracy if the poor were in control, and, if the poor were fewer than the rich, it would still be an oligarchy if the rich were in control. *Id.* at 209 (pts. 1279b20-31); see also *supra* note 158.

209. ARISTOTLE, *supra* note 8, at 209-211 (pts. 1279b17-1280a4).

210. See SINCLAIR, *supra* note 169, at 30, 62.

military success over the Persian Empire and the subsequent growth of her empire, certainly allowed her democracy to flourish. Similarly, slavery and limited franchise characterized ancient society generally, and Athens was no exception. Nonetheless, Athens was no less a democracy because the class (Athenian males by birth) to whom citizenship was granted was limited.²¹¹ The political participation implicit in Athenian democracy was not made possible by the existence of slavery, despite its political and economic value.²¹² Neither characteristic—Athens's limited citizenry or acceptance of slavery—vitiates comparison with revolutionary America.²¹³ Ultimately, a historical review will clarify the relationship between the tax system and Athens's democratic political choices, to which she credited her economic, political, and artistic success.

As the Founders themselves noted, historical tradition frequently identifies a single lawgiver as the individual responsible for initiating significant constitutional reforms.²¹⁴ Solon was the first Athenian lawgiver to institute reforms to end civil strife among and between nobles and the poor, who lacked any share in the government. These reforms included the cancellation of all debts and the prohibition of future loans made with the individual's body as surety.²¹⁵ Because his reforms were generally political, with no effort to redistribute wealth, Solon's reforms were positively regarded.²¹⁶

211. A citizen was defined as Athenian by birth on the father's side and, after 451, on the mother's side as well. See Finley, *supra* note 74, at 87 (discussing limited citizenship in Athens, e.g., law of 451/0 restricting citizenship); see also Barry S. Strauss, *The Melting Pot, the Mosaic, and the Agora*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 252-64 (J. Peter Euben et al. eds., 1994) (discussing the utility of Athenian democracy as a model for America, despite Athens's limited citizenship group). The significance of broadly defined citizen status does not necessarily result in greater equality or political franchise. See Wood, *Demos*, *supra* note 133, at 133. Ellen Meiksins Wood correlates the modern extension of citizenship with its declining, almost meaningless, value. *Id.*; see also Wood, *Democracy*, *supra* note 119, at 70-76 (correlating the decline in value of civic status with the rise of capitalism).

212. The existence of slavery cannot preclude the establishment of democracy, however problematic its existence is for a government predicated on human equality. Despite debate about the consistency of slavery with the ideals of the American Constitution, there was frank realization that there was no possibility of eliminating slavery in revolutionary America. See RAHE, *supra* note 1, at 618-50. Slavery in antiquity is not problematic for comparisons between modern and ancient democracy. First, it is a misconception of the ancient economy to assume that slavery permitted active political participation because it freed all Athenian citizens to participate actively in the political process. Second, the industrial use of slaves, including their use in the Laurium silver mines, provided useful, but not essential, revenue for democratic Athens. See, e.g., M.I. FINLEY, *Was Greek Civilisation Based on Slave Labour?*, in *ECONOMY & SOCIETY*, *supra* note 74, at 98-115 (discussing and comparing the integral nature of slavery to the ancient world and the American South); Roberts, *supra* note 142.

213. Fifth century Athens is more, not less, comparable to the United States at the time of the American Revolution by reason of the disenfranchisement of women in Athens and the acceptance of slavery. Not until well after mid-twentieth century, if one is establishing a *terminus post quem*, do we see a call for equal rights for all races and genders. See, e.g., U.S. CONST. amends. XIV, XIX, XXVI; the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. Noteworthy is the ancient ambivalence to slavery. Despite Aristotle, the Romans regarded slavery as contrary to natural law, but acceptable by custom. Compare FINLEY, *supra* note 212, at 104 (discussing Roman jurists' recognition that the practice of slavery was well-accepted but "contrary to nature"), with RAHE, *supra* note 1, at 765-772 (distinguishing slavery's propriety if different races enslaved).

214. See *supra* notes 105-09 and accompanying text (discussing the Founders, the *Federalist Papers*, and the role models thus provided).

215. See Roberts, *supra* note 142, at 99-101 (discussing especially Adams's ultimate recognition of

Nevertheless, Solon's reforms proved inadequate for resolving the conflict among the aristocracy or the complaints of the poor. As a result, Peisistratus, an aristocrat who turned to the people for support, was able to establish himself as tyrant. The *Constitution of the Athenians* describes Athens as enjoying a constitutional government (a constitutional tyranny) under Peisistratus, because he was able to provide Athens a tranquil period of economic growth and political development, especially when compared with the preceding civil unrest.²¹⁷ His reforms, especially those designed to make Athens and its population more economically productive, engendered popular support.²¹⁸ However positively portrayed in retrospect, Peisistratus was still a tyrant and his rule a tyranny.²¹⁹ The people who had earlier been instrumental in bringing him to power (based in part because of his greater attention to their needs) were soon able to mobilize their support behind a popular leader prepared to institute democratic reforms.²²⁰

this fact). Solon's reforms are usually dated to the beginning of the sixth century B.C. Because Solon left a contemporary account, he is considered the first Athenian really known to us. His moderation is evident in his verse where he rebukes the rich for their selfishness and the poor for their excessive demands. See ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 73-74 (ch. 6, pts. 2-3); J.B. BURY & RUSSELL MEIGGS, *A HISTORY OF GREECE* 121 (4th ed. 1975). The exact identity of "the nobles" and "the wealthy" is unclear from the *Constitution of the Athenians*. However, we can surmise that the aristocracy (by birth and wealth) could not effectively apportion government amongst themselves or adequately address the concerns of the people in general.

216. See DEMOSTHENES, *Against Androtion*, in DEMOSTHENES: AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 173-75 (bk. XXII, §§ 25-27) (T.E. Page et al. eds., J.H. Vince trans., Harvard Univ. Press 1935) [hereinafter DEMOSTHENES, *Against Androtion*] (crediting Solon with recognizing that while actual equality among citizens was unlikely, the availability of equal legal protection was the critical feature in reform).

217. BURY & MEIGGS, *supra* note 215, at 128. The *Constitution of the Athenians* describes Athens under Peisistratus as follows:

Peisistratus administered the state in a moderate fashion, and his rule was more like a constitutional government than like a tyranny. For he was benevolent and kind, and readily forgave those who had committed an offense; he even advanced money to the poor to further their work so that they could make a living by farming.

ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 83 (ch. 16, pts. 2-3).

218. Peisistratus was able to redistribute, to the poor, land abandoned by his opponents who had left Attica. BURY & MEIGGS, *supra* note 215, at 128-29. In addition to addressing the needs of his popular supporters, Peisistratus's actions brought several additional benefits. With the populace scattered throughout the countryside, and not congregating in Athens, Peisistratus's popular supporters were engaged in farming rather than in politics. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 83-84 (ch. 16, pts. 3-4). Their productivity was increased by the creation of local judges to settle disputes. *Id.* at 84 (ch. 16, pts. 4-6). More importantly, the reforms that increased productivity also increased the revenue from the land tax collected by Peisistratus. *Id.*

219. See, e.g., the description in Aristotle's *Constitution of the Athenians*. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 84 (ch. 16, pts. 7-8) (describing the generally peaceful state of Athens, both internally and externally, and noting that "it became a common saying that the tyranny of Peisistratus had been the Golden Age"). Aristotle goes on to praise Peisistratus for appearing in court on a charge of homicide, but notes that his accuser was too afraid to appear. *Id.* It should be noted that the reforms aimed at productivity clearly benefitted Peisistratus personally, because he gained increased revenue (since in a tyranny, there is no distinction between the state and the tyrant). For a more realistic appraisal of this characterization of Peisistratus's rule, see FINLEY, *supra* note 74, at 83, describing this as the only passage in which Aristotle permits himself a joke, noting that "[f]reedom under a tyranny is not a fruitful subject for discussion."

220. See BURY & MEIGGS, *supra* note 215, at 187-195.

Historical tradition credits one individual, Kleisthenes, for instituting, in 508-07 B.C., the first constitutional reforms, which ultimately resulted in Athenian democracy—a democracy that flourished for almost two centuries, until Alexander conquered Greece in 323 B.C.²²¹ The importance in these reforms of the people (*demos*) is clear: The origin of democracy rests with the people's own decision to assume political authority, not just an aristocratic lawgiver disposed to popular sovereignty. The citizen group is now defined by free birth and registration in the local community, not aristocratic birth and wealth.²²² The development of democracy is a remarkable event; the people (the citizenry) themselves claimed political authority, henceforth to reside with the whole citizenry (the *demos*) who alone can formulate authoritative law (*nomos*).²²³

Athens regarded her subsequent success, including her defeat of the vastly superior forces of the Persian army at Marathon, as intimately related to the newly adopted democracy with its dedication to freedom and equality. The victory seemed to signify divine approbation of the Athenian decision to abandon the usual aristocratic government in favor of equality and democracy.²²⁴ More immediately, Athenian *hoplites* (heavy-armed infantrymen) were credited with the victory at Marathon. The *hoplites* were Athenians who qualified for military obligation, i.e., *hoplite* status, based on wealth sufficient to result in a compulsory obligation to defend the community. Contrary to what we expect, the rich paid for and fought in the wars. Equality in political rights did not entail equality of obligation for those with disparate resources. The Athenian citizens with significant property

221. See ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 89-91 (chs. 20-21); OSTWALD, *supra* note 192, at 158-60. Kleisthenes is usually credited with the significant constitutional reform, having "tak[en] the people as his political partners." OSTWALD, *supra* note 192, at 159; see also *infra* note 222 and accompanying text (discussing the centrality of the *demos* to this decisive moment).

222. SINCLAIR, *supra* note 169, at 3-4, 17; Morris, *supra* note 149, at 19-42 (describing the parallel tradition favoring the "middling" citizen in contrast to the hybriatic aristocrat); Josiah Ober, *The Athenian Revolution of 508/7 B.C.E.*, in *CULTURAL POETICS IN ARCHAIC GREECE* 215-32 (C. Dougherty & L. Kurke eds., 1993) (crediting Kleisthenes, but identifying, as the critical event, the people's "acts of collective self-definition" *Id.* at 227). Ober's analysis is especially noteworthy, because he questions the "elitist" assumption that aristocratic leadership was the *sine qua non* for democracy's development. See Ober, *supra*, at 215-32. On the definition and development of "citizen," see Ostwald, *supra* note 123; Wood, *Democracy*, *supra* notes 119 & 133, *passim* (describing Athenian citizens).

223. On the importance of transition to a legal landscape where the sovereign people willingly adopt positive law as the ultimate authority, see OSTWALD, *supra* note 192, at 55. It is more remarkable, when placed in a landscape otherwise populated by tyrants, oligarchies, and aristocracies—a culture closer to the Homeric epics than eighteenth century America.

224. See Roberts, *supra* note 142, at 94 (noting that the victory at Marathon was seen as divine approbation of democracy). Athens's vitality and success, including her success against the vast forces of the Persian Empire, were directly attributed to her commitment to freedom. HERODOTUS, *supra* note 163, at 407-08 (bk. V, ch. 78) (describing freedom as an "excellent thing" and the reason that the Athenians were now eager to be the best possible). "If then a man should now say that the Athenians were the saviours of Greece, he would not exceed the truth." *Id.* at 549 (bk. VII, ch. 139). Herodotus links the Athenians' commitment to freedom with their courage to stand firm in the face of the Persian Empire. *Id.* Whatever the course of Athenian history, there can be little doubt that the development of Western democracies would not have been the same. See Roberts, *supra* note 142, at 96 (discussing and quoting John Stuart Mill on the importance of Marathon: "The battle of Marathon, even as an event in English History, is more important than the battle of Hastings").

undertook the most significant (both military and financial) obligations.²²⁵ As M.I. Finley noted, "[T]he poorer Athenian citizen had the freedom to choose between serving and not serving and to be maintained by the state if he chose to serve, whereas the wealthier Athenian citizen had no freedom in this sphere."²²⁶ During two centuries of democracy, the poor never complained about taxes (because they were exempt), although the poor were frequently accused of soaking the rich.²²⁷

The adoption of additional democratic reforms was closely related in time to the second Persian threat of conquest and the development of the Athenian navy that allowed a second victory over the vastly superior autocratic Persian Empire at Salamis. The navy not only defeated Persia, but also allowed Athenian supremacy over the Aegean. Athens's navy provided employment for her poorest citizens and brought great benefits for commercial activities and ultimately for Athens's political supremacy over other Greek states.²²⁸ The Old Oligarch (an author well-known for his antipathy to democracy) grudgingly admits that democracy in Athens is justified "because it is the ordinary people who man the fleet and bring the city her power."²²⁹ Athens, however, attributed her almost unparalleled prosperity in the fifth century B.C., not just to her empire, but to her political commitment to freedom and equality. The benefits that arose from her military success contributed to her democracy's vitality; they were not responsible for that democracy.

Athens's empire is most assuredly associated with her increased prosperity, but in no way can it be regarded as a condition precedent, or the chief source of revenues for the democracy.²³⁰ The empire contributed both indirectly and directly to Athens's prosperity. Nonetheless, democracy ex-

225. See FINLEY, *supra* note 74, at 91; THUCYDIDES, *supra* note 162, at 612-13, 618 (bk. VIII, chs. 48, 63-64). Only rarely did the tax burden of the wealthy prompt efforts to overthrow democracy.

226. FINLEY, *supra* note 74, at 89. Finley further distinguishes state support of the *hoplite*, who was required to supply his own armor, for limited periods with the rowers of the navy whose extended service for three-quarters of a year constituted a significant source of revenue. *Id.*; cf. WOOD, RADICALISM, *supra* note 96, at 275 (discussing the debate between the Federalists and the Anti-Federalists, which centered on the merits of aristocracy, and noting the Anti-Federalist complaint that the poor paid for and fought in the wars) ("The wars that the heroic gentry exult in are paid for by the blood and treasure of ordinary people.").

227. See generally 1 ARISTOPHANES, *The Wasps*, *supra* note 191 (a comedy dated to 422 B.C., which critiques the Athenian judicial system).

228. Athens's success and empire is interwoven with the contemporary debate between aristocracy and democracy. Thus, Athens's subject states tended to be democratic; those seeking democracy sought her support. In contrast, those states preferring oligarchy tended to prefer Sparta, Athens's rival. See, e.g., RUSSELL MEIGGS, *THE ATHENIAN EMPIRE* (1972).

229. [XENOPHON], *The Constitution of the Athenians*, in ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY 37 (pts. 2-3) (J.M. Moore trans., 1975).

230. A.H.M. JONES, *ATHENIAN DEMOCRACY* 5-10 (1957) [hereinafter JONES, *DEMOCRACY*]. Jones notes the increased prosperity that resulted from the Empire, but concludes that its demise did not interfere with the democracy; indeed, assembly pay was instituted in the fourth century, well after the Empire's demise. *Id.* at 5. The Old Oligarch concurs, disputing the complaints that it was a mistake for the *demos* to require the allies to litigate their commercial disputes in Athens. MEIGGS, *supra* note 228, at 265 (translating and quoting [XENOPHON], *CONSTITUTION OF THE ATHENIANS* pts. 16-18: "[F]irst of all, the court fees provide the jurors' fees for the whole year"). He also notes the increased taxes and generalized economic prosperity that result from increased trade. *Id.*

isted both before and after the empire, continuing until the conquest of the Greek states by Alexander, late in the fourth century, B.C. In the fifth century, the empire played a significant role in Athens's preeminence. For example, tribute paid by Athens's subject states helped to support her public building programs, including the Parthenon.²³¹ This golden age of art and architecture meant many building projects that provided increased employment for the residents of Athens.²³² Increased economic activity from trade and employment added revenue from taxes paid on imports and exports and the use of her harbors. Commercial litigation also increased and correspondingly provided additional revenues through court fines and penalties paid.²³³ Aristophanes recounts the numerous types of taxes and fines collected by Athens, and other ancient states.

[B]ut roughly thus on your fingers count
 The tribute paid by the subject States,
 and just consider its whole amount;
 And then, in addition to this, compute
 the many taxes and one-per-cents,
 The fees and the fines, and the silver mines,
 the markets and harbours and sales and rents.²³⁴

Although these fees and taxes might have rankled Athens's allies, these revenues were not the *sine qua non*, the critical financing, for Athenian democracy.²³⁵ A survey of revenue sources throughout Athenian democracy's two-century success shows her reliance on the wealthy as her taxpayers.

B. Public Finance: From Tyranny to Democracy

The critical question remains: From what sources did Athens finance her democracy, a democracy where ordinary citizens are sovereign and pay for public service permits general participation? If all citizens, regardless of wealth or birth, participate in the democracy, what was the role or obligation of the propertied classes, no longer in control, to help fund this government? A review of Athens's sources of revenue, especially her system of

231. But see Lisa Kallet-Marx, *Did Tribute Fund the Parthenon?* 8 CLASSICAL ANTIQUITY 252 (1989) (examining sources other than tribute for funding the Parthenon).

232. Generalized prosperity probably arose in a variety of ways. Acquisition of land overseas allowed Athens to increase the wealth of its lowest class of citizens (the *thetes*). JONES, DEMOCRACY, *supra* note 230, at 7. By settling its poorest citizens abroad, Athens immediately raised those citizens to the next higher property classification, and thus, they became subject to military service (beyond that of a rower in the navy). The Empire provided increased employment, not only in the building projects, but also in increased activity in the shipyards that would have provided a whole range of increased need for services. *Id.* at 6, 9.

233. See *supra* notes 230-232 (discussing same).

234. 1 ARISTOPHANES, *The Wasps*, *supra* note 191, at 473 (ll. 656-59).

235. See JONES, DEMOCRACY, *supra* note 230, at 5 (discussing and disputing link between the empire and democracy); BURY & MEIGGS, *supra* note 215, at 217 (noting the importance of taxes borne by the wealthy); MEIGGS, *supra* note 228, at 255-56 (discussing economics of empire); *supra* notes 211-13.

taxes, will reveal that paying taxes was seen as a public service required of the wealthy.

1. *The Ancient World: Rights and Responsibilities*

The modern tendency is to require governmental legitimacy (including political liberty) as a condition precedent for taxation. Representation is seen as the essential predicate for any financial obligation to that government. However, the notion of political rights and non-political obligations (taxes) moving in tandem does not accurately describe the norm.²³⁶ For example, taxation of individuals lacking political rights can be found throughout history.²³⁷ Fixed and regular flat tax assessments based on agricultural production were the basis for taxation throughout antiquity, in regimes headed by monarchs or emperors, including the Persian Empire, Egypt, and the Roman Empire.²³⁸

A well-documented example from the Roman Empire, and one familiar from the Bible (the birth of Christ), will illustrate. The emperor Augustus (31 B.C.-14 A.D.) rationalized the Roman system of taxation based on two taxes, the *tributum soli* (a flat tax based on the assessed value of property) and *tributum capitis* (a poll tax on the adult population).²³⁹ Both brought

236. G.E.M. DE STE. CROIX, *THE CLASS STRUGGLE IN THE ANCIENT GREEK WORLD* 206 (1981) (noting that the differences among rulers and régimes apparent to the historian were imperceptible to the ruled—except in Athens where there were extended political rights). In other words, enfranchisement and political rights are not generally conditions precedent to taxes. *See also* FINLEY, *supra* note 74, at 88 (disentangling political and non-political rights and emphasizing the correlation between rights and duties). *Compare* I.R.C. §§ 871, 881 (1994 & Supp. V 1999) (providing that resident aliens in the United States are required to pay taxes), *with infra* note 249 (describing the *metoikion*, the tax on resident aliens imposed in Athens).

237. Although property ownership or birthright are often prerequisites for citizen qualification, they were not coextensive with any obligation to finance government. Land ownership was effectively restricted to citizens. For example, the native peasantry of Egypt was never free. *See* M.I. FINLEY, *THE ANCIENT ECONOMY* 98 (1973) [hereinafter FINLEY, *ECONOMY*]. Peasants lived on small, subsistence holdings subject to dues and taxes. *Id.*; *see also supra* note 18.

238. Taxation in antiquity is a subject beyond the scope of this Article. Evidence exists in abundance; however, all of this evidence supports the assertion that equal taxation was characteristic of most regimes, especially those least interested in popular sovereignty. *See* HERODOTUS, *supra* note 163, at 257-59 (bk. III, chs. 89-94); A.H.M. JONES, *Taxation in Antiquity*, in *THE ROMAN ECONOMY* 151 (P.A. Brunt ed., 1974) [hereinafter JONES, *Taxation*]. Fixed and regular assessment of taxes owed based on the estimated wealth of an area (according to its agricultural production) is ascribed first to the Persians during the reign of Darius (500 B.C.). JONES, *Taxation*, *supra*, at 151. According to Jones, Darius divided the Persian Empire into satrapies, each of whose tribute was assessed separately according to its estimated wealth. *Id.* Within each satrapy, the satrap apportioned the tribute due among its communities who collected it. *Id.* Arable land was assessed in Ptolemaic Egypt, with rates varying by its legal classification. *Id.* at 156. Rates were adjusted based on the Nile flood levels. *Id.* Fixed rate taxes (one-sixth to one-tenth) were assessed on all vineyards, orchards, and gardens. JONES, *Taxation*, *supra*, at 151. Where the collection of specific taxes was impossible, the Hellenistic Kings used a block assessment. *Id.* Rome similarly imposed, in the provinces, tithes or pasture dues. *Id.* at 161. Tithes were already in effect in Sicily by 241 B.C. and were sold to the tax contractor crop by crop. *Id.* at 161-62 (describing the Roman addition of *lex Hieronica* to provide courts allowing for dispute resolution between contractors and cultivators). The assumption was that the law encouraged individual contracts with neither side being able to cheat the other. Similarly, Rome imposed tithes on provinces, including Asia. *Id.* at 163-64; *see also* FINLEY, *ECONOMY*, *supra* note 237, at 150-75.

239. JONES, *Taxation*, *supra* note 238, at 164-65. The story of the birth of Christ is connected with

with them administrative benefits and problems. The poll tax required a regular census to register the population and property; the property tax, when based on a fixed levy on assessed property instead of a proportionate levy based on yield, provided more predictable revenue but could not account for annual variations.²⁴⁰ Effectively calculating the tax due to match the estimated expenditures was one of the reforms made by the emperor Diocletian (284-305 A.D.), who reorganized and regularized the tax system.²⁴¹ The agrarian crisis that plagued the later Roman Empire is commonly attributed to the increasing burden of taxation and dues on land that resulted in the peasant classes' transformation to "fully exploitable subjects."²⁴²

2. Athens: Taxes from Tyranny to Democracy

Prior to the adoption of the constitutional reforms that established democracy, the tyrant Peisistratus and his sons generated revenue through the imposition of a regular, annual tax on agricultural production.²⁴³ According to the historian Thucydides, the tyrants "without exacting from the Athenians more than a twentieth of their income, splendidly adorned their city, and carried on their wars, and provided sacrifices for the temples."²⁴⁴ The Peisistratid's assessment of a generally applicable, annual flat tax at a rate between one-tenth and one-twentieth (or ten to five percent) on all agricultural production was very unpopular.²⁴⁵ It likely contributed to the people's

Augustus's tax reforms. On Augustus's introduction of a census, see *Luke 2:1* (New International Version), ("In those days Caesar Augustus issued a decree that a census should be taken of the entire Roman world."). The poll tax was levied on adults, sometimes only men (as in Egypt), sometimes on both women and men (as in Syria). JONES, *Taxation*, *supra* note 238, at 164-65.

240. JONES, *Taxation*, *supra* note 238, at 165 (describing the problems associated with both taxes); see also A.H.M. JONES, *Over-Taxation and the Decline of the Roman Empire*, in *THE ROMAN ECONOMY*, *supra* note 238, at 82-89 [hereinafter JONES, *Decline*]. Fixing the yield based on assessed value was better administratively for Empire revenues, but worse for the peasants' farming. JONES, *Decline*, *supra*, at 88. Rates of taxation were generally low (tithe was, as one would expect, one-tenth) until the Empire, when they rose dramatically. See *id.* Jones links the increasing rate of taxation with abandonment of less profitable land. *Id.*; see also STE. CROIX, *supra* note 236, at 207 (describing the increased tax burden imposed on peasantry in the later Empire).

241. JONES, *Taxation*, *supra* note 238, at 169.

242. FINLEY, *ECONOMY*, *supra* note 237, at 103. Finley notes the corresponding reduction in the meaning of citizenship accorded to those in the Roman Empire. *Id.*

243. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 84 (ch. 16, pts. 4-6); BURY & MEIGGS, *supra* note 215, at 128-29.

244. THUCYDIDES, *supra* note 162, at 369 (bk. VI, ch. XIX, para. 54); A.W. GOMME ET AL., *VI A HISTORICAL COMMENTARY ON THUCYDIDES 329-30* (1970). Thucydides concurs with Aristotle's description of Athens as generally peaceful and prosperous under the tyranny. THUCYDIDES, *supra* note 162, at 369 (bk. VI, ch. XIX, para. 54). Gomme reconciles Thucydides description of the tax as one-twentieth as easily subsumed within the generic "tithe" (and Aristotle's description of it as one-tenth). GOMME, *supra*, at 329. His use of these funds for the benefit of the city might be seen as justification for Peisistratus's imposition of the tax. *Id.* at 330. Nevertheless, the lack of a distinction between the public sphere and a tyrant's personal benefit vitiates such justification. Cf. *supra* notes 95-96, 219, and *infra* note 246. On the importance of democracy's definition of a public sphere (distinguished from any private benefit accruing to those in power). See *supra* notes 92-99 (ascribing to this development the popularity of republicanism and democratic government during the revolutionary era).

245. See COHEN, *supra* note 160, at 195.

willingness to overthrow the tyranny. Indeed, it is generally regarded as the basis for the Greek view that such flat, annual taxation is “tyrannical.”²⁴⁶ One famous story, recounted by Aristotle, provides an illustration. When touring Attica, Peisistratus asks a hard-working man just how much he derived from working a particularly rocky farm: “Just so many aches and pains; and of these aches and pains Pisistratus ought to take his ten percent.”²⁴⁷

Thus, the Greeks associated uniform assessments with tyranny.²⁴⁸ Their importance in the overthrow of the tyranny is likely, given that generally applicable taxes (including the poll tax known as *metoikion*) were levied only against resident aliens and were intimately associated with their inferior status as non-citizens.²⁴⁹ Instead, with the adoption of the democracy, the wealthy as a class became Athens’s taxpayers, liable to fund the most important state expenditures, especially its most important military operations (the fleet) and its religious festivals.²⁵⁰ The significance of the wealthy bearing the cost of Athenian democracy is best expressed by Finley: “[T]ax exemption [of all but the wealthy] was an important underpinning for that novel and rarely repeated phenomenon of classical antiquity, the incorporation of the peasant as a full member of the political community.”²⁵¹

VI. THE WEALTHY AS TAXPAYERS

If a democracy is predicated on strong ideas of equality, how is it possible that “the wealthy” came to be synonymous with “the taxpayers”? An examination will show that although the wealthy had no greater political

246. See, e.g., FINLEY, *supra* note 74, at 90 (noting that “[t]he classical Greeks looked upon direct taxes as tyrannical”); *id.* at 262 n.34 (connecting the Peisistratid tithe with the overthrow of the tyranny given that the tithe was abolished at that time). Finley reaches his conclusion, because both ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 84 (ch. 16, pt. 4), and THUCYDIDES, *supra* note 162, at 369 (bk. VI, ch. XIX, para. 54), make specific mention of the tithe. See also COHEN, *supra* note 160, at 195.

247. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 84 (ch. 16, pt. 6).

248. See *supra* note 246 and accompanying text.

249. The basic facts of the *metoikion* are well-known, although we lack complete information about its collection. DAVID WHITEHEAD, *THE IDEOLOGY OF THE ATHENIAN METIC* 75 (1977). Metics—aliens who resided in Athens beyond a small number of fixed days—were liable to pay a head tax (*metoikion*). *Id.* Men paid at a rate of twelve drachmas annually; women without a husband or son liable for the tax paid at half that rate (six drachmas). *Id.* The tax was unique in being levied on the person, and not his property or actions. *Id.* at 76. Its most significant impact (although its financial burden should not be discounted) was in demarcating the citizen from the non-citizen resident. *Id.* The penalty for failure to pay was severe—slavery. WHITEHEAD, *supra*, at 76; see also FINLEY, *supra* note 74, at 90 (noting that the *metoikion* was not a great financial burden but noting its great psychological impact); HAILEY, *supra* note 18, at 643 (discussing the poll tax in Africa). A regular assessment by Athens on subject states was a sign of the states’ inferior status. However, note that the Athenians made periodic re-assessments based on subsequent events. For example, confiscation of land by the Athenians prompted a corresponding reduction in tribute. See *A SELECTION OF GREEK HISTORICAL INSCRIPTIONS passim* (Russell Meiggs & David Lewis eds., 1969) (for epigraphic evidence generally describing the tribute assessment, especially pages 188-201); JONES, *Taxation*, *supra* note 238, at 152; PLUTARCH, *Life of Aristides*, in *THE LIVES OF ARISTIDES AND CATO* 80-83 (David Sansone ed., trans., Aris & Phillips Ltd. 1989) (ch. 24) (describing the incorruptible Aristides’s assessment).

250. JONES, *DEMOCRACY*, *supra* note 230, at 55-56.

251. FINLEY, *ECONOMY*, *supra* note 237, at 96.

rights legally, they had significantly greater obligations for the operation of the democracy. The wealthy generally accepted the state's position that they served as the appropriate stewards of their resources until the state required their contribution.²⁵²

No systematic treatise written by any ancient author sets forth the ancients' theories on how to structure the public economy with a goal to ensure an adequate revenue stream for a democracy's operations. Yet, modern commentators often assume the classical Greeks' aversion to taxation of either person or property obviated the need to fund their government or that Athenian democracy was made possible by the empire.²⁵³ As a result, insufficient attention has been paid to the significance of the shift from universally applicable taxes, in use by the tyrants before the adoption of democracy, to the wealthy bearing most of the cost under the democracy. Significant features of Athenian democracy were made possible because taxes were imposed on the property of the wealthiest of its citizens or by liturgies—obligations entailing both personal service and financial cost assigned only to the wealthiest of its citizens. As Cohen notes, "The Athenian system, in fact, constitutes the quintessence of 'progressive' taxation"²⁵⁴

In pre-democratic Athens (a pre-bureaucratic state), the resources for any significant expense, whether religious festivals or military expeditions, rested with the aristocracy.²⁵⁵ If an aristocrat lacked individual resources, he could turn to the people for funding from generally applicable taxes, as Peisistratus did.²⁵⁶ The adoption of a democratic constitution created a need

252. See DEMOSTHENES, *The First Olynthiac*, in DEMOSTHENES: OLYNTHIACS, PHILIPPICS, MINOR PUBLIC SPEECHES, SPEECH AGAINST LEPTINES 19-21 (bk. I, §§ 26-28) (T.E. Page et al. eds, J.H. Vince trans., G.P. Putnam's Sons 1930) [hereinafter DEMOSTHENES, *First Olynthiac*] (explaining the need for the wealthy to contribute their resources for an adequate military response to Philip of Macedon as follows: "[I]t is the duty of the well-to-do, that spending but a fraction of the wealth they so happily possess, they may enjoy the residue in security" *Id.* at 21); *infra* notes 306-308 and accompanying text (discussing the complaints of the wealthy within the context of forensic speeches and comedy).

253. See A.M. ANDREADES, A HISTORY OF GREEK PUBLIC FINANCE 126-130 (Carroll N. Brown trans. & rev., 1979) (1933); RUDI THOMSEN, EISPHORA 11 (1964) (generally detailing aversion to taxes). Although no ancient treatise exists, ancient comedies and forensic speeches (written by professional orators for defendants in the law courts) provide numerous references to taxes, but must be evaluated according to the sources in which they appear. On interpreting the orators, see, for example, Edward M. Harris, *Demosthenes' Speech Against Meidias*, 92 HARV. STUD. CLASSICAL PHILOLOGY 117, 117 (1989), noting that the Attic orators possessed many virtues, but that "truthfulness was not one of them." No systematic, up-to-date, modern treatise exists that examines all the pertinent evidence. See Ostwald, *supra* note 183, at 369. The comprehensive works that exist, such as AUGUSTUS BOECKH, THE PUBLIC ECONOMY OF ATHENS (George Cornwell Lewis trans., 1976) (1843), are outdated, failing to incorporate much current, i.e., epigraphic, evidence. In part, the difficulty arises because the fifth century provides only sporadic evidence. For the fourth century, the evidence is diffuse, coming from comedies and forensic speeches. Epigraphic evidence exists in greater quantity from the fourth century, and, although less abundant, provides invaluable information for the fifth century, much of which is difficult to interpret. I use "democracy's operations" intentionally to note the change of the use of aristocratic wealth for general, not individual, benefit.

254. COHEN, *supra* note 160, at 194. Cohen explains that the high rates of taxes imposed in Athens were only imposed on a "relatively small" number of people appearing to own the largest amount of property. *Id.*

255. See *supra* note 250 and accompanying text.

256. Peisistratus's collection of flat taxes from the entire population provided him with the resources necessary for his government. See *supra* note 239 and accompanying text. Pericles relied on public

to fund state expenditures, while at the same time constitutional developments reduced or eliminated property qualifications necessary for political participation. The basis (wealth) for the aristocracy's preferential political status was thus altered. A new system was required, one that utilized the wealthy's resources while preserving political equality. Through the liturgy system (involving both financial and personal obligations), Athens shifted to the wealthy significant elements of the state's financial burden, and did so in a way that permitted the wealthy some special prominence within the democratic system. Although relying on long-standing aristocratic norms, the liturgy system was connected with the development of democracy and allowed the state to shift to the wealthy responsibilities for public functions.²⁵⁷

The liturgical system was essentially aristocratic in origin, although it became a functional necessity for Athenian democracy. The liturgy involved direct, personal responsibility, for the liturgy itself as well as its cost. It thus reflected the competitive aristocratic tradition, combining both compulsory and honorific elements.²⁵⁸ A liturgical obligation provided the opportunity, within the democratic structure, for an individual to make use of superior wealth, birth, and talent to gain individual honor and glory—attributes in reputation that could serve him in good stead as a defense in the law courts.²⁵⁹ Wealthy Athenians did not simply assume their liturgical burden from a long aristocratic tradition of competitive behavior, nor were they motivated to serve the state solely from altruism. The evidence for liturgy avoidance will demonstrate that they were not much, if at all, different from current taxpayers.²⁶⁰ Their responsibility for the tax burden was consciously related to democracy and democracy's commitment to equality.

A. Liturgies

"Liturgy," now defined as "service to the divinity," is a familiar religious word.²⁶¹ In antiquity, the word signified something closer to its com-

revenues to fund public service in Athens, thereby gaining public support. See *infra* note 347 and accompanying text.

257. VINCENT GABRIELSEN, *FINANCING THE ATHENIAN FLEET* 35 (1994) (noting that while the democratic constitution aimed to reduce, but not eliminate, aristocratic influence, it embodied the requirement that the affluent expend their wealth on the city through liturgies). The liturgical system parallels Athenian democracy from its inception in the late sixth or early fifth century through the late fourth century, when it fell into disuse. *Id.*

258. FINLEY, *ECONOMY*, *supra* note 237, at 151.

259. The terms *lamprotes* (honor) and *philotimia* (glory) describe what the wealthy Athenian achieved by generous liturgical service. COHEN, *supra* note 160, at 199. For example, supporters of his opponent try to dissuade the orator Demosthenes from pursuing charges against Meidias, because "he is a rich man and will talk about the equipment of war-galleys and other public services" DEMOSTHENES, *Against Meidias*, in DEMOSTHENES: *AGAINST MEIDIAS*, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 105 (bk. XXI, §§ 151-52) (T.E. Page et al. eds., J.H. Vince trans., Harvard Univ. Press 1935) [hereinafter DEMOSTHENES, *Against Meidias*].

260. See COHEN, *supra* note 160, at 198-99; Matthew R. Christ, *Liturgy Avoidance and Antidosis in Classical Athens*, 120 *TRANSACTIONS AM. PHILOLOGICAL ASS'N* 147, 150 (1990).

261. See generally FINLEY, *ECONOMY*, *supra* note 237, at 151; H.W. PARKE, *FESTIVALS OF THE*

pound elements (“public” + “work”), to mean “work for the people,” or “service to the state,” broadly defined.²⁶² Liturgies were a “form of taxation-cum-personal service” that obligated the wealthiest Athenian citizens to undertake various services for the state.²⁶³ Because only the wealthy were obligated to bear these duties, “the wealthy” were synonymous with “the taxpayers.”²⁶⁴ Liturgies, combining financial and personal obligations to carry out state service, did not constitute the only obligation of the wealthy. The wealthy were also liable for other taxes. Liturgies were the most noteworthy financial obligation, varying in their frequency and cost with numerous annual religious festivals and less frequent, but more costly, military ones.²⁶⁵ In contrast to the limits imposed on office holding, the wealthy could be obligated to annual liturgies over the course of their lifetimes.²⁶⁶

1. Festival Liturgies

Festivals honoring religious deities pre-dated the introduction of democracy. In archaic Athens, cults were often associated with particular aristocratic families. With the beginning of democracy, those that were not too closely associated with particular aristocratic families were encouraged and administered as part of the new state.²⁶⁷ Early in the democracy (502-01 B.C.), the state assumed responsibility for these festivals through what is known as the choregic system.²⁶⁸ Festivals, numbering approximately one hundred annually, were celebrated as great public events (including dramatic festivals) in honor of different deities. These festivals involved a vari-

ATHENIANS 16 (1977); OXFORD CLASSICAL DICTIONARY 613 (N.G.L. Hammond & H.H. Scullard eds., 2d ed. 1970).

262. Naphtali Lewis, *Leitourgia and Related Terms*, 3 GREEK, ROMAN AND BYZANTINE STUDIES 175, 177 (1960).

263. J.K. DAVIES, *ATHENIAN PROPRTIED FAMILIES, 600-300 B.C.* xx (1971) [hereinafter DAVIES, APF].

264. COHEN, *supra* note 160, at 195. Aristotle equates the two. ARISTOTLE, *supra* note 8, at 297 (pts. 1291a33-34). This identification is confirmed by the Old Oligarch, [XENOPHON], *supra* note 229, at 1.13, DEMOSTHENES, *Against Meidias*, *supra* note 259, at 105 (bk. XXI, § 151), and DAVIES, APF, *supra* note 263, at xxi.

265. Christ, *supra* note 260, at 148.

266. There was one limit to liturgical obligations: there was no requirement to serve two simultaneously. On the exemption limiting performance of two liturgies simultaneously, see DEMOSTHENES 50.9; on the two-year reprieve accorded anyone performing the more burdensome *trierarchy*, see ISAEOS 7.38; COHEN, *supra* note 160, at 196 & nn.32-33; Christ, *supra* note 260, at 149 n.9 (summarizing the evidence).

267. J.K. DAVIES, *WEALTH AND THE POWER OF WEALTH IN CLASSICAL ATHENS* 109-10 (1981) [hereinafter DAVIES, *WEALTH AND POWER*]; see also Roberts, *supra* note 142, at 84 (describing the role of the dramatic festivals in creating communitarian life and tragedies' role in promoting democratic ideology).

268. See Edward Capps, *Greek Inscriptions, A New Fragment of the List of Victors at the City Dionysia*, 12 HESPERIA 1, 10-11 (1943). Capps dates the “fundamental innovation” of the democracy and its establishment of the choregic system for tragedy to 502/1 based on the epigraphic evidence recording the victorious from 502/1. See *supra* note 164 and accompanying text (discussing tragedy's concern with democratic issues, including *isonomia* (legal equality)). For another important use of religious cults for democratic purposes, see MAUREEN B. CAVANAUGH, *ELEUSIS AND ATHENS, DOCUMENTS IN FINANCE, RELIGION AND POLITICS IN THE FIFTH CENTURY B.C.* (1996).

ety of obligations (financial and personal) for the wealthy, who were assigned to perform festival liturgies.²⁶⁹ Spheres of church and state are neatly and constitutionally separate for us, unlike the ancient world. The religious festivals performed an important function in the democracy. Funding these state sponsored public events became the responsibility of the wealthy and was implemented through the festival liturgy system.

For example, after the overthrow of the tyranny and the institution of democracy, the state assumed responsibility through the choregic system for the festival in honor of Dionysus (the festival known as the City Dionysia). In addition to choosing which playwright's tragedy, e.g., Aeschylus or Sophocles, would be performed, the chief magistrate would appoint individuals (*choregoi*) from the wealthy to finance the chorus and undertake various duties and related expenses.²⁷⁰ The relationship between dramatic festivals and growth of democracy in Athens is evident in the frequency of topics related to democratic political ideals.

2. Military Liturgies (Trierarchy)

More expensive, but less frequent, was the liturgy known as the *trierarchy* which involved the military expense of maintaining a war ship (*trireme*) for a year.²⁷¹ Individual responsibility for state military functions, especially the navy, critical to Athens's empire and democracy is surprising but explicable as a reflection of a pre-bureaucratic state in transition from aristocracy to democracy.²⁷² Aristotle's *Constitution of the Athenians* under-

269. J.K. Davies, *Demosthenes on Liturgies: A Note*, 87 J. HELLENIC STUD. 33-40 (1967) (examining the forensic evidence for the actual number). The number of festivals varied, according to the year, from 97 annual liturgies to 118 in a Panathenaic (quadrennial) year. See DAVIES, APF, *supra* note 263, at xxi-xxii (detailing the evidence for the liturgies and their cost according to the ancient sources); FINLEY, ECONOMY, *supra* note 237, at 151. The element of personal service varied as well as the cost for these religious festival liturgies. For example, a wealthy citizen could be called upon to act as impressario for a dramatic or choral production (*choregia*) or to train and maintain a team of relay-runners as *gymnasiarch*. DAVIES, APF, *supra* note 263, at xx.

270. ARISTOTLE, CONSTITUTION, *supra* note 169, at 132 (ch. 56, pt. 3) (describing the selection, from the wealthiest men, of various individuals to serve as *choregoi* for the tragic poets and numerous other festivals). The responsibilities of the *choregos* included more than simply paying the cost. For example, see Harris, *supra* note 253, at 117-36 (discussing Demosthenes and Meidias). On the costs, which were substantial (often equivalent to the annual salary of a skilled workman), see COHEN, *supra* note 160, at 196; DAVIES, APF, *supra* note 263, at xxi-xxii (discussing costs of various liturgies). Even allowing for exaggeration, which is likely given the nature of forensic speeches, the outlays were significant. *Id.* at xxii.

271. The *trireme* was the specially designed rowing war ship in use from the fifth century B.C. through the fourth century A.D. With a crew of 200, including 170 oarsmen, it was a fast and effective ship credited for the naval superiority enjoyed by Athens. OXFORD COMPANION TO CLASSICAL CIVILIZATION 746 (S. Hornblower & A. Spawforth eds., 1998). For a complete account of the financing of the fleet, see GABRIELSEN, *supra* note 257.

272. According to tradition, the initial outlay for the Athenian fleet at the time of the Persian War was made possible because of the foresight of Themistocles. He persuaded the Athenians to use the silver mines for that purpose rather than distributing it to the citizenry. According to tradition, the silver was lent to Athens's wealthiest citizens (100 in number), each then charged with building one *trireme*. See GABRIELSEN, *supra* note 257, at 30-32 (discussing ARISTOTLE, CONSTITUTION, *supra* note 169, at 92 (ch. 22, pt. 7); PLUTARCH, THEMISTOCLES 4.1. Gabrielsen underscores the connection in commenting that "[t]he key notions are there: wealthy citizens, personal responsibility, fleet finance." GABRIELSEN,

scores the close connection between wealth ownership and the responsibility of wealthy individuals to finance the navy.²⁷³

Athenian public resources could only support certain basic functions related to the cost of its navy, such as the bare ships and base pay for the crew.²⁷⁴ The trierarchic liturgy permitted Athens to shift other required costs and activities to wealthy individuals.²⁷⁵ These costs and obligations were significant, including the actual hiring of the requisite oarsmen, and any additional costs necessary when a competitive labor market increased labor costs because of fewer skilled oarsmen.²⁷⁶ The cost of the *trierarchy* was high, amounting to between one-quarter and one-third of the entire assets qualifying an individual to be included in the liturgical class.²⁷⁷ Significant personal responsibility attached to the liturgy since the trierarch commanded as well as assumed the financial responsibility for the *triereme*.²⁷⁸ As the changes undertaken to distribute the trierarchic burden among a greater number by the mid-fourth century B.C. demonstrate, the burden of this liturgy was often too heavy for a single individual.²⁷⁹

3. The Taxpayers—The Liturgical Class

Wealth, and the power associated with wealth and property ownership, had long been recognized. Early in the sixth century, Athens's first constitutional system attributed to the lawgiver Solon divided the Athenian popula-

supra note 257, at 31.

273. GABRIELSEN, *supra* note 257, at 26-30 (tracing the more gradual build-up of the Athenian navy) and *supra* note 272.

274. *Id.* at 106, 114 (noting that the aggregate resources required exceed the amounts available from the state). In periods of inadequate state resources, even greater costs were shifted to the trierarch. See JONES, DEMOCRACY, *supra* note 230, at 32 (describing trierarchs' need to mortgage property or use other means to obtain adequate resources required to finance necessary expenses). Aristophanes's *The Knights* takes aim at the burden of the *trierarchy*:

A trierarch's office you shall fill,
And by my influence I'll prevail
That you shall get, to test your skill,
A battered hull with tattered sail.
Your outlay and your building too
On such a ship will never end;
No end of work you'll have to do,
No end of cash you'll have to spend.

1 ARISTOPHANES, *The Knights*, in ARISTOPHANES: IN THREE VOLUMES, *supra* note 191, at 215 (ll. 912-18).

275. GABRIELSEN, *supra* note 257, at 105-45.

276. *Id.* at 107-08, 118-19 (noting that military effectiveness directly related to the resources available, i.e., the ability to supply a skilled and trained crew with adequate provisions); *id.* at 122-23 (describing the tactical ploy of offering higher pay to lure crew away from the enemy).

277. COHEN, *supra* note 160, at 196.

278. BORIMIR JORDAN, THE ATHENIAN NAVY IN THE CLASSICAL PERIOD: A STUDY OF ATHENIAN NAVAL ADMINISTRATION AND MILITARY ORGANIZATION IN THE FIFTH AND FOURTH CENTURIES B.C. 134-37 (1975).

279. P.J. RHODES, A COMMENTARY ON THE ARISTOTELIAN *ATHENAION POLITEIA* 680 (1981). The law of Periandros (357 B.C.) divided the *trierarchy* among twenty groups of sixty men each. Christ, *supra* note 260, at 148 n.5. By 340 B.C., the law of Demosthenes made only the wealthiest 300 responsible. *Id.*; see also GABRIELSON, *supra* note 257, at 173-217.

tion into four property classes based on real property ownership.²⁸⁰ These classifications were retained in the democratic constitution but had no force, at least as a requirement for office holding in democratic Athens.²⁸¹ Nonetheless, wealth continued to provide an important source of political power. As the sources of wealth became increasingly diverse throughout the fourth century, there was a greater acceptance of self-made individuals. Although the wealthy often recognized their obligation to undertake these liturgical obligations as part of the price of democracy, they were likely to complain about them, as well.²⁸² Attempts to avoid undertaking any liturgy did not prevent the wealthy from boasting of their expenditures on the people's behalf.²⁸³

The wealthy who performed liturgies were synonymous with those identified as "the taxpayers."²⁸⁴ The "wealthy" were those who qualified for liturgical classification based on the wealth available for liturgies, especially expensive military liturgies—those citizens who could afford the costly *trierarchy*, the expense of outfitting a ship (*triereme*).²⁸⁵ Even the cheapest liturgy constituted a significant expense, equivalent in amount to the annual wage of skilled workman.²⁸⁶ Often significantly higher, the cost frequently required the wealthy to borrow in order to meet their obligations.²⁸⁷ The liturgical class was comprised of the top one percent of all citizens in the fifth century; in the fourth century, the liturgical class was enlarged to in-

280. ARISTOTLE, CONSTITUTION, *supra* note 169, at 74 (ch. 7, pt. 3). Aristotle identifies the four classes based on agricultural production or capacity. *Id.* at 74-75 (ch. 7, pt. 3). The highest class, Pentacosimedimni, ("the 500 measure men") was based on agricultural production; Knights, who generally possessed land with a production greater than 200 bushels, but less than 500, had the ability to keep horses; Zeugitae (yoke of oxen) probably possessed land with a production of 200 measures. *Id.* at 75 (ch. 7, pt. 4). The earliest classifications, identified with agricultural production, were never changed to reflect sources of wealth common in the fifth century. DAVIES, WEALTH AND POWER, *supra* note 267, at 41-66. These included not only land, but also industrial slave holding, money lending, and ownership based on foreign property. *Id.* But see Ostwald, *supra* note 183, at 374-75 (linking the classifications not with any rights, but rather with obligations to the community, and describing the classification as not setting up a system of "graduated entitlements," but instead a system to determine "the degree of service the state could expect from each group of citizens"); see also Ostwald, *supra* note 123, at 56.

281. See ARISTOTLE, CONSTITUTION, *supra* note 169, at 120 (ch. 47, pt. 1) (identifying the treasurers of Athena with the Pentacosimedimni, but allowing that these individuals chosen by lot from the highest property class could be poor).

282. See Christ, *supra* note 260, at 152-54.

283. *Id.* at 156.

284. See DAVIES, WEALTH AND POWER, *supra* note 267, at 9.

285. *Id.* at 20-22. Davies notes that the amount required (one talent for a naval *trierarchy*) was greater in the fifth century than in the fourth (which was half that amount). *Id.* at 24.

286. DAVIES, APF, *supra* note 263, at xxi-xxii (discussing the claims of the defendant in LYSIAS 21, who recounts his significant liturgical outlays); FINLEY, ECONOMY, *supra* note 237, at 150-51 (discussing and translating LYSIAS 21.1-5). Finley comments that the beginning of this otherwise unknown defendant's speech, which recounts years of expenditure in an amount more than twenty times the minimum property requirement for military qualification, although legally irrelevant, is revealing of the liturgical system and its importance for the wealthy. *Id.*

287. If a skilled workman earned between 300-600 drachmas per year and the average *trierarchy* cost one talent (36,000 drachmas), the trierarch could expend the equivalent of the annual wage for sixty skilled workmen. The burden of the liturgy is sometimes discounted because the system allowed some individual choice in spending. But see COHEN, *supra* note 160, at 195 (discussing ancient sources on individual variability). On the need to borrow in order to raise sufficient cash, see Christ, *supra* note 260, at 153 (discussing evidence including burden of simultaneous liturgy and *eisphora*).

clude the top 1.5 percent, or approximately 300-400 individuals.²⁸⁸ Ownership of the resources—the wealth necessary for qualification among the liturgical (taxpaying) class—justified the imposition of such financial burdens on this fairly limited group.²⁸⁹ This narrow group (the top one or two percent) is assumed to correspond with an “equally disproportionate distribution of property.”²⁹⁰ Since only the wealthiest were expected to so contribute their resources, the liturgical system included procedures (*antidosis*) to allow an individual to challenge another as wealthier and to propose him as a substitute liturgist.²⁹¹ Because continual prosperity within the liturgical class was not assumed, if another individual possessed greater wealth, he was more accurately identified as the proper taxpayer.²⁹²

B. Property Taxes

In addition to the recurring and significant liturgical expenses, the wealthy (in this case, including both citizens and non-citizens) were also called upon, as required by military need, to pay special assessments on wealth as necessary, usually related to current military activities.²⁹³ The introduction of the *eisphora* is associated with the increasing democratization of Athens, and the rise of new, self-made politicians who were no longer members of the aristocracy.

1. Eisphora—Extraordinary Property Tax

It is true that no regular, annual tax on property was levied during the fifth and fourth centuries B.C. However, when necessary to fund military operations, an extraordinary property tax (*eisphora*) was levied on both citizens and resident aliens.²⁹⁴ The authorizing legislation included the percentage of tax (generally, one to two percent) to be assessed.²⁹⁵ The *eisphora*

288. DAVIES, WEALTH AND POWER, *supra* note 267, at 27-28. Rhodes concludes that the number would be at least twice that, i.e., 800. P.J. Rhodes, *Problems in Athenian Eisphora and Liturgies*, 7 AM. J. ANCIENT HIST. 1, 5 (1985).

289. DAVIES, WEALTH AND POWER, *supra* note 267, at 12.

290. *Id.* at 34; see also COHEN, *supra* note 160, at 195 (discussing complaints by the wealthy). Compare and contrast the current tax burden of the wealthiest Americans. See PHILLIPS, *supra* note 7, at 96 (charting the wealthy's declining tax burden); McMahon & Abreu, *supra* note 7, at 7-9.

291. DAVIES, WEALTH AND POWER, *supra* note 267, at 9-10.

292. *Id.* at 73-87. Fragmentation of wealth resulted from equal division among heirs in the absence of any requirement or custom that promoted transmission based on primogeniture. *Id.*; see also DAVIES, *supra* note 263, at xxii; GABRIELSEN, *supra* note 257, at 91-95; Christ, *supra* note 260, at 160-68.

293. See Christ, *supra* note 260, at 148-49.

294. JONES, DEMOCRACY, *supra* note 230, at 23; G.E.M. de Ste. Croix, *Demosthenes' TIMHMA and the Athenian Eisphora in the Fourth Century B.C.*, 14 CLASSICA ET MEDIAEVALIA 30, 31 (1953). The extraordinary nature of the tax should not be overemphasized given the fact that warfare occurred during two out of every three years. Munn attests to the frequency of the *eisphora* in the 420s. MARK MUNN, THE SCHOOL OF HISTORY 74 (2000); see also *id.* at 373 nn.26-27 (citing ancient sources).

295. See JONES, *Taxation*, *supra* note 238, at 23; Ste. Croix, *supra* note 294, *passim* (providing good overviews of the evidence, mostly gleaned from Demosthenes). The *eisphora* is generally believed to have been levied at a single, not a progressive, rate. For a review of the evidence, see THOMSEN, *supra* note 253, at 19-23. For evidence that it was levied at rates increasing with wealth, see COHEN, *supra*

was a tax on capital, not income, on the self-assessed value of real and personal property.²⁹⁶ It is likely that those paying the *eisphora* may have included more than the liturgical class alone, but those paying probably did not exceed one-third of all Athenians (estimated at approximately 6000)—with property belonging to the bottom two-thirds of the citizen population being exempt.²⁹⁷

The introduction of the *eisphora* is associated with the increasing democratization of Athens and especially with the rise of the self-made popular politicians.²⁹⁸ As the frequency of this *topos* in the forensic speeches of the orators attests, the wealthy vociferously complained about their burden.²⁹⁹ Because of the association of the *eisphora* with military operations and the wealthy's aversion to it, the wealthy became associated with the peace party.³⁰⁰ Some have even attributed to the wealthy responsibility for the failure of Athenian foreign policy, because of their failure over time to approve sufficient taxes.³⁰¹

2. Proeisphora

If the state required funds immediately, certainly the case when there was any assessment of an extraordinary tax, a mechanism existed for the wealthiest to provide those funds immediately. To satisfy the urgent need for revenue, the 300 wealthiest citizens performed an additional liturgical obligation by immediately paying the amount anticipated to be collected.³⁰² Performance of the *proeisphora* was purely a financial obligation.³⁰³ Citi-

note 160, at 194, 197; Ste. Croix, *supra* note 294, at 35-36; see also BOECKH, *supra* note 253, at 504-05 (arguing for a progressive tax rate in the *eisphora*).

296. PATRICE BRUN, *EISPHORA-SYNTAXIS STRATIOTIKA* 4-5 (1983); see also JONES, *Taxation*, *supra* note 238, at 154-55.

297. For an analysis of the sources describing the tax and the value of property included in the assessment, see JONES, *DEMOCRACY*, *supra* note 230, at 24; Ste. Croix, *supra* note 294, at 32-33. Given the limited bureaucracy of the ancient state, Ste. Croix argues convincingly that the property tax collection process would have exempted large number of citizens with minimal property. Ste. Croix, *supra* note 294, at 33. In 332 B.C., the Macedonian general, Antipater, established a 2000-drachma property qualification for the right to vote and hold office. M.I. Finley, *Land, Debt and the Man of Property in Classical Athens*, 68 *POL. SCI. Q.* 249, 255 (1953). This effort to establish an oligarchy resulted in disenfranchising approximately seventy percent of the citizen body. *Id.* Rhodes disputes Jones's conclusion and reasoning. Rhodes, *supra* note 288, at 3-5. Ultimately, he concludes that only 1200 Athenians were liable for the *eisphora*. *Id.*; see also Christ, *supra* note 260, at 149 n.6 (offering 1200 to 9000 as the range of taxpayers subject to the *eisphora* and arguing for lower number).

298. See BURY & MEIGGS, *supra* note 215, at 260. Generally, this would coincide with the latter part of the fifth century and the second half of the Peloponnesian War. *Id.* Meiggs associates comments from *The Knights*, performed in 424 B.C., in particular with Cleon. *Id.* at 536, n.12.

299. Christ, *supra* note 260, at 152-54.

300. Ste. Croix, *supra* note 294, at 70 n.154 (noting that most historians recognize that the wealthy were the "peace party"); see also DEMOSTHENES, *First Olynthiac*, *supra* note 252, at 8-9 (bk. I, §§ 8-9) (complaining of the wealthy's lack of willingness to contribute adequate resources for action against Philip, Alexander's father).

301. Ste. Croix, *supra* note 294, at 69-70.

302. See COHEN, *supra* note 160, at 197; THOMSEN, *supra* note 253, at 255; Ste. Croix, *supra* note 294, at 35-36.

303. The *proeisphora* was purely financial. The orator Demosthenes was only a child of seven when selected. Hence, qualification was purely based on wealth, and required no individual service. See Ste.

zens obligated to undertake this liturgy were required to advance the entire tax assessment anticipated from the *eisphora*, with only a right of repayment from their fellow taxpayers.³⁰⁴ As a result, the *proeisphora* might entail significant losses if others had already collected available funds, as one banker found to his dismay after he returned from performing his trierarchic liturgy.³⁰⁵

As this review of the liturgical system makes clear, the financial burden on the wealthiest taxpayers occasioned frequent outbursts about fears of their financial ruin.³⁰⁶ The physical records (chiefly monumental and epigraphic) lauding munificence of individual liturgists should be placed alongside the literary testimony.³⁰⁷ The objections to the liturgical system voiced by the wealthy were motivated not only by fears of financial insecurity, but also because these objections were regarded then, as today, as a threat to personal autonomy.³⁰⁸ Objections to their financial burden also reflected the fundamental disagreement about the choice of democracy as the best constitutional system.³⁰⁹ The literary evidence offers ample evidence for the vitality of the debate over which was the best constitutional form, aristocracy or democracy.³¹⁰ Notwithstanding the complaints of the wealthy, Athens was able to implement fully its democracy through the liturgy system and may well thus have avoided actual open strife between

Croix, *supra* note 294, at 58-59 (discussing Demosthenes's performance of this liturgy at the age of seven and concluding that it was a "purely financial" liturgy).

304. *Id.* at 57-59.

305. COHEN, *supra* note 160, at 197 (quoting and discussing DEMOSTHENES 50.9). As Cohen notes, even those lucky enough to recoup all the funds advanced would have borne the cost of lost interest. *Id.*

306. The fears of the wealthy are well-documented, chiefly in comedy or rhetorical speeches composed by professional orators, and so such claims should not be taken at face value. Christ, *supra* note 260, at 152-54. On the issue of how to evaluate the orators, see generally *supra* note 253 (discussing orators' accuracy). For example, Demosthenes warns his listeners not to give any gratitude to those claiming ruin from significant liturgical service (and thus blaming the state), for what is really the result of their own profligacy. 1 DEMOSTHENES, *One of the Sons of Aristaechnus Against Nausimachus and Xenopeithes, a Special Plea*, in DEMOSTHENES: PRIVATE ORATIONS 437 (bk. XXXVIII, § 26) (T.E. Page et al. eds., A.T. Murray trans., Harvard Univ. Press 1936) [hereinafter DEMOSTHENES, *Against Nausimachus*]; see also, e.g., Christ, *supra* note 260, at 152 (noting the bias inherent in our preserved literary sources). On the aristocratic bias of our sources, see OBER, *supra* note 168, at 195-98; ROBERTS, *supra* note 156, at 34.

307. On honorific decrees and monuments, see RICHARD BRILLIANT, *ARTS OF THE ANCIENT GREEKS* 226, 293 (1973); OXFORD CLASSICAL DICTIONARY, *supra* note 261, at 230-31 (describing differing prizes and monuments associated with various contests).

308. Christ, *supra* note 260, at 152. A comparison with modern tax discussions is all too familiar. A rich character in Antiphanes bemoans the fate of all wealthy men:

Any mortal man who reckons that any possession is secure [to him] in life is seriously mistaken: for a war-tax is sure to come along and snatch away his wealth; or perhaps a lawsuit will leave him ruined; or having served as general, he will find himself in debt; or having decked out his chorus in golden robes when selected as *choregos*, he will be forced himself as a result to wear rags; or being named trierarch, he will hang himself; or sailing or walking somewhere he will be captured, or slain by his household slaves in his sleep.

Id. at 154 (translating and quoting Antiphanes, fr. 204).

309. See *id.* at 151-68.

310. See, e.g., *id.* (discussing the "Old Oligarch" whose treatise, believed to be the earliest expression of the growing cynicism of the wealthy, argues against democracy as the preferred constitutional form).

the oligarchs and the people that was common to other Greek cities during the fifth and fourth centuries B.C.

VII. LITURGY AVOIDANCE

The liturgy system was an important part of the development of Athenian democracy. The system worked, and worked well, for a significant period of several centuries. Nonetheless, the wealthiest Athenians were no different than modern taxpayers in their aversion to accepting responsibility for funding a democratic government that gave them, in their opinion, insufficient recognition for their superiority, attested by their wealth and birth. Tax avoidance in antiquity is fully reflective of the debate about the proper form of government, aristocracy or democracy. Even critics of democracy, who were quick to recount its ills, recognized that actual implementation of oligarchy brought no advantages, not even greater security for the wealthy.³¹¹

The wealthy's obligation to make their resources available to the state as necessary obviated any real need for redistribution, if we accept as fact the complaints voiced by Xenophon: "Whenever you seem to fall short of what is expected of you, the Athenians will certainly punish you as though they had caught you robbing them [of their own property]."³¹² The liturgy system has often been explained, and discounted, as willing taxpayers motivated by an excess of personal honor (*philotimia*) or civic pride.³¹³ But so commonplace was liturgy avoidance that a compliant liturgist could boast of such practice in the law courts.³¹⁴ Claims of liturgical munificence even occur frequently in the very same speeches where the wealthy detail their efforts to avoid the liturgy.³¹⁵

Ways to avoid selection or performance of any liturgy were readily available. First, "visible" wealth was the criterion for inclusion in the class of "the wealthy." This encouraged a method of "self-help," by creating "invisible" wealth, to avoid inclusion into the liturgical class. Second, the liturgical system included a legal procedure, *antidosis* (exchange), designed to

311. See OBER, *supra* note 168, at 197-98 (describing the contemporary view that confiscations were more frequent under oligarchies); Martin Ostwald, *Oligarchy and Oligarchs in Ancient Greece*, in POLIS & POLITICS: STUDIES IN ANCIENT GREEK HISTORY 385, 388 (Perille Flensted-Jensen et al. eds., 2000) (describing Plato's contempt for oligarchy as only a little less than his contempt for democracy). Ostwald notes that Plato describes oligarchies as comprised of greedy, money-grubbing individuals of the type that are usually reluctant to pay their taxes. Ostwald, *supra*, at 385, 388; see also *supra* notes 100-09 (discussing relative merits of different systems of government).

312. XENOPHON, *Oeconomicus*, in XENOPHON: MEMORABILIA, OECONOMICUS, SYMPOSIUM, APOLOGY 377 (ch. 2, pts. 6-7) (E.C. Marchant trans., Harvard Univ. Press 1923).

313. COHEN, *supra* note 160, at 199 (noting that the evidence is "at odds with the romantic notion that Athenian taxpayers gloried in paying governmental charges and contended in *agonistic* fervor to advance ever-greater sums").

314. Christ, *supra* note 260, at 160 (quoting and translating LYSIAS 20.23: "Although he might well have concealed his wealth and deprived you of his service, he chose rather that you should have knowledge of it, so that even if he should wish to be unscrupulous, it would not be possible, but he would instead have to pay the war-tax and perform liturgies").

315. COHEN, *supra* note 160, at 197-200.

allow the substitution of another wealthier individual as the liturgist. Although it was difficult to determine another's wealth, *antidosis* required naming someone as better qualified because of his greater resources.³¹⁶ Both methods of avoidance were prevalent, showing that wealthy taxpayers from antiquity were just as eager to avoid these obligations as their modern counterparts.

A. Invisible Wealth

In antiquity, wealthy individuals' ability to hide wealth was as problematic and common as it is today.³¹⁷ The comic playwright Aristophanes makes the subject of tax avoidance a topic of debate between the tragic poets, Aeschylus and Euripides. Aeschylus complains to Euripides that: "Your kings in tatters and rags you dressed, and br[ing] them on, a beggarly show, To move . . . our pity . . ." ³¹⁸ He worries about the consequences of portraying the wealthy as poor, because:

No more will a wealthy citizen now
equip for the state a galley of war.
He wraps his limbs in tatters and rags,
and whines *he is poor, too poor by far*.³¹⁹

Indeed, the consequence of endorsing the wealthy man's complaints of poverty is simply to encourage tax avoidance and personal extravagance.

But under his rags he is wearing a vest,
as wooly and soft as a man could wish.
Let him gull the state, and he's off to the mart;
an eager, extravagant buyer of fish.³²⁰

In contrast to hiding one's wealth, a decision to hold assets as "visible," with acknowledged ownership, corresponded to a decision to undertake the tax burden.³²¹ General knowledge of visible wealth formed the basis for the self-assessment (required for property tax payment) in a "face-to-face society."³²² "Visible" and "invisible" do not describe types of property but the

316. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 193 n.178.

317. See David Cay Johnston, *I.R.S. Says Offshore Tax Evasion is Widespread*, N.Y. TIMES, Mar. 26, 2002, at A1.

318. 2 ARISTOPHANES, *The Frogs*, in ARISTOPHANES: IN THREE VOLUMES, *supra* note 191, at 397 (ll. 1063-64) [hereinafter 2 ARISTOPHANES, *The Frogs*].

319. *Id.* (ll. 1065-66).

320. *Id.* (ll. 1067-68).

321. COHEN, *supra* note 160, at 198 (quoting LYSIAS 20.23, which makes "invisibility" and tax avoidance explicit). Modern parallels can easily be found, viz., the IRS is currently trying to determine how many billions of dollars, held by how many millions of taxpayers, is escaping U.S. taxation because it is being funneled through offshore credit card companies. See *supra* note 317.

322. Vincent Gabrielsen, *Phanera and Aphanes Ousia in Classical Athens*, 37 CLASSICA ET MEDIAEVALIA 99, 99-113, especially n.41 (1986).

relationship of the owner to that property.³²³ Objective, state-maintained registers, such as tax rolls, land registers, or lists of individuals recording their actual net worth are frequently assumed, but probably did not exist, at least not to the extent we imagine.³²⁴ While financial assets were typically “invisible assets,”³²⁵ even real property, the paradigmatic “visible” wealth, could be made “invisible.”³²⁶

B. Antidosis (*Exchange*): Legal Challenge to Liturgy

A wealthy individual, nominated by those charged with selecting the wealthiest individuals to perform any of the liturgies, could use various mechanisms to challenge that selection.³²⁷ Claims for exemption could be made according to an established legal procedure (*skepsis*).³²⁸ Even acknowledging eligibility, individuals could identify someone else as wealthier, and hence as the more appropriate liturgist through the procedure known as *antidosis*. Although involving an obligation to the state, the entire *antidosis* procedure, including the legal procedure to resolve any disputes, effectively converted a public matter into a private dispute.³²⁹ Thus the state

323. *Id.* at 114. The separation of the legal right from the property itself marks a decisive step towards abstract thought in Greek legal and philosophical thinking. See Louis Gernet, *Things Visible and Things Invisible*, in *THE ANTHROPOLOGY OF ANCIENT GREECE* 343, 347-48 (J. Hamilton & B. Nagy trans., 1968).

324. MOSES I. FINLEY, *STUDIES IN LAND AND CREDIT IN ANCIENT ATHENS* 207-10 (1973). But see MUNN, *supra* note 294, at 74; Ostwald, *supra* note 183, at 369-75 (discussing possible mechanisms of early Athenian finance).

325. COHEN, *supra* note 160, at 201. Even large caches of coinage, while visible, could fairly easily be hidden. See Gabrielsen, *supra* note 322, at 109 (providing ancient and modern examples). Bankers' deposits and unsecured loans were even more “invisible” and beyond physical seizure. COHEN, *supra* note 160, at 201. Cohen explores the terminology: unsecured loans were termed an obligation “in the sky.” *Id.* Cohen provides an excellent overview of the rise of bankers in antiquity, including their role in hiding wealth. See *id.* at 201-07.

326. See Gabrielsen, *supra* note 322, at 105-07 (providing examples). Christ notes that, despite its visibility, land was generally scattered through Attica, and, thus, the land-holdings of the wealthy were not always easy to identify completely. Christ, *supra* note 260, at 158.

327. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 132 (ch. 56, pt. 3); Christ, *supra* note 260, at 149. These officials varied, depending on the liturgy—archons for festival and the generals for military liturgies. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 132-33 (ch. 56, pts. 3-5). Other individuals or local tribes could also nominate individuals. Christ, *supra* note 260, at 149.

328. For example, someone already performing another liturgy, minors, or those legally declared exempt (*ateleia*) would be immediately relieved of obligation. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 132 (ch. 56, pt. 3); see also Christ, *supra* note 260, at 149 (noting among the legally exempt those holding office as archon, the disabled, metics (disbarred as non-citizens)). Other bases for exemption might include previous performance of that same liturgy or *trierarchy*. ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 132 (ch. 56, pt. 3); Christ, *supra* note 260, at 149 n.9.

329. See Vincent Gabrielsen, *The Antidosis Procedure in Classical Athens*, 38 *CLASSICA ET MEDIAEVALIA* 7, 22 (1987) [hereinafter Gabrielsen, *Antidosis*]. This was the case, especially if there was a failure to deliver the true inventory within the specified period. *Id.* The time period during which this procedure would have been accomplished varied according to the liturgy at issue. *Id.* For example, there was likely little time available for trierarchic challenges. *Id.* During any part of the exchange, either party could make use of procedures in case of irregularities. *Id.* at 23. The *diadikasia* was the procedure available to the injured party. Gabrielsen, *Antidosis*, *supra*, at 23. If there had been an agreement to exchange, the procedure provided a mechanism for the injured party to recover what he was owed. *Id.* If both parties claimed they were cheated, the agreement to exchange could be revoked. *Id.* In short, a dispute over who was liable for public revenue became little more than that a dispute between an ordinary debtor

and its revenue were insulated and protected: Only if successful in finding a substitute could an individual be relieved of his obligation.³³⁰ In any ultimate legal proceeding, the jurors' role was to decide which of the men was the wealthier and hence liable for the liturgy.³³¹

If the individual challenged agreed to undertake the liturgy, the challenger was exempt.³³² The replacement was liable for the liturgy and the procedure was concluded.³³³ If the individual refused, the challenger could then propose an exchange of property (all real and personal property), to allow him to perform the original obligation, presumably now better able by reason of his increased wealth. Before any exchange could be contemplated, the parties required specific knowledge of each other's property.³³⁴ Assuming the parties agreed to exchange properties, based on mutual assent in the validity of the inventories, then the exchange was completed. Various reasons might exist to refuse an exchange.³³⁵ An exchange of properties, almost incomprehensible to modern commentators, was considered far from unusual by men of wealth in Athens.³³⁶ In the preserved speeches, wealthy opponents each charged the other with being lax in fulfilling his obligations while asserting his own munificence.³³⁷

and a debt collector. *Id.* at 25.

330. The individual, who was initially assigned the liturgy, had to challenge his selection by naming another individual as being the more appropriate, i.e., the wealthier individual and hence more capable of performing the assigned liturgy. COHEN, *supra* note 160, at 198. Cohen notes that this was essentially a "zero-sum competition," where there were winners only if there were losers. *Id.* A system of "complementary opposition" was a fact of life in Athens, where the *agon* (competition) was the norm. *Id.*

331. Gabrielsen, *Antidosis*, *supra* note 329, at 28.

332. *Id.* at 14.

333. The challenge was an almost private, "quasi-judicial mechanism." See *id.* at 7, 12-14. The challenge served to record a claim of exemption by the challenger and the name of the proposed replacement. *Id.* at 13. The challenger summoned his opponent to appear before the appropriate officials on the legally sanctioned days and named him as a replacement in the performance of the assigned liturgy. *Id.* at 12-13 (reviewing the evidence). Sometimes a private negotiation to conclude an agreement was begun or an actual trial (*diadikasia*) was held to settle a disputed claim. Gabrielsen, *Antidosis*, *supra* note 329, at 14. "*Diadikasia*" is the generally accepted term for any conflict involving "the legitimacy of competing claims." Christ, *supra* note 260, at 164.

334. Gabrielsen, *Antidosis*, *supra* note 329, at 17. The challenger had the right to inspect his opponent's properties; the challenger and his relatives carried out the inspection personally. *Id.* The inspection allowed the challenger to ascertain whether any real property was encumbered. *Id.* Similarly, some property would have been excluded. *Id.* at 18. For example, silver mines were excluded. *Id.* Here, the difficulty raised by invisible wealth becomes obvious—any property not legally known to belong to the challengee could seriously affect the challenger's decision. See Gabrielsen, *Antidosis*, *supra* note 329, at 18-19. Following inspection, the challenger could take any steps necessary to prevent a serious diminution of the challenger's estate. *Id.* at 19. This process occurred outside of judicial control and the parties were left to rely on their respective good faith and oaths. *Id.* at 19-20. Oaths would have been taken at the inspection itself and subsequently when the inventories were officially filed. *Id.* at 20.

335. For example, Demosthenes, the orator, declined to exchange properties and accepted the liturgy, because of the impact of an exchange on his own suit to recover from his guardians for mismanagement of his father's estate. *Id.* at 16 (discussing DEMOSTHENES 21.78). His suit, including any potential recovery from his guardians, would have been transferred, along with the rest of his properties. Gabrielsen, *Antidosis*, *supra* note 329, at 16.

336. Christ, *supra* note 260, at 161 n.68, 163; Gabrielsen, *supra* note 329, at 15-16. Christ discusses a passage from Xenophon's *Oeconomicus* (ch. VII, pt. 3), where a wealthy interlocutor implies that he is frequently summoned for an *antidosis*. Christ, *supra* note 260, at 164. The procedure was sufficiently common for suitable speeches to form a standard part of the professional orator's stock in trade. See *id.*

337. The *antidosis* procedure was subject to abuse and manipulation. See Gabrielsen, *Antidosis*,

Legal proceedings allowed the jury, likely composed of the poorer members of society, to assign the liturgy to the wealthier of the two.³³⁸ While not necessarily conducive to maximum accuracy (the jury's role was effectively to decide who was more persuasive), the *antidosis* provided a mechanism for those having suffered a loss of economic prosperity and willing to plead financial inability while effectively shifting the responsibility for—fulfilling or avoiding—a compulsory public obligation to the individuals involved.³³⁹

Despite attempts by some modern commentators to characterize the liturgy system as purely optional, it is clear that the consequences of failure to assume any liturgy could result in prosecution. For example, failure to undertake a *trierarchy* could be prosecuted under multiple charges.³⁴⁰

C. The Ideology of Liturgy

1. Aristocratic Origins

The obligation of the wealthy to use their superior resources for the benefit of the community had a long history in Greek culture. This use of resources, one's obligation to use one's private resources for public benefit, reflected a mutual expectation of what was expected of a member of the community.³⁴¹ As a result, the liturgy system contained both compulsory and honorific elements. The honorific and competitive elements of liturgies can also be traced to the competitive nature of aristocratic society that preceded the democracy. Generosity, the wise use of one's resources for community benefit, was part of aristocratic ethos.³⁴² Indeed, an aristocrat's generosity is intimately connected with his right to rule. In the *Iliad*, Agamemnon's right to rule the combined Greek forces is compromised because

supra note 329, at 29. Standard rhetorical fare included assertions of the speaker's honesty and charges of the opponent's dishonesty in providing a record of assets. Christ, *supra* note 260, at 164-65. When Demosthenes, the orator, brought suit against his guardians to reclaim his inheritance, they used the *antidosis* to complicate his suit. *Id.* Either he would have to undertake a liturgy with limited resources or forego recovery on his suit in the case of a property exchange (necessarily including his pending law suit against his guardians). *See id.*; Gabrielsen, *supra* note 329, at 29.

338. Christ, *supra* note 260, at 161; *see also supra* note 190 (discussing the relative composition of juries and Assembly).

339. Gabrielsen, *Antidosis*, *supra* note 329, at 37-38; *see also* Christ, *supra* note 260, at 166 (describing the court dispute as a "contest of self-presentation before the eyes of a popular jury"); *id.* at 167 (questioning the jury's ability to assess limited and incomplete financial information available).

340. *See* Gabrielsen, *supra* note 329, at 24. Failure to assume the *trierarchy* could be prosecuted as a *graphe paranomon* or *eisangelia* for impeding military activities and acting in defiance of public authorities. *Id.*; *see also* A.R.W. HARRISON, 2 THE LAW OF ATHENS 54, 235 (1971).

341. Ostwald, *supra* note 123, at 57; Ostwald, *Public Expense*, *supra* note 183. Another explanation for the greater share in civic obligations was a different conception of obligations and rights—as Ostwald explains the Athenian view, the individual thinks of his relationship as providing him a share in that community. Ostwald, *supra* note 123, at 55-57. Ostwald distinguishes American views towards the relationship of the individual and the state, as defined by the individual's assessment of rights. *Id.* *But see* Hansen, *supra* note 151 (disputing Ostwald's assessment of rights (positive/negative) in antiquity).

342. *See* J.T. Roberts, *Aristocratic Democracy: The Perseverance of Timocratic Principles in Athenian Government*, 64 ATHENAEUM 355, 355-56 (1986).

he greedily stores riches “up for himself instead of sharing them.”³⁴³ Willingness to redistribute one’s own wealth was therefore not necessarily motivated by disinterested selflessness. On the contrary, willingness to put one’s own resources to use for the community was directly connected with personal ambition. By sharing one’s resources, political prominence could be attained; an investment could be made in good will to be stored up for future use.³⁴⁴ Competitive love of honor was aristocratic, not democratic, and thus somewhat at odds with growing egalitarianism and democracy.³⁴⁵ Where it could be harnessed for the benefit of the community as a whole, even where it served as justification for political prominence, it could be reconciled with democracy.³⁴⁶

As a pre-bureaucratic state and a democracy, Athens made use of the liturgy system to harness the competitive spirit and resources of the aristocracy. The aristocracy in turn needed the liturgy system to overcome their new disability, a government predicated on equality that did not give preference to greater resources or associations. Conversely, public resources effectively allowed popular individuals, without individual resources, the possibility to achieve public prominence heretofore only possible for the individually affluent.³⁴⁷

Using their wealth for the benefit of the community, the wealthy also sought to defuse general hostility to wealth.³⁴⁸ The wealthy thus used public displays of generosity to engender increased popular support and individual reputation. At the same time, these displays were intended to have an apotropaic effect, to limit public hostility to affluence. For example, Aristotle suggests associating expensive liturgies with supreme offices so that the people will be willingly excluded from them.³⁴⁹

2. Geometric Equality

If superior resources obligated the wealthy to use their wealth for the benefit of the community, this wealth could be the basis (in the form of a sophisticated philosophical argument advanced by the aristocracy) for justifying their demands for a greater share in government. Democracy is predi-

343. *Id.* at 357.

344. *Id.* at 361.

345. David Whitehead, *Competitive Outlay and Community Profit: Philotimia in Democratic Athens*, 34 *CLASSICA ET MEDIAEVALIA* 55, 57 (1983).

346. *Id.* at 59.

347. For example, pay for public service is attributed to Pericles. 3 PLUTARCH, *Pericles*, in PLUTARCH’S LIVES: IN TEN VOLUMES 27 (ch. IX, pt. 2) (T.E. Page et al. eds., Bernadotte Perrin trans., Harvard Univ. Press 1916); see also *supra* note 198 and accompanying text (discussing introduction of pay and its relationship to democracy). According to Plutarch, Pericles’s motivation was purely to use the state’s own resources as a political tool against his far wealthier adversaries. *Id.*; see also ARISTOTLE, *CONSTITUTION*, *supra* note 169, at 97-98 (ch. 27, pts. 1-5). However, Aristotle also describes pay as the ultimate democratic institution. ARISTOTLE, *supra* note 8, at 491-93 (pts. 1317b33-38).

348. Roberts, *supra* note 342, at 368.

349. ARISTOTLE, *supra* note 8, at 517-19 (pts. 1321a31-41). Aristotle reasons that, where a high price is paid for an office, the people will feel no resentment because of their exclusion. *Id.*

cated on strict equality among citizens and based on the belief in the equality of all citizens, at least for purposes of political rights. This formulation of equality ran counter to the aristocracy's preeminence, based on wealth and birth. The obvious aristocratic arguments against the equality that predominated in democracy were predicated on the existence of different types of equality. The Greeks differentiated between two types of equality: arithmetic and geometric equality.

Democracy is characteristically associated with arithmetic equality where terms stand in the same proportion to each other (e.g., one person, one vote). Geometric equality is defined differently and assumes that just as those with greater wealth have a greater obligation to use their funds for the democracy, so they should have priority in rights. Thus, geometric equality gives a greater share to those with greater wealth or other qualifications (e.g., when the first term stand in the same relationship to the second as the second to the third).³⁵⁰

According to aristocrats, arithmetic equality (exemplified by the lot) is an inferior form of equality because it does not differentiate between citizens. Geometric equality is "true equality," according to Plato, because it gives in proportion to the nature of each. Because those individuals with greater ability and resources are better capable of governing, geometric equality that gives these individuals a greater share results in a better distribution, in proportion to the greatest good for individuals and states.³⁵¹ According to Aristotle, the combination of both yielded greater political harmony and stability.

All men grasp justice to some extent; but they only go part of the way, and they do not state the whole of the absolutely just. For example, justice is thought to be equality; and so it is, but for equals and not for everybody. Inequality is also thought to be just; and so it is, but for unequals, not for everybody. They omit the "for whom" and judge badly. That is because they are judging themselves. Most men are bad judges in their own cause.³⁵²

To the aristocrats, so identified by birth or wealth, denial of their superior claim to govern was unacceptable. The demands of democracy—in

350. This description reflects the work of Archytas of Tarentum, a Pythagorean who is credited to first describing these proportions. Arithmetic equality is described by the relationship between the numbers 6,4 and 2 ($6-4 = 4-2$). Geometric equality is reflected by the relationship between the numbers 8, 4, 2 ($8:4::4:2$). To the democrats, arithmetic proportion is true equality since each number stands at an equal distance to its neighbors, i.e., everyone receives exactly the same. To the aristocrats, geometric equality is true equality, because the ratio remains the same and those with greater resources receive more, i.e., politically, one receives what he is worth. See F.D. Harvey, *Two Kinds of Equality*, 26 CLASSICA ET MEDIAEVALIA 101, 103-05 (1965); M.B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. J. 381 (1994) (discussing classical theories of equality and applying them to the equal protection clause).

351. PLATO, *supra* note 101, at 142-44 (bk. VI, pts. 756-757).

352. ARISTOTLE, THE POLITICS pts. 1280a9-17 (Richard Robinson trans., 1962).

particular, that the aristocrats' superior resources be made available to a government dedicated to principles of equality—is problematic because of fundamental disagreement with those principles of equality. The use of multiple definitions of equality to justify their claims for superior rights was a sophisticated and clever way to base a claim for preferential political rights and opportunities on these same superior resources.

VIII. CONSEQUENCES OF TAXING ONLY THE WEALTHY

Athenian democracy, through its institutions and allocation of tax burden to only the wealthiest, made possible for the ordinary citizen a status that was otherwise unprecedented and unequalled since. Participation in civic life for the ordinary citizen, who worked very hard, was not predicated on a life of leisure made possible because of the existence of slavery, but because of a political commitment to democratic ideals and exemption of all but the wealthiest from obligations to finance that democracy. Citizenship status, together with tax exemption, was responsible for this achievement. As Professor Ellen Meiksins Wood explains: “[I]n the Athenian democracy . . . [there was] an unprecedented degree of freedom from the traditional modes of exploitation, both in the form of debt bondage or serfdom and in the form of taxation.”³⁵³

Democracy is predicated on the belief that all individuals are equally capable of participating in the process of self-governance. Those who disputed this assessment, including Athenian aristocrats, who based their claim to a superior right to rule, did so because their wealth or birth, the source of their claim, justified a claim of priority in ability to govern. In the *Protagoras*, Plato addresses the question of virtue, specifically civic virtue, whether it is innate or whether it can be taught. Plato denies the basic premise of democracy—that it can be taught. In answering affirmatively that it can be taught, Protagoras supplies the sole defense for democracy in the Platonic corpus—the civic virtue necessary for civilized community is indeed a universal quality, one that can be learned and passed on within the community. As Professor Wood notes, democracy, by “allowing shoemakers and smiths to make political judgments,” raises “the fundamental epistemological and ethical questions that form the basis of . . . the whole Western philosophical tradition”³⁵⁴ The decision to implement democratic

353. WOOD, DEMOCRACY/CAPITALISM, *supra* note 133, at 189; see also *id.* at 202 (“Democratic citizenship in Athens meant that small producers were to a great extent free of the extra-economic exactions to which direct producers in pre-capitalist societies have always been subject.”). These exactions varied (from the depredations of Hesiod’s gift-devouring lords to the feudal obligations of the medieval peasant subject to their lords’ military and jurisdictional power). Professor Wood describes the burden of the modern peasant as subject to “the taxation of European absolutism, in which public office was a primary instrument of private appropriation” *Id.*

354. *Id.* at 193. The issue of whether all men have the capacity and the virtue necessary to rule is the question of much of the Platonic dialogues. Protagoras provides a unique defense of democracy in the Platonic corpus. This debate about the relative merits of the aristocracy and the demos and their ability to govern by reason of civic virtue is a debate that forms an essential part of the constitutional debate in

ideals, including the funding that makes that implementation a reality, necessarily engages in this philosophical discussion—whether all individuals are equally capable of civic participation.

Similarities and dissimilarities exist between Athenian and American representative democracy. Nevertheless, democracy means a commitment to democratic ideals of liberty and freedom, above all self-governance. Representative democracy was the Founders' "cure" for the perceived problems of participatory democracy.³⁵⁵ Representation allowed the Founders to protect wealth but, more importantly, to replace the common craftsman with his wealthy better. Thus representation was necessary to act as a "filter" for the people, to dilute the power of the people, not just to protect property rights.³⁵⁶

Because democracy is the form of government most dedicated to equality, equal political rights necessarily imply the allocation of the tax burden to those whose superior resources are available to make the implementation of democratic ideals a reality. Placing the greatest tax burden on the wealthy is ultimately a necessary correlate of the political decision for democracy.

IX. CONCLUSION

Beginning from unexamined theories of "equality" and democracy, there has been a long but unsatisfactory debate predicated on the assumption that equality in political rights and equality in obligations to fund a government dedicated to equal political rights must move in tandem. The result has been arguments that flat (head or poll) taxes or taxes levied at the same percentage (proportionate taxes) are more consistent with democracy, a political system devoted to equality. Conversely, progressive taxation (because it shifts a greater burden to the wealthy) has been described as tyrannical and antithetical to equality and democracy.

A comparison of political systems in antiquity and the correlation between modes of taxation and political ideals has shown that the relationship is quite the opposite of what the current debate suggests. Rather than equal tax obligations describing governments characterized by equal political rights, the reverse is the case: Greater equality of tax burdens is uniformly associated with governments little concerned with political rights. Typically, political regimes from the Persian to Roman Empires shared a common form of taxation—flat rates of tax (often a tithe) on agricultural production, sometimes including a head tax. Whatever the citizenship status of the population, taxes were levied generally from the population, without consideration of political status or economic ability, to generate sufficient

America. *See supra* notes 127-41 (discussing the debate regarding the relative merits of democracy and aristocracy).

355. *See supra* notes 126-29.

356. *See supra* notes 130-36.

revenue to permit operation of government, whether dedicated to the sovereignty of one or a few.

However these various political systems are described, none can be characterized as democracies, or governments concerned with political equality. In the one democracy available for examination, Athens, with which we share the most common democratic ideals, the historical record shows that its aristocratic government, including a constitutional tyranny, broadly applied taxes at a fixed rate. When the Athenian people claimed sovereignty by instituting democracy, they abolished the universal, annual flat tax. At the same time as they instituted a series of constitutional reforms that led to the most advanced democracy known, they shifted the tax burden to the wealthy. This allocation of the tax burden to the wealthiest of the wealthy allowed the wealthy few to put their wealth, and the power associated with that wealth, to use for the good of the democracy. In their role as the taxpayers, the wealthy were thus legitimately able to achieve a greater power than the equality consistent with pure democracy otherwise permitted.

Despite complaints frequently voiced about the burden of liturgical obligations or other taxes, the liturgical system worked well for almost two centuries. The real consequence of allocating the tax burden to the wealthy was a remarkable freedom from civil strife enjoyed by Athens, political stability, and prosperity not seen elsewhere in the ancient world. More importantly, it was this allocation that permitted an almost unparalleled development of democracy. Tax exemption of all but the wealthiest contributed to political stability and allowed for the incorporation of the ordinary citizens as full members of the political community.

When the Founders examined the political regimes of antiquity they sought to fashion a government that would make possible the goals of government expressed in the Declaration of Independence. In implementing these goals (freedom and equality) in our democratic Constitution, they relied on mixed government theory to limit the negative features identified by the ancient philosophers and historians with any of the pure government forms, including democracy. As a result, they ultimately fashioned a democracy that recognized popular sovereignty through representation. Ambivalence about participatory democracy and the ability of all citizens to participate in government, led them to design a democracy to allow the "natural aristocracy," comprised of men of property, to filter the opinions and temper the masses. Although ambivalent about certain aspects of democracy, the Founders also recognized the difficulties posed by aristocracy and wealth inequality. Even allowing for the safeguards they put into place, they created a democracy with a strong commitment to liberty and equality, not an oligarchy merely designated a "democracy" in name only.

The American experience has demonstrated the success of our democracy. Comparison of Athens and America reveals many commonalities, including a dedication to freedom and equality. When the constitutions are compared, a democracy properly defined as rule by the people (the majority

of whom are not wealthy) best implements the possibility of civic participation and equality. These values are only possible when the greater burden for funding that government is shifted to the wealthy because their wealth allows them to perform this valuable function.

To limit the disparate power associated with wealth, Athenian democracy with its dedication to equality made use of the lot, instead of election, and gave meaning to popular sovereignty by situating actual political authority in the assembly and the law courts comprised of all citizens. The liturgy system allowed Athens to make use of the wealth held disproportionately by the wealthiest of its society for the benefit of the democracy. In return, the wealthy gained, through the use of their wealth, social and political preeminence not otherwise acceptable in a government committed to equality. The wealthy then, as today, correlated wealth with ability and argued by reference to geometric, not arithmetic, equality that they deserved additional stake, or prominence, in the government. Conversely, the wealthy did not advance arguments currently familiar—namely, that theoretical arithmetic equality in political rights requires arithmetic (not geometric) equality in taxation.

Identification of the wealthy as a natural aristocracy occurred early on in the American constitutional debate. The allocation of power among the three branches and the recognition that the vastness of America would require representation allowed a democratic form of government wherein preeminence would devolve naturally to the wealthy. By virtue of our constitutional system, greater power rests with people of property. A logical corollary of that greater power would be greater responsibility to put their resources to work for America, not simply to exercise greater authority by reason of those resources. To the extent that the wealthy can occupy greater control in government while shifting the cost of that government onto the rest of the people, we are describing a non-democratic regime. A decision to impose a broad and flat tax rate across the population in American democracy would be consistent with democracy only if we now define “democracy” as government by the wealthy. If democracy retains its original definition and normative content (government of ordinary, not wealthy, citizens), this political decision requires progressive taxation to permit a democratic government.³⁵⁷ As Thomas Jefferson suggested, democracy can be achieved and extreme wealth inequality and associated factionalism avoided by exempting the largest number from paying tax and shifting an increasing tax burden to the wealthy.³⁵⁸

Rightly described as a democracy, our representative government has become more “democratic” over time. Witness the extension of rights to those now designated as citizens through the abolition of slavery, the enfranchisement of women, and the lowered voting age. The adoption of civil

357. See Breyer, *supra* note 96, at 271-72 (urging judicial interpretation to implement participatory government, i.e., positive as well as negative freedom).

358. See *supra* note 143 (discussing and quoting Jefferson).

rights legislation guaranteeing equality (regardless of race, ethnicity, gender, age, or disability) further suggests democratization of rights. This suggests that Athens may be an even more appropriate model now than it was for the Founders. Given our renewed commitment to equality, it would be ironic if, in the name of equality, we adopted a flat tax that is inconsistent with democracy. Proportionate and flat taxes are incompatible with representative democracy that aims to limit the participation of the *demos* chiefly to prevent civil strife. Wealth concentration and significant wealth inequality is a guarantee of strife, as Aristotle noted. The Founders were keen to create a stable government. If representative government seeks above all to ensure stability, giving greater voice to the natural aristocracy through representative democracy does not justify shifting the tax burden to make the government in fact more consistent with oligarchy.

Taxes are frequently decried as “tyrannical.” An historical review has shown that the imposition of flat, non-progressive taxes is tyrannical. Democracy (on the basis of definition and normative content) provides no inherent justification for the imposition of a flat tax. Representative democracy, by allowing greater political access for the wealthy, more properly justifies geometric (i.e., progressive) taxation. Above all, it is inappropriate to make use of the political ideals of democracy to justify a tax system that is inimical to a democratic system and more characteristic of an empire or feudalism.

