

To: NYU Colloquium on Law, Economics, and Politics

From: Joseph Fishkin

Re: The Constitution of Opportunity

My colleague Willy Forbath and I are at work on a book manuscript called “The Constitution of Opportunity.” Part of the book’s argument is distilled reasonably well, we think, in an essay that is forthcoming in the journal NOMOS (“Wealth, Commonwealth, and the Constitution of Opportunity: A Story of Two Traditions”). But I want to give you a little more of the argument than just that essay. So what I have given you here is a pastiche: most of the essay, interwoven with a few excerpts from the manuscript, to give you a sense of the overall shape and texture of the book.

I am very much looking forward to discussing the project with you. It’s a genuine work in progress, so you can be sure that your criticisms and suggestions will be put to work!

Wealth, Commonwealth, & the Constitution of Opportunity: A Story of Two Traditions

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Introduction [from NOMOS essay]

We live in a time of profound and justified anxiety about economic opportunity. Americans are deeply attached to an idea of America as a middle-class nation, with very few of us on the economic margins, abundant opportunities to reach the middle class, and a fair shot at wealth and distinction for all. Half a century ago, it was possible to believe that we were heading in that direction. Now, it is clear that we are becoming something very different. Inequality had been increasing quietly for decades, but the Great Recession laid bare just how much. The number of Americans facing poverty is growing, opportunities for middle-class livelihoods are shrinking, and economic clout is becoming concentrated at the top to a degree that recalls the last Gilded Age.¹ As structures of opportunity grow more narrow and brittle, and class inequalities mount, our nation is becoming what reformers throughout the nineteenth and early-twentieth century meant when they talked about a society with a “moneyed aristocracy” or a “ruling class”—an oligarchy, not a republic.

Such a claim seems to raise constitutional concerns. And we think it should. For earlier generations of reformers, economic circumstances like our own posed not just an economic, social or a political problem, but a *constitutional* one. That understanding was rooted in a constitutional discourse we have largely forgotten—one that this essay suggests we ought to reclaim. From the beginning of the Republic through roughly the New Deal, Americans vividly understood that the guarantees of the Constitution are intertwined with the structure of our economic life. This understanding was the foundation of a powerful constitutional discourse that today, with important but limited exceptions, lies dormant: a discourse of *constitutional political economy*.

Throughout the nineteenth and early twentieth centuries, waves of reformers of widely different stripes reckoned with crises in the nation’s opportunity structure resembling the one we are experiencing today. They responded with constitutional claims. The content of these claims varied, but at the core of these reformers’ arguments was the idea that we cannot keep our constitutional democracy—our “republican form of government”—without two essentials: constitutional restraints against oligarchy; and a political economy that sustains a broad middle class, wide open and broad enough to accommodate everyone.²

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¹ See, e.g., Timothy Noah, *The Great Divergence: America’s Growing Inequality Crisis and What We Can Do About It* (New York: Bloomsbury, 2012): 10-27; Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2014); Joseph E. Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future* (New York: W.W. Norton, 2013).

² Of course, as we shall discuss, who belonged in the category of “everyone” changed over time, and was always contested.

Such arguments are, at their heart, structural constitutional arguments. But unlike the structural mode of interpretation familiar to us today, which builds claims about topics like the separation of powers and federalism on institutional relationships within the political sphere, arguments about constitutional political economy begin from the premises that economics and politics are inextricable, and that our constitutional order rests on and presupposes a political-economic order. These arguments are attuned to the threat of oligarchy: the danger that concentrations of economic power and political power may be mutually reinforcing—and, if sufficiently extreme, may threaten the Constitution’s democratic foundations. These arguments also generally hold that economic opportunities in our society must be structured in an open, democratic way. Avenues to wealth and distinction must be open to ordinary Americans, not just the privileged few; the roads to a middle-class life must be broad enough to accommodate everyone, so that the economy reliably produces the mass middle class that is both the social bulwark of republican government and the structural condition for fair equality of opportunity.

From our vantage point today, all these arguments might seem to be drawing on what Cass Sunstein calls “constitutive commitments”—fundamental commitments of our society that are not necessarily found within the Constitution itself.³ But this distinction is anachronistic, as applied to the constitutional thinking of these nineteenth and early twentieth century reformers. These reformers were interpreting the Constitution as they understood it, and they said so. They offered arguments based on constitutional text and history, and arguments based on commitments embodied in the Declaration of Independence, as well as arguments in a straightforwardly structural mode. At the same time, their project was not exclusively interpretive. These reformers also offered constitutional amendments and reforms—many of them successful—at both the state and federal levels, aimed at protecting what the reformers saw as an underlying constitutional commitment to a political economy in which power and opportunity are dispersed among the people rather than concentrated in the hands of a few.

These reformers’ diagnoses and prescriptions differed in many respects, but together they add up to a distinctive tradition of American constitutional argument, which we will call the *democracy of opportunity tradition*. Arguments in this tradition animated a protracted series of hotly contested constitutional debates about class and opportunity. In general, *all* sides in each of these debates—both proponents and opponents of the democracy of opportunity tradition—made extensive arguments about constitutional political economy. Most often, one side invoked the distributive commitments of the democracy of opportunity tradition, while the other side called forth anti-redistributive constitutional precepts. Frequently, all sides claimed to be safeguarding or restoring fair equality of opportunity and a broad middle class. All assumed that the principles at stake in these political-economic battles were constitutional principles; the difficult question was which way our constitutional commitments pointed.

³ See Cass R. Sunstein, *The Second American Revolution: FDR’s Unfinished Revolution and Why We Need It More than Ever* (New York: Basic Books, 2004), 62. Advocates of constitutional welfare rights have argued otherwise—that in that area, at least, economic rights are part of the Constitution itself. For the canonical article see Frank I. Michelman, “The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,” *Harvard Law Review* 83 (1969): 7; for a critical historical and theoretical overview see William E. Forbath, “Constitutional Welfare Rights: A History, Critique And Reconstruction,” 69 *Fordham Law Review* 69 (2001):1821.
,” *International Journal of Constitutional Law* 6 (2008):663. We will discuss some reasons why this may be the case now, even though it was not true for most of our history, in the last section of this essay.

Today, there remains broad agreement that it is important to promote opportunity, avoid oligarchy, and build a robust middle class. These principles remain mainstays of our politics. However, we have lost the crucial idea that these are *constitutional* principles.

Take the problem of oligarchy—the problem of concentrated political and economic power. Today, from the left, this problem remains a pressing concern, but its relationship to the Constitution has become surprisingly attenuated. The dominant story of that relationship goes something like this: Economic elites enjoy too much political sway. When our legislators attempt to do something about this—to blunt the conversion of economic power into political power—they hit a constitutional roadblock. The First Amendment, as interpreted by the current Court, has come to mean that making political influence less unequal is not even a permissible *goal* for campaign finance regulation.⁴ Notice that in this story, the Constitution appears only at the end. The problem of oligarchy is not itself a constitutional concern; the Constitution only constrains what legislators can do in response.

Or consider a different sort of problem: the inability of tens of millions of Americans who comprise the so-called “working poor” to afford health insurance—and to pursue their lives and ambitions free from the enormous and avoidable peril of going without it. Here again, the Constitution enters the story very late, as a potential roadblock, in the form of a Spending Power question: does the Spending Power permit Congress to expand Medicaid?

The contemporary liberal response to these constitutional roadblocks is to argue that, no, the Constitution, when properly interpreted, presents no barrier: the First Amendment, and the Spending Clause, rightly understood, do not condemn the statutes at hand. By now you can guess that we are heading toward the proposition that the Constitution belongs at the *beginning* of the story. Understood in the light of the tradition we are sketching, the Constitution may impel lawmakers to enact measures like the ones that the Court struck down. In court, that would mean that constitutional precepts are at stake on *both* sides, not just one.

Nobody today, however, is making those affirmative arguments. At the same time, it would be wrong to say that nobody is making arguments about constitutional political economy. This form of argument lives on today in a significant way—on the libertarian right. Libertarian advocates have a substantive vision of a political and economic order that they believe the Constitution requires. They have long translated that vision into rights claims that can be enforced in court. And indeed, even where such claims cannot be enforced directly in court, they can nonetheless *inflect* court decisions, the way libertarian freedom of contract inflects both the majority’s and joint dissent’s reasoning in *NFIB v. Sebelius*.⁵ This libertarian school draws on many past rounds of constitutional contestation; it shares some roots with the democracy of opportunity tradition, particularly in the Jacksonian era, although it developed in a very different and more reactionary direction. At many crucial moments in the late nineteenth and early twentieth centuries, advocates making claims within the democracy of opportunity tradition

⁴ Joseph Fishkin and William E. Forbath, “The Anti-Oligarchy Constitution,” *Boston University Law Review* 94 (2014): 672, 694-96.

⁵ *Ibid.*, 672 n.9.

squared off against advocates of this libertarian tradition in high-stakes constitutional struggles over the most pivotal constitutional issues of the day.

Today, the contemporary libertarians who are the lineal descendants of early twentieth century freedom-of-contract and property-rights Lochnerism continue to make an array of constitutional claims that are recognizable as constitutional political economy. These arguments hang on many different doctrinal hooks. They inform interpretations of the Commerce Clause, the separation of powers, the First Amendment, even the Equal Protection Clause. Whatever the doctrinal setting, the underlying force of these claims comes from a particular vision of the relationship between the Constitution and our economic life that would be very familiar to veterans of many nineteenth and early twentieth century constitutional struggles over banking, currency, credit, labor, trusts, and federal power over economic matters. All that is missing is the libertarians' traditional opponents: the advocates of the democracy of opportunity tradition. *Their* descendants live on in our political life, but we have forgotten that these, too, are constitutional arguments.

We think the libertarians get much wrong but one big thing right: The Constitution really can be understood to make substantive demands on our political economy. The question is how we should understand the content of those demands and their relationship to constitutional law.

A Story of Two Constitutional Traditions

So far, we may be heard to be singing the praises of the democracy of opportunity tradition that stretched from the founding through the New Deal. But there was a devastating moral blindness in this tradition's ideas and arguments about opportunity and the constitution. They were usually understood to protect the economic and political prospects of only one group: white men.

Thus, the story we tell in this essay concerns not one but two constitutional traditions. *Both* of these traditions focus on the relationship between opportunity and the constitution. Both invoke ideals of equality and ideals of freedom. If the tradition we have been discussing, the democracy of opportunity tradition, is largely forgotten, the other tradition is familiar and widely celebrated.

Today, when we speak of "equal opportunity" in a constitutional key, we associate it almost exclusively with antidiscrimination law and the project of racial and gender justice. When we think this way, we are calling on a particular tradition in American constitutional discourse—one that we will call the *inclusionary* tradition—with deep roots in the Civil War and Reconstruction and especially in the Fourteenth Amendment's promise of equality. This tradition's great vindication came in the mid-twentieth century with *Brown v. Board of Education* and then a series of important statutes—the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act. Although this tradition began with race, its scope deepened and broadened over time and continues to do so today.⁶ We call it the inclusionary tradition because

⁶ The recent revolution in the law of sexual orientation fits comfortably within this inclusionary tradition. Throughout this tradition, analogies to race play an important role. See generally Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2011).

inclusion is its lodestar: the core idea is to include, on equal terms, those who would otherwise have been excluded from the full range of opportunities the nation offers—in education, employment, housing, public accommodations, voting, and everywhere that opportunities shape our lives. This tradition is less focused on questions of exactly what the content of those opportunities must be—what the economic order must look like, what forms of education the state must provide. In the inclusionary tradition, the core idea is that whatever opportunities may exist must be genuinely and fully open to racial minorities and to the members of all other unjustly excluded groups. In the hands of the most conservative advocates who embrace a version of the inclusionary tradition, this may mean no more than formal equality. In its more robust instantiations, the inclusionary tradition has summoned efforts by courts and lawmakers to restructure important features of our economic, educational, and political systems—to achieve what President Johnson called “equality as a fact and equality as a result” with regard to formerly excluded minorities.⁷

This essay, and the book from which it is drawn, tell a story of these two major traditions and their interaction, which has generally not been harmonious. Relations between the inclusionary tradition and the democracy of opportunity tradition have been fraught, and often tragic. Generations of mainstream champions of the older democracy of opportunity tradition refused to include women and racial others—and worse than that, made their subordination part of the tradition’s outlook and program. Champions of racial and gender equality would strive to broaden and transform the democracy of opportunity to join it to the inclusionary tradition; there always were some individuals and organizations rooted in the older tradition who welcomed the marriage of the two. The story of Reconstruction, as we shall discuss, is a pivotally important but all-too-brief moment of unity for these two traditions. Far more often, from the early nineteenth century onward through the New Deal, the white male champions and constituents of the democracy of opportunity had no truck with racial or gender equality.

The great triumphs of the inclusionary tradition in the mid-twentieth century—the Civil Rights Revolution, the Great Society—were likewise largely disconnected from the constitution of opportunity tradition, but for a different reason. The Civil Rights Revolution and Great Society unfolded in an unprecedented moment of broadly shared prosperity. Thanks to the New Deal reforms and the post-World War II boom, America appeared to be becoming the kind of middle-class nation past generations of reformers dreamed about—or so liberals believed. Thus, the moment that marked the rebirth and greatest triumphs of the inclusionary tradition also saw the eclipse of the democracy of opportunity tradition. President Johnson and his allies in Congress insisted that the nation could pay for their War on Poverty out of the increased revenues that would flow from continued economic growth.⁸ No tax hikes would be necessary, no controversial redistribution, no structural changes in the political economy. The Great Society did not aim, as nineteenth- and early-twentieth century reformers had aimed, to redistribute wealth and power between “capital” and “labor,” the “few” and the “many,” or

⁷ Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights” (June 4, 1965), in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, Book II—June 1 to December 31, 1965* (Washington, DC: Government Printing Office, 1966), 636.

⁸ See, among others, Alan Matusow, *The Unravelling of America: A History of Liberalism in the 1960s* (Athens, GA: University of Georgia Press, 2009), 42-59, 155-179; Irving Bernstein, *Guns or Butter: The Presidency of Lyndon Johnson* (New York: Oxford University Press, 1996), 36-42.

private business elites and government. These demands, in various forms, had been at the center of the political *and constitutional* claims of the Jacksonians, the Populists, the Progressives, and the New Dealers. They are at the heart of the democracy of opportunity tradition. But they were gone from the Great Society agenda. And no wonder. Fifty years ago, at the Great Society's greatest moment, broad-gauge class inequality was at or near historic lows. Increasing numbers of working-class Americans were enjoying a middle-class way of life, and also a measure of dignity and voice at work—underwritten by strong unions, high wages, and a generous meld of public and private-employment-based social insurance. What remained to be done, it seemed, was to open those opportunities to black America, and to the overlapping category of the marginalized poor.⁹

To be sure, this was not a universally held view. Many civil rights leaders and activists, left-leaning labor leaders, academics and intellectuals, and a small number of high officials in the Johnson administration, demurred from the notion that America's broad-gauge class problems were behind it, and all that remained was the unfinished work of racial justice and the inclusion of the marginalized poor. They worried—rightly, as it turned out—that by assuming our class problems were solved, and forgetting the older tradition that addressed them, Great Society liberalism risked undermining its own ambitions. They championed, in vain, the idea of marrying the Great Society's renewed attention to racial inequality, with all *its* constitutional overtones, to the old tradition's attention to broad-gauge class inequalities and pathways to the middle class—in short, constitutional political economy.¹⁰

This defeat and forgetting happened at an inopportune moment. Just as Congress, the Executive and the courts began to get behind the civil rights movement's demands for "Jobs and Freedom," just as Title VII made equal employment opportunity a norm that reached into the nation's factories and offices, union hiring halls and joint labor-management committees, the seeming abundance of decent jobs began to dwindle, and the doors of middle-class opportunity in our industrial regions and workplaces began closing. By the 1970s, the political economy was on its way to becoming the one we know today—one where, as President Obama has observed, "opportunity comes to be seen as a zero sum game, in which your dreams come at my expense."¹¹

This brings us to the present: a moment of deepening inequality and profoundly unequal opportunity. We understand now, in a finer-grained way than ever before, that the two are related: work in economics, like Thomas Piketty's *Capital in the Twenty-First Century* and Miles Corak's "Great Gatsby curve," have dramatically shown that extreme wealth inequality *makes*

⁹ That is, the project of inclusion was not limited to race, but also included an imperative to generate opportunities for the overlapping category of the marginalized poor—"poor" or "poverty-stricken" whites as well as blacks; "poor" whites being seen as predominantly rural and like African-Americans excluded from the prosperous industrial economy and the welfare state that had been built around it—excluded, often, because their geographic and economic circumstances were similar to African Americans, and fell outside the New Deal system by dint of the racialized lines its architects had drawn.

¹⁰ See, William P. Jones, *The March on Washington: Jobs, Freedom and the Forgotten History of Civil Rights* (New York: W.W. Norton, 2013); William E. Forbath, "Constitutional Welfare Rights: A History, Critique and Reconstruction," *Fordham Law Review* 69 (2001): 1842–45.

¹¹ Barack Obama, "A More Perfect Union" (March 18, 2008), in *The American Spirit: United States History as Seen by Contemporaries*, ed. David M. Kennedy and Thomas A. Bailey (Boston, MA: Wadsworth, 2010), 663.

opportunity more unequal by hardening class lines, restricting access to networks, and giving elites both the means and the incentive to maintain and magnify their own advantages and keep others out.¹² Moreover, we know more clearly than ever how *economic* and *political* inequality and unequal opportunity are intertwined. Social and political science and popular and high-brow public discourse alike are focusing attention on the permeability of the membrane between our economic order and our political one; we increasingly recognize the threat this poses to fundamental values of equal citizenship. As Bernie Sanders’s current primary campaign illustrates, some of us have begun to speak openly of “oligarchy” once again, in ways that our nineteenth- and early-twentieth century forbears might understand.

But we have somehow lost the *constitutional* stakes—the sense that these threats to our democracy of opportunity are threats, as well, to our constitutional order. Those stakes are what we aim to recover in a larger book project, the gist of which we hope to convey in this essay.¹³ Here, we haven’t world enough or time to show you in detail each instantiation of the democracy of opportunity tradition, and the many, changing ways it melded constitutional and political economic ideas and arguments. Nor can we chronicle here the full tragic and tangled story of its relations with the more familiar inclusionary tradition. Here we will sketch both in a few broad strokes, with snapshots of some critical moments. We will tell the story of the original American democracy of opportunity tradition, beginning at the beginning. We will then briefly recount how this older tradition evolved through several key moments in our constitutional history, how it was then forgotten, and how that forgetting was linked to the ways that the Civil Rights Revolution and the Great Society rekindled the inclusionary tradition. Finally, we will suggest why it might matter to reclaim the older tradition today and consider how our constitutional order might look different if it were informed by this crucial piece of our constitutional legacy.

The “Pursuit of Happiness”: Opportunity and Constitutionalism in the Early Republic [From Chapter One]

The democracy of opportunity tradition has its deepest roots in the anti-aristocratic, republican ideals of the revolutionary generation. They held it a constitutional essential for the new United States to avoid reproducing the hierarchies, titles, and aristocratic forms of privilege and elitism that the colonists hoped to leave behind. Most deemed it no less essential to supplant that aristocratic order with a republic (or, more precisely, many new republics, joined in a larger union) of “middling sorts,” without extremes of wealth or poverty—above all, without a permanent class of impoverished (but free and unbound) toilers or a permanent wealthy elite—amongst the citizenry.

Available, fertile land was the seedbed of American republicanism. A vast portion of white settlers came over from Europe as indentured servants; a good many, however, became freeholders. The key was what economic historians call the colonies’ favorable land/person

¹² Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2014); Miles Corak, “Income Inequality, Equality of Opportunity, and Intergenerational Mobility,” *Journal of Economic Perspectives* 27 (2013). For a discussion of the mechanisms by which inequality exacerbates unequal opportunity, see Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* (New York: Oxford University Press, 2014): 199-219.

¹³ See Joseph Fishkin and William E. Forbath, *The Constitution of Opportunity* (under contract, Harvard University Press). For a first installment, see Fishkin and Forbath, “The Anti-Oligarchy Constitution.”

ratio. Cheap fertile land enabled poor settlers to exit the wage labor market; and labor scarcity assured relatively high wages, making it possible for hirelings to buy land. Given the broad suffrage rules of most of the colonies, becoming propertied stakeholders enabled a majority of white male settlers to become voters in elections for the colonial assemblies.¹⁴

These circumstances—the “poor [white] many” generally smallholders and enfranchised, and the “dangerous class” of property-less, super-exploited labor generally not freemen but enslaved for life—enabled patricians like Madison and Jefferson to imagine and embrace an unprecedented experiment in broad-based republicanism.¹⁵

Patrician and plebian revolutionaries alike agreed that they were embarked on a great experiment in republican self-rule. They agreed too on the proposition that “all men” were entitled to “equal rights” to “life, liberty, and the pursuit of happiness”—ringing phrases inscribed in many of the first state constitutions at the same time Jefferson enshrined them in the Declaration of Independence. Along with this revolutionary rights talk, the state constitutions of the 1770s and ‘80s brimmed with provisions expressing both sides of this founding republican impulse: to dismantle the aristocratic elements of the colonial social order,¹⁶ and to broaden the distribution of wealth, power and opportunity, along republican lines. Some provisions, like the abolition of primogeniture and entail or the allocation of public lands to smallholders, directly implemented distributional goals; others empowered and enjoined government to maintain a wide distribution of property and a broad middle class.¹⁷ The revolutionary elites who designed the new constitutions were encouraging and responding to the expectations of plebian patriots that the new constitutions would ensure, in the words of one of their leading historians, “not only that everyone enjoy equality before the law or have an equal voice in government, but also that

¹⁴ See Joshua Rosenbloom, “Indentured Servitude in the Colonial U.S.,” in *EH.net Encyclopedia*, ed. Robert Whaples. Available at <http://eh.net/encyclopedia/indentured-servitude-in-the-colonial-u-s/>; Robert C. Allen, et al., “Colonial Origins of the Divergence in the Americas: A Labor Market Approach,” *Journal of Economic History*, 72 (2002), 880; James T. Lemon, *The Best Poor Man’s Country: A Geographical Study of Early Southeastern Pennsylvania* (Baltimore, Johns Hopkins Press, 1972); Stanley Engerman and Kenneth Sokoloff, “The Evolution of Suffrage Institutions in the New World,” *Journal of Economic History* 65 (2005); Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in America* (New York: Basic Books, 2000), 6-7.

¹⁵ See, Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975).

¹⁶ All of the new constitutions rehearsed the federal titles of nobility clause, often in passionate language revealing something of the drafters’ resentments toward the upper ranks of the old imperial order. Thus, New Hampshire’s constitution provided that “no office or place whatsoever in government, shall be hereditary – the abilities and integrity requisite in all, not being transmissible to posterity or relations.” And Virginia’s that “no Man or Set of Men are entitled to exclusive or separate Emoluments or Privileges from the Community, but in Consideration of public Services; which not being descendible, or hereditary, the Ideal of Man born a Magistrate, a Legislator, or a Judge is unnatural and absurd.” Gordon Wood, *The Radicalism of the American Revolution* (New York: A.A. Knopf, 1991), 181.

¹⁷ Thus, for example, the penultimate draft of the Declaration of Rights that began Pennsylvania’s constitution sternly warned that excessive accumulation of land or wealth is “dangerous to the Rights, and destructive of the Common Happiness” of the community. See Eric Foner, *Tom Paine and Revolutionary America* (New York: Oxford University Press, 1976), 133. Frontier delegates at Kentucky’s first convention declared “that to grant any Person a larger quantity of land than he designs Bona Fide to seat himself...[is] subversive of the fundamental principles of a free republican Government [and] to allow any such individual or Company or body of Men to possess such large tracts of Country [will give them] undue influence over laws and police...and therefore ought not to be done.” See Thomas P. Abernethy, “The Journal of the First Kentucky Convention, Dec. 27, 1784—Jan. 5, 1785,” *The Journal of Southern History*, 1 (1935): 75-75.

everyone have an equal share in the fruits of the common enterprise”¹⁸—an “equality” that, another prominent historian of revolutionary era law has observed, was “to be achieved if necessary through government acting as a distributive mechanism under the guidance of a people whose inalienable right to political participation was the Revolution’s signal domestic achievement.”¹⁹

Many revolutionary leaders like the starchy John Adams and his erudite friend, Noah Webster were confident that the abolition of aristocratic laws and privileges, by themselves, would go a substantial way toward closing the gulf between rich and poor—a gulf, which, already, was not nearly so great as in the old world. An end to primogeniture and entail, Webster argued, would produce, over time, that “equality of property” that is “the very soul of a republic.”²⁰ Every state abolished these devices for holding together the landed wealth and social and political power of “great families,” either by statute or by writing the abolition into their constitutions.²¹ Nor was Webster wrong in believing that the abolition of these reviled aristocratic institutions would, over a generation or two, have fairly large distributional consequences. At least where economic historians have carefully examined the question, as with Virginia, they conclude it did.²²

Where the revolutionaries of the 1770s and early ‘80s differed was not about the need for a broad distribution of property, wealth and opportunity, but about how much and what kinds of ongoing shaping and reshaping of the rules and policies that governed the distributional outcomes of economic life were necessary or desirable to achieve that result, or how urgent (or foolhardy) it was to direct policy toward making the poor independent. Many agreed with Thomas Jefferson, who led the campaign against primogeniture and entail in Virginia but insisted that maintaining a republican constitution over time demanded much more. “[L]egislators,” he declared, “cannot invent too many devices for subdividing property.”²³ Steep taxes on large landholdings, public land policies, even “agrarian laws”: all were apt tools for sustaining a republican citizenry and upholding the equal right of every “poor man” to the pursuit of happiness.²⁴

¹⁸ Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1980), 188

¹⁹ Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 81.

²⁰ Noah Webster, “An Examination into the Leading Principles of the Federal Constitution, Oct. 10, 1787,” in *Pamphlets on the Constitution of the United States Published During its Discussion by the People, 1787-1788*, ed. Paul L. Ford (Brooklyn, NY: 1888), 59.

²¹ Claire Priest, “Creating an American Property Law: Alienability and its Limits in American History,” *Harvard Law Review* 120, no. 2 (2006).

²² Holly Brewer, “Entailing Aristocracy in Colonial Virginia: ‘Ancient Feudal Restraints’ and Revolutionary Reform,” *William and Mary Quarterly*, 3d Series, 52, No. 2 (Apr. 1997); Lee Soltow, *Distribution of Wealth and Income in the United States in 1789* (Pittsburgh, PA: University of Pittsburgh Press, 1989), 144-47 (considering especially New Jersey).

²³ Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in *The Papers of Thomas Jefferson*, eds. Julian P. Boyd *et al.* (Princeton: Princeton University Press, 1953), VIII:682.

²⁴ *Ibid.* (Jefferson’s idea “to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise”); Tomlins, *Law, Labor, and Ideology*, 81-82; Richard K. Matthews, *The Radical Politics of Thomas Jefferson: A Revisionist View* (Lawrence: University Press of Kansas, 1984), 19-29, 40-42, 50. On such subjects as high taxes on large holdings and total exemptions for the smallholder, Madison consistently seconded Jefferson’s views. In implementing the new constitutions, Madison held that state legislatures

Libertarians imagine Jefferson as a foe of “energetic” government. He was that—but only with respect to a distant, central government, which he feared “always” would use its power in “oppressive” ways. He was not skeptical about governmental power as such. Quite the contrary. As intellectual historian of the early republic, Joyce Appleby observes, Jefferson was “never loathe” to use both “constitutional and statutory measures to make the poor independent” and achieve and sustain “the institutional framework for a free society.” “What today would appear as social engineering,” Appleby notes, “presented itself to Jefferson as liberation of [the potential of ordinary men] long held in check by the Old World artifices of monarchy, nobility and established religion.”²⁵

Another part of Jefferson’s “system [of what we might call framework statutes] by which every fibre would be eradicated of antient and future aristocracies” from Virginia’s constitutional “fabric” was his famous “systematical plan of general education.”²⁶ We haven’t space to explore it in depth; but we note it as a classical statement of two other durable precepts of the democracy of opportunity tradition:

(i) the idea that some social goods are so important to building and maintaining a democracy of opportunity that government must treat such goods as *initial endowments*; and

(ii) the idea that *elites* must be open to and drawn from all classes, on the basis of *talent or merit*, not birth or blood.

From the Revolution onward, in the annals of the democracy of opportunity tradition, education was a social good second only to free or cheap land in undergirding the constitutional order of the new republics. These were the original “essentially necessary” initial endowments. Thus, just as Jefferson called for a right to fifty acres of land for each and every free man, so, as governor, Jefferson demanded and got an “amendment of our constitution...in aid of the public education.”²⁷ [Discussion of Jefferson’s system of education in Virginia, versions of which were gradually inscribed in many state constitutions, omitted.]

Jefferson’s friend and fellow Virginian George Mason drafted their state constitution’s Declaration of Rights in early 1776. Jefferson had Mason’s language in his hands that June when he set about drafting the Declaration of Independence. Like Jefferson’s, Mason’s Declaration commenced with the “inalienable rights” enjoyed equally by all men. Mason

ought to craft laws and policies whose “silent operation” would “reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.” See, Madison, “For the *National Gazette*, [ca. Jan. 23] 1792,” in *The Papers of James Madison*, ed. Robert A Rutland and Thomas A. Mason (Charlottesville: University Press of Virginia, 1983), XIV:197

²⁵ Joyce Appleby, “What is Still American in the Political Philosophy of Thomas Jefferson?” *William and Mary Quarterly*, 3d Series, 39, no.2 (1982): 295; Appleby, “The Radical *Double-Entendre* in the Right to Self-Government,” in *The Origins of Anglo-American Radicalism*, eds. Margaret Jacob and James Jacob (London: George Allen and Unwin, 1984), 281.

²⁶ Thomas Jefferson, *Autobiography* (1821) in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (New York: G.P. Putnam’s Sons, 1904), I:75, 77.

²⁷ Jefferson, *Notes on the State of Virginia* in *Works of Jefferson*, ed. Ford, IV:12, 64.

already had altered the familiar Lockean trinity of life, liberty and property to include “pursuing and obtaining happiness,” a change Jefferson took a step further in the Declaration by altogether dropping “property” in favor of “the Pursuit of Happiness.”²⁸ The substitution, which recurred in several of the new state constitutions, was about substance, not just stylistic felicity.²⁹ Many of these new constitutions made more explicit the right of the people and the duty of the state to promote the public happiness with language securing to “the people of this State... the sole exclusive and inherent Right of governing and regulating the internal Police of the same.”³⁰ We can get a deeper purchase on the distributive and regulatory dimensions of the constitutional discourse of the early republic by pausing over these two words, “Police” and “Happiness,” whose eighteenth-century meanings we have quite forgotten.

“Police,” as Christopher Tomlins has forcefully reminded us, had nothing to do with uniformed officers of the law, which, apart from militia or regular military troops, simply did not exist in North America until the middle of the nineteenth century.³¹ “Police” instead was the eighteenth-century ancestor of what today we call the “police power” of the states. As eighteenth-century lawyers understood the term, it harked back to Aristotle, or, more precisely, as Tomlins points out, to English translations of Aristotle explaining that the term derived from “polis” and “polity” and “can signify the constitution in general, or the constitution under which the many rule with a view to the common good,” or “[w]hen the masses govern the state for the common interest or public happiness.” “Police” named both the source and exercise of governmental power whose key object was securing the common “weal” and “happiness.”³²

For a contemporary definition of the “happiness” whose pursuit the new republics were vouchsafed to secure in equal measure for all, we can turn to a humbler source. William Manning was a farmer and tavern-keeper in Billerica, Massachusetts, and a self-taught commentator on constitutional and political-economic matters. The views expressed in his pamphlets roughly tracked figures like Jefferson and the more plainspoken Thomas Paine. They provide as good a single snapshot as any of the widely shared public meaning of key words like these. Manning defined that “Happiness” enshrined in the Declaration and state constitutions as “a person... enjoying the goods of his own labors, and feeling that his life and liberties (both civil and religious) and his property are all safe and secure; and not in the abundance he possesseth, nor in expensive...grandeur, which have the tendency to make other men

²⁸ Virginia Declaration of Rights, Art. 1, (June 1776), in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, Francis Newton Thorpe, comp. and ed. (Washington, D.C., 1909), VII:3813.

²⁹ Appleby, “What is Still American in the Political Philosophy of Thomas Jefferson?” 297.

³⁰ Constitution of Pennsylvania, Art. III (Sept. 1776), in *Federal and State Constitutions*, Thorpe, ed., 5:3082. Nearly identical language exists in the constitutions of Delaware (Sept. 1776), Maryland (Nov. 1776), North Carolina (Dec. 1776), and Georgia (Feb. 1777). See, Adams, *The First American Constitutions*, 287; Tomlins, *Law, Labor, and Ideology*, 57.

³¹ Christopher Tomlins, “Law, Police and the Pursuit of Happiness in the New American Republic,” *Studies in American Political Development*, 4 (1990).

³² Nicolai Rubinstein, “The History of the Word *Politicus* in Early-Modern Europe,” in Anthony Pagden, ed., *The Languages of Political Theory in Early Modern Europe* (New York: Cambridge University Press, 1987), 42-3; Christopher L. Tomlins, *Law, Labor and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 44, 55-59, 81-88.

miserable.”³³ Government had the duty, Manning held, following Jefferson and Paine—and Locke, as the latter two read Locke (more literally than Locke may have intended)—to prevent the wealthy from accumulating property to a degree that deprived the “poor” of their “natural inheritance” in available land and resources.³⁴

So, as revolutionary lawyer-leaders like Mason and Jefferson pushed aside the inherited “mixed” constitution of king, nobility and commons, and began in earnest to imagine government under “purely republican constitutions” in which “the many rule with a view to the common good,” their understandings of “Police” was inflected by the natural rights discourse of the Revolution and the radical notion of “the people” possessing the “sole and inherent right to govern and regulate.”³⁵ “Police” came to mean regulating (and also deregulating) the social and economic activities and relations of the new republics with an eye to the “Safety and Happiness” of the “whole mass” of “the people.” A regard for the “Happiness” of “Every Man” meant that the aim was assuring conditions of ownership, production and exchange that enabled all to achieve a “competency” or “a degree of comfortable independence.”³⁶ The right to the pursuit of happiness took the shape of what we might call a substantive and positive right of economic opportunity. It signified genuine access to the means of a decent livelihood.

How did this square with their thinking about property rights? A rough answer emerges if we return to the replacement of property with the pursuit of happiness. Jefferson was at pains to distinguish between the two. The pursuit of happiness was a natural right; the right of property, in Jefferson’s view, was not. Property was essential to individual and collective well-being. However, it was not a natural right at all, “but one which is established by and subject to the civil power,” and as such, decidedly subordinate to the inalienable right to the pursuit of happiness.³⁷ Republican legislation and “police” could touch the vested interests of large property holders in order to maintain this inalienable right for the “poor many.” There should be no mistaken claims that such incidental injuries were violations of higher law.³⁸

³³ Michael Merrill and Sean Wilentz, eds., *The Key of Liberty: The Life and Democratic Writings of William Manning, “A Laborer,” 1747-1814* (Cambridge, MA: Harvard University Press, 1993), xi-xii, 131.

³⁴ “The earth,” Jefferson famously and frequently wrote, “is given as a common stock for man to labour and live on.” All persons had a natural right to enough land to produce their subsistence, as well as a right to the property produced by mixing their labor with the land. This theory sanctified private property for most free inhabitants of the early republic and its cheap, fertile land. Jefferson recognized that the country was not ready “yet” to let the landless appropriate enough uncultivated land to meet their needs. But “it is not too soon,” he insisted, “to provide by every possible means that as few as possible shall be without a little portion of land.” Letter from Jefferson to Madison (Oct. 28, 1785), *Papers of Thomas Jefferson*, ed. Boyd, 681; Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991), 36; Matthews, *The Radical Politics of Thomas Jefferson*, 28.

³⁵ See, Tomlins, *Law, Labor and Ideology*, 44. The people’s “sole and inherent right to govern and regulate” is from the Pennsylvania constitution (1776), with similar language in the constitutions of Delaware, Vermont, New York, and North Carolina. See Adams, *The First American Constitutions*, 287.

³⁶ Daniel Vickers, “Competency and Competition: Economic Culture in Early America,” *William and Mary Quarterly* 47, no. 1 (1990): 3.

³⁷ See, Tomlins, *Law, Labor and Ideology*, 84.

³⁸ Rather, by Jeffersonian lights, higher law constrained the accumulation of property to the extent it clashed with the natural right of the poor to a sufficient share of land and resources to make a livelihood. Christopher Tomlins, “Law, Police and the Pursuit of Happiness in the New American Republic,” *Studies in American Political Development*, 4 (1990), 28-31; David M. Post, “Jeffersonian Revisions of Locke: Education, Property-Rights, and

Thus did Jefferson explain the phrasing of the Declaration; and a dozen years later, when Jefferson was the United States' envoy in France and his friend Lafayette, the liberal French aristocrat and hero of the American Revolution, sent Jefferson his working draft of what would become France's 1789 Declaration of the Rights of Man and of the Citizen, the American envoy returned the draft with the words "Life, Liberty and Property" edited to omit "Property" and substitute "the Pursuit of Happiness," with just this explanation.³⁹

We must pause here in our snapshot chronicle of the adventures of the democracy of opportunity tradition and jump ahead to the Jacksonian era; a rendering of the intervening decades will be found in forthcoming work. In sum, what unfolded was this. By the mid-1780s, a significant portion of the national revolutionary leadership had had their fill of the capacious authority these first republican constitutions imparted to the new states' lawmakers—or at least with some of the uses to which they were putting their authority. The deliberations of the men who gathered in Philadelphia in 1787 reflected this elite desire to circumscribe state lawmakers' power over political economy (although they rejected the strongest proposals to do so, such as Madison's Virginia Plan with its federal veto over state laws). The Anti-Federalists' Bill of Rights aimed for greater protections for individual liberties and greater protections for the states. The States, on this reckoning, remained essential guardians of both individual rights and "Public Happiness" and "distributive Justice."⁴⁰

Many in the front ranks of national leadership, like Jefferson and Mason, worried from the start that the new national framework might provide the machinery by which the privileged classes would climb to new oligarchic powers. As he watched Alexander Hamilton pursue policies that seemed to justify Jefferson's and Mason's fears—policies aimed at creating a strong central, fiscal-military state, with a national bank, a national debt, and a national patronage-based moneyed elite, openly modeled on Britain's—Madison reversed (or at least, dramatically shifted) ground.⁴¹ During the 1790s, he joined Jefferson in creating a national opposition, based on the very values and institutions he had gone to Philadelphia to subdue. The pair coordinated newspaper campaigns against the Bank and Hamilton's other policies. As leaders of the burgeoning Democratic-Republican opposition movement, they forged an enduring outlook on federalism and republican self-rule and political economy under the new Constitution: an outlook rooted in states' rights and the democracy of opportunity tradition, which the revolutionary contest had bred. Tightly linking text, structure and political economy in one discourse, it made the distributional purposes and effects of national policies matters of great constitutional moment. According to this outlook, the Bank and other Federalist policies not only breached constitutional limits and usurped powers that the Constitution assigned to the states, but also imperiled the constitutional order by promising to concentrate wealth and power in a moneyed

Liberty," *Journal of the History of Ideas* 47, no. 1 (1986): 152-153; Matthews, *Radical Politics of Thomas Jefferson*, 40-42, 50, 122.

³⁹ Appleby, "What is Still American in the Political Philosophy of Thomas Jefferson?" 297.

⁴⁰ Jack Rakove, "Confederation and Constitution," in *The Cambridge History of Law in America: Volume I, Early America* ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 497, 499-502, 503-04, 510; Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 177-224; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990), 144-48.

⁴¹ See, Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005), 43-49.

aristocracy with control over the levers of public policy and private finance. Hamilton's Reports on the Public Credit and on Manufactures openly laid out the scheme, while his arguments for the Bank's legality revealed some of the ways that the would-be Federalist oligarchy meant to torture the Constitution's text in pursuit of it. Only by restoring the constitutional balance between national and state power would lawmakers accountable to the humbler classes of citizens retain essential powers over economic life and development; only then would the safeguards for sustaining a broad middle class and fair equality of opportunity be assured. And only then, with its social basis intact, would the Constitution—conceived as a grand experiment in republican self-rule—survive.⁴²

It is no wonder that the Democratic-Republicans insisted on the constitutional stakes of their opposition to Hamilton's policies. Although their work in the 1790s seems plainly partisan, neither Madison nor Jefferson saw party-building as constitutionally legitimate. Party-building was still, by definition, faction-building; and factions were what the new Constitution or any good republican constitution was designed to overcome, and what virtuous citizens scorned. But traditional anti-partyism did make room for an exception. "Just as the people might organize to effect their right of revolution (as they did in 1776)," Gerald Leonard explains, "they might organize a temporary party of the Constitution to attempt salvation by peaceful, political means when the Constitution was in danger of usurpation."⁴³

So, the Democratic Party came into being as a "party of Principle," its very warrant for existence the *constitutional* stakes of defeating the "moneyed Oligarchy" in power. Americans would later grow accustomed to the idea of permanent political parties. But for decades, the Democrats—or "the democracy," as the party called itself—would continue to proclaim the constitutional necessity for a mass party of "the people" or "the producing classes" to counter the inevitable tendency of "wealth" to convert economic into political domination. "To be allied to power, permanent, if possible... is one of the strongest passions which wealth inspires," Martin Van Buren, the great architect and theorist of Jacksonian Democracy, observed in his remarkable *Inquiry into the Origin and Course of Political Parties*. "Here [in the U.S.], where [wealth] is deprived of [aristocratic privileges], it maintains a constant struggle for the establishment of a moneyed oligarchy, the most selfish and monopolizing of all depositories of political power, and is only prevented from realizing its complete designs by the democratic spirit of the country"—a spirit, Van Buren argued, which could only find effective political expression via a permanent party organization.⁴⁴

⁴² Gerald Leonard, "Jefferson's Constitutions" (October 31, 2014), 21. Forthcoming in *Constitutions and the Classics: Patterns of Constitutional Thought From John Fortescue to Jeremy Bentham*, ed. D.J. Galligan (New York: Oxford University Press, 2015); Wilentz, *Rise of American Democracy*, 41, 53-68; Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill: University of North Carolina Press, 1999), 174-187; Saul Cornell and Gerald Leonard, "The Consolidation of the Early Federal System, 1791-1812," in *Cambridge History of Law in America*, ed. Grossberg and Tomlins, 525-27.

⁴³ Leonard, "Jefferson's Constitutions," 21, 25.; Ralph Ketcham, *Presidents Above Party: The First American Presidency 1789-1829* (Chapel Hill: University of North Carolina Press, 1984), 100-113; Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley: University of California Press, 1969), 123-128.

⁴⁴ Martin Van Buren, *An Inquiry Into the Origin and Course of Political Parties in the United States* (New York: Hurd and Houghton, 1867), 166; Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (Chapel Hill: University of North Carolina Press, 2002).

Looking back from mid-century on “the democracy’s” origins in the decades we have just canvassed, Van Buren set out a canonical rendering of the Jeffersonian narrative of constitutional redemption. Hamilton’s policies in the 1790s, Van Buren declared, were well-intentioned and brilliantly crafted, but knowingly unconstitutional. Convinced that the best interests of the nation demanded flouting the Constitution that “the people recently had ratified,” Hamilton aimed to “sap and mine” and ultimately supplant the Constitution with what he believed was “a superior Monarchical form of Government.” If the Party’s founding father had not thwarted him, “this glorious old Constitution of ours... would long since have sunk beneath the waters of time... Our system might then have dissolved in anarchy, or crouched under despotism or some older type of aristocratic government—a monarchy, an aristocracy, or, most ignoble of all, a moneyed oligarchy—but as a Republic it would have endured no longer.”⁴⁵

Together, during the 1790s, Jefferson and Madison honed an account of the constitutional order and the roles it assigned to national, state and local government in support of a more democratic and decentralized political economy: one dedicated to a democracy of opportunity, one where, as Hamilton ruefully observed, people would expect “distributive justice” from the “hands” of state government, where great fortunes at the top would diminish, the share of those at the bottom would rise, and the middling classes would predominate in both state and civil society. The “Revolution of 1800,” Jefferson would proclaim, signified an enduring national decision in favor of this view of the principles enshrined in the national Constitution.

The new Democratic Republican Party toppled Hamilton and the Federalist grandees, gathered into its ranks the nation’s enfranchised majority of small farmers and artisans and incorporated them into a new, broad-based elite alliance with rising enterprisers and Southern planters. Over the next two decades, a new generation of state-based entrepreneurial Republican leaders took on board much of Hamilton’s program and built up *at the state level* much the same kind of monetary, corporate and transportation infrastructure Hamilton had hoped to create from the center on a national scale. On the national plane, Republicans aimed to stabilize money and credit and subsidize manufactures.⁴⁶

This new Republicanism embodied a stunning shift in direction, as the Party’s founding father saw it. Yet, the younger politicians who engineered the shift defended their reversal of Jeffersonian tradition in the name of that tradition. The new entrepreneurial wing of the Republican elite acknowledged, as one of them put it: Yes, they had “grown reconciled to... measures and arrangements which may be as proper now as they were premature or suspicious when urged by champions of Federalism.” On the other hand, they proclaimed undying fealty to the Jeffersonian vision of government acting to protect Every Man’s equal rights and opportunities. Every new bank, canal and railroad, every glittering investment opportunity, they chartered and underwrote with unsecured loans or bonds backed by local taxpayers’ dollars was to promote the ordinary mechanics’ and farmers’ opportunities.⁴⁷

The delusion that “legerdemain tricks upon paper can produce as solid wealth as hard labor in the earth,” complained Jefferson from Monticello, made it impossible to “reason Bedlam

⁴⁵ Van Buren, *Inquiry Into the Origin and Course of Political Parties*, 214-15.

⁴⁶ Sellers, *Market Revolution*, 36-69; Wilentz, *Rise of American Democracy*, 203-05.

⁴⁷ Letter from Madison to William Eustis (May 22, 1823), quoted in Sellers, *Market Revolution*, 101.

to rights.” Early in 1819, with the bust almost at hand, Jefferson wrote that the speculative frenzy had produced “a filching from industry its honest earnings, wherewith to build up palaces, and raise gambling stock for swindlers and shavers.”⁴⁸

When the bust came, it brought the nation’s first “traumatic awakening to the capitalist reality of boom and bust.”⁴⁹ As the Republican’s second national Bank set about saving its own skin by calling in loans and demanding settlement of its heavy balances against state banks, the brutal deflation brought down most of the nation’s new market economy. “Export prices collapsed; businesses failed; settlers lost their allotments of public lands for inability to complete payments; the remorseless process of debt liquidation brought down modest enterprisers and large ones; distress was greatest in the cities where roughly a million, perhaps three out of four, of the growing new class of wage earners, were out of work . . . the destitute fled back to kin in the countryside for subsistence.”⁵⁰

The so-called “Workey” or urban working-class press saw the emergence of a new, more radical and class-conscious brand of popular constitutionalism. Jefferson saluted it, and was gladdened by the growing sway of “Old School” Republican leaders like William Duane of Philadelphia, whose son would serve a dozen years later as Jackson’s radical Secretary of the Treasury during the Bank War of the 1830s. These new “Old School” Republicans and the older purists alike assailed *McCulloch*’s grandiloquent vision of national authority and national development.⁵¹ The Bank that Marshall vindicated, in the Old School view that Jackson would make his own, was a “great monopoly . . . concentrat[ing] the whole moneyed power of the Union.” With its vast power to corrupt and its “numerous dependents,” it was engendering a new oligarchy with a sway sufficient “to defeat any measure” in Congress. But even at the state level the “paper system” enabled “one class in society” to corrupt the polity and exploit and rule over the rest.⁵²

Thus was a pattern—we might say, a dialectic—of constitutional political-economic discourse and debate formed, which would endure for well over a century to come. After the Federalists’ demise, no mainstream party ever again openly proclaimed itself the party of elite rule. All sides appropriated the language of democracy of opportunity—and made their rival constitutional political economic claims and defenses at least partly in its terms. They might accuse their foes of “despoiling the rights of property” or of being the “ruination of enterprise,” they might defend the wealthy, but not the wealthy’s right to rule; always they proclaimed fealty to “equal rights” and broad distribution of prosperity for the producing classes. When such claims grew strained and thin, when the enfranchised “mass” of the citizenry, or some significant portion of it, was pressed too far, thicker distributional claims emerged; and innovative policies and restraints were defended in the name of constitutional restoration. So it was when Jackson and Van Buren set out to save the Constitution of Opportunity once more.

⁴⁸ Letter from Jefferson to Colonel Yancey (Jan. 6, 1816), quoted in Sellers, *Market Revolution*, 133.

⁴⁹ Sellers, *Market Revolution*, 137.

⁵⁰ Id.

⁵¹ Wilentz, *Rise of American Democracy*, 210-16.

⁵² Andrew Jackson, Farewell Address (March 4, 1837), in *A Compilation of the Messages and Papers of the Presidents 1789-1897*, ed. James D. Richardson (Washington, D.C., U.S. Gov’t Printing Office, 1896), 3: 303, 305.

Jacksonian Equal Protection [from Chapter Two]

It was the Jacksonians who first brought the democracy of opportunity tradition into militant democratic ascendancy. One can't understand the central elements of Jacksonian constitutionalism—its conceptions of equal protection and class legislation, strict construction and states' rights—without understanding the contest over constitutional political economy that Jackson and his new Democratic Party believed they were waging.

Jackson's war on the Bank was the centerpiece of a broader questioning of how American capitalism was taking shape. With the Panic of 1819 and the economic pain that followed, a breach had opened between the party elites and ordinary farmer- and worker-voters over the paths of national and regional development the elites were blazing. Into the breach stepped a popular non-politician. A farmer-worker populace, voting directly, in mass numbers, in a presidential election for the first time, found in General Jackson more than military charisma. Ordinary Americans were mustering democracy against “the paper system” and its “new aristocracy” of enterprise. To the astonishment of old party leaders like Calhoun and Clay, the voters rallied to Old Hickory's cry: the Constitution was imperiled “and the people alone by their Virtue and independent exercise of their free suffrage” could rescue and redeem it. Not until FDR would a presidential candidate again speak so plainly about the realities of class divisions and the incompatibility of political democracy and economic oligarchy. Voters who readily accepted that they were the “poor Many” fighting off the “wealthy Few” exercised their suffrage for what the new Democratic Party press heralded as a “Constitutional Millennium.”

The idea of equal protection of the laws is central to our modern understanding of the Constitution. Today we generally think of equal protection as the wellspring of the inclusionary tradition: a constitutional provision aimed against laws that injure groups defined by race and sex and other “discrete and insular minorities.”⁵³ But there was also another equal protection, *before* the Equal Protection Clause. For Andrew Jackson and his followers, equal protection was a touchstone of the democracy of opportunity tradition: a constitutional principle about protecting the “many” against class legislation that privileged the “few.”⁵⁴

Today, when they read and write about the fights from that era about tariffs and internal improvements, constitutional scholars—especially our fellow liberals and progressives—think they see a story about states' rights and the limits of national power. They understand it largely in terms of a Southern elite determined to keep Congress's hands off slavery, and they are right to do so. But that is only half of the story. Entwined with those battles was a different strand of constitutional debate about the nation's distribution of opportunity, wealth and power.

The mass of ordinary white farmers and workers, “the laboring classes of society” who formed the social base of Jacksonianism, were fearful of the new “paper-money system”; the new boom and bust business cycle; and the growing inequalities of wealth, opportunity, and political power between the poor many and the rich few. The new “paper-money system,”

⁵³ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

⁵⁴ Andrew Jackson, Veto Message (July 10, 1832), in *Compilation of the Messages and Papers*, ed. Richardson,, 2:576, 590.

Jackson told the nation in his Farewell, threatened “to undermine . . . your free institutions” and place “all power in the hands of the few . . . to govern by corruption or force.”⁵⁵

The Bank controversy perfectly distilled the Jacksonians’ fears, which found expression in the constitutional discourse inherited from their party’s founders. As one leading Jacksonian put it, although the Bank is “maintained out of the hard earnings of the poor,” “it is essentially an aristocratic institution” that “bands the wealthy together” and tends “to give exclusive political, as well as exclusive money privileges to the rich.” The Bank, he argued, “falsifies our grand boast of political equality; it is building up a privileged order, who, at no distant day, unless the whole system be changed, will rise in triumph on the ruins of democracy.”⁵⁶

Jacksonians responded to these fears with a welter of sustained constitutional arguments—in the courts, in Congress and state legislatures, and in critical presidential vetoes. These arguments sounded in the key of constitutional political economy. They condemned an array of corporate and bank charters, tax exemptions, subsidies, and protectionist tariffs as unequal laws: “invasion[s] of the grand republican principle of Equal Rights—a principle which lies at the bottom of our constitution.”⁵⁷ Such laws created “inequalities of wealth and influence” that would lead “inevitably” to the invasion of the rights of the “weak” by the “strong.” Specifically, such laws would enable an emerging oligarchy—the “moneyed aristocracy”—to amass economic and political power over the “middling and lower classes.”⁵⁸ In vetoing the Bank, President Jackson urged the government to “confine itself to *equal protection*, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor” rather than “grant[ing] titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful.”⁵⁹

The Jacksonians viewed the direction of economic development that this emerging oligarchy was charting with a distinct sense of *constitutional* crisis: they argued that it subverted the nation’s republican Constitution (or, more precisely, republican constitutions). In great part, this was a story of the corrosive effects of inequalities of wealth. An American political economy built upon true constitutional principles, argued Jacksonian Congressman John Bell of Tennessee, would not aim for the “European” goal of maximizing national wealth “without regard to the manner of its distribution”: “the accumulation of great wealth in the hands of individual citizens” subverts the natural “equality of rank and influence” that is “the fundamental principle upon which [our Government] is erected.”⁶⁰

Mainstream Jacksonians laid down strong distributional constraints on government policy—ones that ran not only to formal equal opportunity but also to “equality in the actual condition”

⁵⁵ Jackson, Farewell Address (Mar. 4, 1837), in *Compilation of the Messages and Papers*, ed. Richardson, 3:292, 302.

⁵⁶ William Leggett, “The Monopoly Banking System,” *Evening Post*, Dec. 1834, in *A Collection of the Political Writings of William Leggett*, ed. Theodore Sedgwick, Jr. (New York: Taylor & Dodd, 1840), 1:103.

⁵⁷ *Ibid.*, 97.

⁵⁸ William Leggett, “The Reserved Rights of the People,” *Evening Post*, Dec. 13, 1834, in *Democratick Editorials: Essays in Jacksonian Political Economy*, ed. Lawrence H. White (Indianapolis, Ind.: Liberty Press, 1984), 7, 8; Leggett, “Despotism of Andrew Jackson,” *Evening Post*, May 23, 1834, in *A Collection of the Political Writings*, 1:1, ed. Sedgwick, Jr., 1:290; Leggett, “The Division of Parties,” *Evening Post*, Nov. 4, 1834, in *Ibid.*, 1:64, 66.

⁵⁹ Jackson, Veto Message, in *Compilation of the Messages and Papers*, ed. Richardson, 2:590 (emphasis added).

⁶⁰ Statement of John Bell, June 8, 1832, 22nd Cong., 1st sess., *Register of Debates in Congress*, 8, pt.3: 3357.

of the citizenry. As Bell's speeches illustrate, these constraints were at once precepts of their political economy and—equally, inseparably—of their constitutional outlook. “I deny,” Bell proclaimed, “that it is either necessary or proper, or consistent with the constitutional objects of our Government, to promote the growth of the country in wealth, without regard to the manner of its distribution.” He viewed “the accumulation of overgrown individual fortunes” as “a positive national evil,” and argued that governments are “free, just, and equal in proportion to the degree of equality in the actual condition of their members or citizens.”⁶¹

The central problem was that economic inequality inevitably has corrosive effects on political equality. In Jackson's words, an economic system divorced from “the great principle of equality” threatened to create “a dangerous connection between a moneyed and political power.” The “moneyed interest” would become a political aristocracy, he warned, as “a control would be exercised by the few over the political conduct of the many by first acquiring that control over the labor and earnings of the great body of the people.”⁶² This is, in short, the problem of oligarchy.

These concerns became the mainspring of a distinctive Jacksonian constitutionalism. They inflected many modalities of Jacksonian constitutional argument, such as textual arguments about federal power—for instance, President Jackson's argument that Congress's textual authority to mint currency should *not* be read to permit Congress to delegate this power to a private bank (by chartering and authorizing the Bank to issue notes that, foreseeably, had become the nation's paper currency). Jacksonian equal protection and equal rights meant that stern constitutional scrutiny was required any time the government granted exclusive privileges, exemptions, immunities, or monopoly powers to determine whether these were truly “necessary” or whether they instead embodied an unjustifiable “bend[ing of] the acts of government” by “the rich and powerful . . . to their selfish purposes.” But Jacksonian equal protection was not *laissez faire* for its own sake. It had two overriding purposes: to prevent the capture of the government by the rich and to safeguard broad opportunities for all.⁶³

Of course, “all” did not mean all. Jacksonians wedded white farmers' and workers' democratic aspirations to the racist causes of southern slavery and Indian Removal, a tragedy of American political and constitutional development from which we are still disentangling ourselves. Slaves' and women's productive work was not merely excluded from the Jacksonians' generous conception of equality for the nation's producers; racial and gender subordination were among the bases on which they rested their vision of the white man's republican liberty and citizenly independence.⁶⁴ It was not the Jacksonians but instead their Whig foes and abolitionist critics who first probed the contradictions between championing an

⁶¹ Ibid., 3357–3358.

⁶² Andrew Jackson, Seventh Annual Message (Dec. 7, 1835), in *Compilation of the Messages and Papers*, ed. Richardson, 3:164, 165, 167; Jackson, “Farewell Address,” in Ibid., 3:305 (“moneyed interest”).

⁶³ Jackson, Veto Message, in Ibid., 2:582–85, 590.

⁶⁴ For this critical perspective on Jacksonian democracy, see Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (New York: Oxford University Press, 2007), 347–49, 352–65; Alexander Saxton, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America* (New York: Verso, 1990), 148–54, 247; Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country*, (New York, Oxford University Press, 1995)..

egalitarian political economy for the white “laboring classes” and perpetuating black bondage; it was nineteenth-century women’s rights advocates who made the case that the Constitution’s promise of equal rights meant equal rights for women.⁶⁵

What the Jacksonians understood, vividly, and articulated in constitutional terms, was that in their time, a nexus of elite wealth and political power threatened the political and economic equality of white male farmers and “mechanics.” In Jacksonian constitutional political economy, this was the fundamental threat to the constitutional order.⁶⁶

To respond to this threat, the Jacksonians created the first modern mass political party. Such a creature seemed to its conservative foes a constitutional nightmare: a permanently organized faction. But, as we have noted, the Jacksonians defended the new creature as just the opposite: not a nightmare, but actually a constitutional necessity, to mobilize the nation’s dispersed “producing classes” as a new “[d]emocracy of numbers” to defeat oligarchy and save the republic from the “[a]ristocracy of wealth.”⁶⁷

The “American System” And the Whig Constitution of Opportunity

What about the Jacksonians’ foes, turncoat Democrats like John Quincy Adams, or the great Whig statesman, Henry Clay, or the rising star in the Whig galaxy, the young Illinois lawmaker, Abe Lincoln? Where did they stand in respect of constitutional political economy? First, it bears underscoring that they too believed that constitutional principles must determine public policy and guide economic development. It was not only up to judges to preserve the constitutional order; judicial review generally played a relatively minor role in their view, as it did in the Jacksonians’. It was chiefly up to the people and their representatives to safeguard constitutional liberty and ensure that the Constitution’s other precepts and purposes were fulfilled, as the nation pursued its combined experiments in constitutional government and capitalist development.

Clashing with the Democrats over the developmental and distributional perils and possibilities of banks and currency, corporate charters, protective tariffs and internal improvements, the Whigs’ arguments were scarcely less suffused with constitutional discourse than their foes’. Where Whigs and Jacksonians differed was over the kind of political economy the developing nation should embrace. Henry Clay’s “American System” called for a robust,

⁶⁵ One such Whig foe was the young Illinois politician, Abraham Lincoln, who probed those contradictions as an Anti-Slavery friend of corporations and spokesman for the Whig vision of capitalist development, which, as we’ll see, he outfitted in a vocabulary of equal opportunity largely borrowed from his Democratic adversaries.

⁶⁶ “States’ Rights” and “Strict Construction” likewise were bound up in Antebellum constitutional discourse with democracy of opportunity for the “humbler [white male] members of society.” As Tony Freyer has shown, the constant Antebellum battles between state and federal courts and federal courts and state lawmakers frequently pitted small and middling producers against larger, regional and national players: the mercantile, corporate and financial elites and their allies on the federal bench. State judges and attorneys championed a broad state police power and broad readings of state versus federal jurisdiction; they tethered “strict construction” and “states’ rights” to safeguarding broad structures of opportunity and a fair chance for “humbler members of society” and to averting oligarchy. See Tony Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America* (Charlottesville: University Press of Virginia, 1994).

⁶⁷ Leonard, *The Invention of Party Politics*, 43, 162, 173 (quoting delegates at an 1837 Illinois Democratic congressional convention).

active role for national government – what development economists today would call a developmentalist state: building up domestic industry via protective tariffs, linking farmers and local enterprises to farflung markets via national subsidies for internal improvements (what we would call infrastructure) like canals and railroads, and promoting growth and prosperity by fostering concentrations of capital for investment and encouraging a credit-based national economy and a flexible medium of exchange via national and state banks. Daniel Webster earned the sobriquet of the great Whig “Expounder of the Constitution”⁶⁸ thanks to his many famous oral arguments on behalf of corporations. As these arguments dramatized, along with the other elements of the American System, Whigs also promoted judicial protection of what they deemed investors’ vested rights. Unless capital investments were secure against popular “interference,” they argued, everyone would suffer.

An ex-Federalist Whig like Webster might scorn egalitarian appeals to the enfranchised masses. But the party leadership soon appropriated the Jacksonians’ mass party organizational structure, and along with it the Jacksonian rhetoric of equal opportunity for the poor farmer and workingman. The rising young Illinois Whig Abe Lincoln adapted that rhetoric to the very development policies Jackson and the “Old School” Democrats assailed. Jacksonians watched and were alarmed by the young lawmaker’s unhesitating sponsorship of dozens of charters for large, new corporations. “What is the passing [of] an act of incorporation, but the making of a law?” Lincoln demanded, as he painted a glowing portrait of future railroad corporations of “a great national character.”⁶⁹ Here, for Lincoln, was the promise of new markets and new opportunities for the “poor [Illinois] farmer” to “improve his condition” by producing for “profitable home markets” of manufacturing workers in the East.⁷⁰ Jacksonian lawmakers pointed out Lincoln’s blindness to the threats posed by large concentrations of capital to the “poor man’s” prospects for material independence and the republic’s need for a “rough equality of condition.” And Lincoln responded by pointing out their blindness to the state’s need for outside capital to underwrite development and the impossibility of a hard-money or specie currency sustaining the pressures of a growing farm population and its hunger for prosperity.⁷¹

Plainly, the Whigs’ political economy was of the “rising tide raises all boats” variety.⁷² A Clay or Lincoln was not unduly troubled by growing inequalities of wealth, as long as the rising fortunes at the top resulted from new industry and growing commerce. Concentrations of capital in well-run banks or in “[t]he joint stock companies of the North” did not distress them. Quite the contrary, they thought them essential to expanding jobs and opportunities. Here, it’s important to recall the typically small scale of manufacturing production that a Lincoln knew in central Illinois or Clay in Kentucky - where, Clay observed, “almost every manufactory known to me is in the hands of enterprising self-made men, who have acquired whatever wealth they

⁶⁸ Remini biog of Webster (1999) at 162, 208.

⁶⁹ Quoted in Borritt, Lincoln & Economics of the American Dream.

⁷⁰ Id.

⁷¹ Id.

⁷² Compare the Jacksonian John Bell’s view that an American political economy built on true constitutional principles would never aim for the “European” goal of maximizing national wealth “without regard to the manner of its distribution,” supra TAN ___, with Clay’s oft-expressed view (in speeches on the Bank, currency and the tariff):

The great desideratum in political economy is the same as in private pursuits; that is, What is the best application of the aggregate industry of a nation, that can be made honestly to produce the largest sum of national wealth? (From Speech on the Tariff, March 30-31, 1824)

possess by patient and diligent labor.”⁷³ Even in manufacturing centers like New York, the typical shop employed only roughly ___ hands.⁷⁴ Given this, it was not yet so far-fetched for these Whig spokesmen to believe that the expansion of American manufacturing promised wide-open avenues for a broad swath of hireling journeymen to acquire the know-how and raise the capital to own “manufactories” of their own.

If some lines of industry, like railroads and textiles, were unfolding on a large scale in the corporate form, and if all this industrial development helped make bankers rich, that was fine.⁷⁵ An entrenched “monied aristocracy” seemed a distant worry to a young Whig like Abe Lincoln in the hazardous, hurly-burly world of new fortunes made and lost in the market economy. As Lincoln’s own path from hard-scrabble farming to counsel for new banks and corporations seemed to demonstrate, those who rose to the top in this brave new competitive world were more likely to be a “natural” elite than an “artificial aristocracy.”⁷⁶

A great many proponents of Jacksonian constitutional political economy hewed to the old republican precept that a rough “equality in the actual condition” of the citizenry was essential to republican constitutions; by their lights, as we’ve seen, policies that promised to magnify inequalities of wealth were suspect. Whigs spurned this “leveling” outlook. But their own views were far from indifferent to distributional concerns. They shared with their foes the other old republican maxim: the citizen’s political equality and independence must rest on a measure of economic independence, and that demanded property-holding. Their vision was a burgeoning commercial republic, not a backward-looking agrarian one, but it was no less a republic with a broad, wide-open, propertied middle class. Thus, they loudly affirmed that a true “American” system of political economy must provide as ample as possible a supply of decent livelihoods for the laboring classes, along with wide opportunities for laborers to become proprietors, and broad avenues to wealth and distinction for the gifted and ambitious “poor beginners.”⁷⁷ Not surprisingly, Whigs contended that their own economic policies were best suited to these core commitments. And more than that: They argued that Jacksonian nostrums like free trade, hard money and “limited government” only hurt the very classes the Jacksonians claimed to champion.

⁷³ Zach’s memo - (1832 speech on the tariff? Gales? 277).

⁷⁴ Find figure in Richard Stott, “Artisans and Capitalist Development,” in Paul Gilje, *Wages of Independence* (1997).

⁷⁵ “The joint stock companies of the North, as I understand them, are nothing more than associations, sometimes of hundreds, by means of which the small earnings of many are brought into a common stock; and the associates, obtaining corporate privileges, are enabled to prosecute, under one superintending head, their businesses to better advantage. Nothing can be more essentially democratic, or better devised to counterpoise the influence of individual wealth...Comparisons are odious, and, but in defence, would not be made by me. But is there more tendency to aristocracy in a manufactory, supporting hundreds of freemen, or in a cotton plantation, with its not less numerous slaves, sustaining, perhaps, only two white families—that of the master and the overseer?” (Clay, 1832 speech on the tariff. Gales 277)

⁷⁶ See supra note ___ [Clay’s comparison of Southern “aristocrats” and Northern entrepreneurs]. See also Gabor Boritt, *Lincoln and the Economics of the American Dream*.

⁷⁷ The parties also shared the view that free education and cheap or free land were essential initial endowments. They differed about how to implement them. Cites.

And here we can begin to see the implications for Whig constitutional political economy. Clay would invoke constitutional text, history, structure and Congressional and judicial precedent against arguments like the southern Democrats' that protective tariffs were beyond Congress's power, because their purpose was not revenue but a practical bar on foreign imports of some lines of manufactured goods. And then Clay would turn to consequences:

It is for the great body of the people, and especially for the poor, that I have ever supported the American system. It affords them profitable employment, and supplies the means of comfortable subsistence. It *secures* to them, certainly, necessaries of life, manufactured at home, and places within their reach, and enables them to acquire, a reasonable share of foreign luxuries; whilst the system of gentlemen *promises* them necessaries made in foreign countries, and which are beyond their power; and *denies* to them luxuries which they would possess no means to purchase. (292)

Similarly, Clay attacked Jackson's war on the national bank, both on grounds that chartering the Bank was well within Congressional power, and on grounds that Jackson's "hard-money policy" would injure the very farmers, laborers and small entrepreneurs for whose "equal protection" in opportunities and livelihoods the President claimed to act:

But if the effect of this hard-money policy upon the debtor class be injurious, it is still more disastrous, if possible, on the laboring classes. Enterprise will be checked or stopped, employment will become difficult, and the poorer classes will be subject to the greatest privations and distresses. Heretofore it has been one of the pretensions and boasts of the dominant party [Democrats], that they sought to elevate the poor by depriving the rich of undue advantages. Now their policy is, to reduce the wages of labor, and this is openly avowed; and it is argued by them, that it is necessary to reduce the wages of American labor to the low standard of European labor, in order to enable the American manufacturer to enter into a successful competition with the European manufacturer in the sale of their respective fabrics.⁷⁸

A lawyer today would guess that the only kinds of *constitutional* claims made on behalf of Clay's American System of political economy were arguments of the familiar permissive kind: you say the Constitution prohibits Congress from enacting this policy; we say it allows it. That was not the case. Whigs like Clay, and erstwhile Democrats won over to Clay's American System like John Quincy Adams, made stronger claims. The Constitution not only allowed Congress to enact policies like the protective tariff, they argued; it compelled them. Article I's enumerated powers were "not only grants of power but trusts to be executed" and "duties to be discharged for the common defense and general welfare."⁷⁹ The "non-use of the power" was "a violation of the trust."⁸⁰ Not the courts, but lawmakers themselves were the "expositors of the purposes for which Congress are expressly enjoined TO PROVIDE," and where the "general welfare" was clearly better served by the exercise of an enumerated power than by its "non-use," Congress had not only the power but the *constitutional duty* to act.

The language of the "solemn Preamble," on this account, was not intended to confer boundless or unrestrained powers, or "indeed any powers at all" beyond what were granted in Article I, but neither was the Preamble devoid of legal meaning. It announced principles like "liberty" and purposes like "the common defence" and "the general Welfare," which the Constitution directed the political branches to use their enumerated powers to secure, promote

⁷⁸ Clay's speech on the sub-treasury bill. see Zach's memo – incomplete cite.

⁷⁹ John Quincy Adams, Report of the Committee on Manufactures (May 23, 1832) Insert full cite.

⁸⁰ Id.

and provide, under the watchful eyes of the People. Especially was this the case, both Clay and Adams argued in the context of the tariff debates of 1832, where the “great and solemn *duty* [of Congress] to *provide* for the common defence and general welfare” is stated in such a fashion that the Article I enumeration of the power to levy taxes and duties “repeats” the “same identical language” of the Preamble.⁸¹

Alongside the textual argument, Clay gave an originalist twist to the case for lawmakers’ constitutional “duty of protecting our domestic industry”:

The States, respectively, surrendered to the General Government the whole power of laying imposts on foreign goods. They stripped themselves of all power to protect their own manufactures, by the most efficacious means of encouragement—the imposition of duties on rival foreign fabrics. Did they create the great trust? Did they voluntarily subject themselves to this self-restriction, that the power should remain in the Federal Government, inactive, unexecuted, and lifeless? Mr. Madison, at the commencement of the Government, told you otherwise. In discussing, at the early period, this very subject, he declared that a failure to exercise this power would be a “*fraud*” upon the Northern States, to which may now be added the Middle and Western States.⁸²

Affirmative Legislative Constitutional Duties

The idea that Congress has affirmative constitutional duties to legislate in the political-economic sphere – and the practice of responding to claims of *no power* with *not merely power, but duty* – proved vital for nationalist-minded lawmakers and administrations for a century to come. How and why we have forgotten them is a question reserved for Chapter [Six]. But one part of the answer is already in view. Lawmakers on all sides of these various political-economic debates believed that they (and the President in the exercise of his “legislative” role) were the primary interpretive actors or “expositors,” *as well as* the primary policy makers.⁸³ Exercises of enumerated powers, making and enacting national policy, were occasions to interpret or “exposit” the Constitution and implement its purposes—occasions for first-order arguments about the Constitution’s meaning and preservation.

Today, the default assumptions are different. The Court is the primary expositor of the Constitution. Two tasks, once deeply connected, have been separated. The political branches make national economic policy; the Court decides whether they have transgressed the limitations of what the Constitution allows them to do. Given this, it makes little sense to think hard about the affirmative constitutional duties of Congress or the President with respect to economic and social policy and its distributional goals and perils. Whatever our rival normative and practical views about these matters, we cannot imagine the courts doing the primary work of choosing among them and enforcing the results. And neither could the lawmakers, statesmen, politicians and reformers whose arguments we are about to explore. However, they imagined and inhabited the constitutional order in a rather different fashion from us: for them, “the Constitution” was at once a text and tradition one interpreted and, at the same time, a system of government, whose

⁸¹ Id.

⁸² Henry Clay, “The Tariff” Feb 2 1832, Senate, Gales & Seaton’s Register –

⁸³ Indeed, virtually all agreed that at least some political-economic issues like the tariff probably could not be assessed in some of their most important constitutional dimensions, except by the political branches. Quote/Cite to Adams, Clay, Calhoun.

powers, purposes and precepts one implemented and pursued over time, through political and legislative action.

In our judicialized constitutional culture and imaginations, it makes sense to think hard and argue seriously about constitutional limits on Congress's power, which courts can and do elaborate and enforce, but not about Congress's affirmative constitutional duties—as to which courts may play an indispensable role, but cannot do the first-order work or the heavy lifting. Partly for this reason, we have forgotten the very idea of affirmative constitutional duties and with it, much of the conceptual landscape of constitutional political economy.

...

The Second Founding: a Brief Marriage of Two Traditions [from NOMOS / Chapter Three]

It is no exaggeration when historians say that the Civil War and Reconstruction Amendments marked a Second Founding and a fundamentally changed constitutional order. From a slaveholding, racially exclusive republic, America reconstituted itself into a racially inclusive republic of equal citizens. The authority of the national government over the states was transformed, and with it, the meaning of American democracy. The legal consciousness of Americans of all colors and classes underwent a sea change, as they began looking more and more to the national government to protect and promote their rights, interests and opportunities. The lion's share of the work of securing equality of rights and opportunities had hitherto belonged to local and state governments; and the lion's share of those rights and opportunities had belonged to white men, as a matter of principle as well as practice. But the struggle to end slavery and uproot the "Slave Power" resulted in more than abolition. It produced a new constitutional order, proclaiming that equality of rights and opportunities, henceforth, was "universal."

During this second founding moment, the inclusionary tradition entered the constitutional mainstream, its main object ushering African-American men into the democracy of opportunity. We have spoken of the two Constitution of Opportunity traditions as distinct and often at odds. But that was not so during this foundational moment. Quite the contrary: The inclusionary tradition emerged as part and parcel of the project of abolishing slavery and making "Freedom"—free labor, the democracy of opportunity, and all the basic civil and political rights they were thought to entail—"National." Equality in the enjoyment of these basic rights was inscribed in the national Constitution and put under national protection for the first time, and its promise extended to all "the People," which the Second Founding redefined as "all persons born in the United States...of every race and color, without regard to any previous condition of slavery or involuntary servitude."⁸⁴

In other words, the *old* precepts of equal protection, equal rights and equal opportunities as safeguards for white workingmen or "producers" only entered the text of the national Constitution with the Fourteenth Amendment, in the context of securing a *new* guarantee of

⁸⁴ 1866 Civil Rights Act, Sec. 1. Excepting Indians – discuss.

equality in the enjoyment of those rights and opportunities for the hitherto excluded.⁸⁵ As things turned out, that inclusionary goal would be honored in the breach by official expositors for almost a century. Yet, in the annals of protest and reform, the inclusionary tradition remained vital. Ever since Reconstruction, when subordinated and excluded groups have laid claim to the status of first-class citizens and rights bearers, demanding opportunities equal to those enjoyed by full members of the community, they have done so in language rooted in these amendments.

Reconstruction, as we have noted, set out to remake many of the basic structures and institutions of Southern politics and society. It proved a case study in the central insight of constitutional political economy with which we began: that economics and politics are inextricably linked, and a republican constitution requires a republican political economy to sustain it, and vice versa. All sides to the bitter battles of Reconstruction understood this insight, and Reconstruction's rise and fall bore it out. Without suffrage and political rights, the ex-slaves could not hold on to and cash out their new rights and opportunities in market and property relations; and, by the same token, stripped of economic citizenship, denied any real measure of material independence, and rendered dependent serfs of the ex-masters, the freedmen's political freedom would prove fatally vulnerable.

These links were crystal clear to Congress's Joint Committee on Reconstruction. "Slavery," the Committee reported in April '66, "by building up a ruling and dominant class, had produced a spirit of oligarchy averse to republican institutions."⁸⁶ Emancipation was hardly enough to "purify" and "restore" the republican Constitution in the defeated South. "[L]eaving that ruling class in the exclusive possession of political power would be to ensure" that the same "oligarchy" be restored, the freedmen's economic liberty destroyed, and the Constitution subverted.⁸⁷ And, conversely, as the Joint Committee's chair, Thaddeus Stevens tartly put it, "The whole fabric of southern society *must* be changed. . . [i]f the South is ever to be made a safe republic." "How can republican institutions. . . exist in a mingled community of nabobs and serfs?"⁸⁸

From Reconstruction onward through the New Deal, we shall see, this latter point would be the constant constitutional refrain of the great movements for economic justice. What FDR would call "equal opportunity in the polling place" was impossible without "equal opportunity in the marketplace": political citizenship was inseparable from social and economic citizenship; both demanded a broad distribution of wealth and social and economic power. There could be no liberal republican Constitution in a society of economic "servitors" and "overlords."⁸⁹

⁸⁵ Remember: when Jacksonians spoke of equal protection and equality of basic rights in the *old* Antebellum sense of equal opportunity for white workingmen or producers, they invoked the equality and equal rights talk of state constitutions or the Declaration; they imputed these norms to the national Constitution – often in the context of states' rights and strict construction arguments as in Jackson's Bank Veto. See *supra* __-__.

⁸⁶ Report of the Joint Committee on Reconstruction, April 30, 1866 at 20.

⁸⁷ *Id.* at 21.

⁸⁸ Speech to Pa. Republican Convention, 1865, quoted in Foner at ____.

⁸⁹ Cites to FDR quotes in Fishkin & Forbath, *The Anti-Oligarchy Constitution*. And, with the central-state-building, legislative precedents and constitutional amendments of Civil War and Reconstruction all in place, along with the accompanying sea change in Americans' legal consciousness about national power, these precepts about equal citizenship had become ones that like the Reconstruction Republicans – but unlike, say, the Antebellum Jacksonians – these late 19th and early 20th century movements would claim the national government had affirmative constitutional duties to protect and promote.

Given our own great forgetfulness about constitutional political economy, we will do well to attend to how, in the minds of the framers of the Reconstruction Amendments, the political-economic and redistributive dimensions of the enterprise and the rights-conferring dimensions were inseparable sides of the same constitutional coin.

Reconstruction was both a revolutionary exercise in constitutional political economy and a revolutionary experiment in racial inclusion. The two were entwined because slavery had been both an economic class system and a racial caste system – a system of labor exploitation and one of racial domination.⁹⁰ As a matter of political economy, abolishing slavery meant, first of all, dismantling two groups of legal subjects: slaves and masters. In the process, property on the order of a trillion dollars, as the slave market measured things, was expropriated, without compensation.⁹¹ The Thirteenth Amendment extinguished slaveholders' property rights in, and conferred rights of self-ownership on, rough four million ex-slaves, among the largest redistributions of ruling class property the modern world would see.

Emancipation, however, had come to mean more than a formal end to slavery. It meant in the martyred President's words "a new birth of freedom," drawing both ex-slave and ex-master into the Free Labor System, and remaking the South into a free society. But just what that transformation would entail – economically and socially, politically and constitutionally – remained up for grabs, as the ink dried on the Thirteenth Amendment in December, 1865. The Radical Republicans had the clearest, most coherent sense of the tasks at hand, and they gradually brought the rest of the Republican Congress on board their vision.

That vision flowed out of Free Labor ideology, imagining the South reshaped in the Antebellum image of small-scale, competitive, democratic capitalism. "My dream," one Radical explained in early 1866, "is of a model republic, extending equal protection and rights to all men... The wilderness shall vanish, the church and school-house will appear;... the whole land will revive under the magic touch of free labor."⁹² In such a society, "[t]he freedmen will enjoy the same economic opportunities as white laborers."⁹³ In a free-labor South, with civil and political equality secured, black and white would find their own level, and, as Senator Benjamin Wade put it, in classical Lincolnian terms, "finally occupy a platform according to their merits." The key was that all must be given "a perfectly fair chance."⁹⁴

Just how fully the Radicals enfolded the ideal of racial inclusion into the older Antebellum discourse of democracy of opportunity, with its anti-oligarchy and anti-class-privilege principles, is on display in the language of Massachusetts Radical Republican Senator Charles Sumner's proposed draft of the 1866 Civil Rights Act: "There shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States..."⁹⁵

⁹⁰ Slavery also had been a system of sexual exploitation and social domination. For brief discussion of how the constitutional politics of Reconstruction addressed (and how it ignored) these dimensions, see *infra* at __ - __.

⁹¹ In today's dollars. See __.

⁹² Foner, *Reconstruction* at __.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Quoted in Steven G Calabresi and Larissa C. Leibowitz, "Monopolies and the Constitution: A History of Crony Capitalism," *Harvard Journal of Law and Public Policy* 34 (2013): 1038-40.

In early '66, political rights were still a bridge too far for more moderate and conservative Republicans. Unlike Sumner, they did not see suffrage flowing from the freedom conferred by the Thirteenth Amendment. However, they did find in the Amendment the power to make the freedmen and women national citizens, and to guarantee them equal enjoyment of the core rights of contract, property and personal liberty – an equality which, along with Chase and Lincoln in the 1850s, they had come to regard as already “declared” in 1776 to belong to “all men,” black and white, in the new republic, “so that the enforcement of it might follow, as fast as circumstances should permit.” Now, circumstances permitted.

The equality-conferring language of the final version of the 1866 Act – “the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens” – encapsulates the outlook of the Republican mainstream at that moment and their constitutional political economic vision of black free laborers owning or leasing land, making contracts and meeting white employers, merchants and landlords on a plane of legal equality.

Most striking are the new convictions about the appropriate uses of national power to constitute a new economic order of local, everyday life populated with new legal subjects, via federal enforcement of these hitherto local and state-based rights in the face of planters’ and state and local authorities’ determination to “enserv the blacks.” 1866 also saw enactment of the Freedmen’s Bureau Act and the Civil Rights statute imparted on the new federal agency and the federal district courts unprecedented power to adjudicate and enforce rights claims under the statute. This expansion of national authority, Republicans explained, was not only within Congress’s power under the Thirteenth Amendment; it was an affirmative duty to safeguard the freedmen’s precarious economic enfranchisement and new constitutional standing as “freemen.”

What turned moderate and conservative Republicans around on the suffrage question was an unstable compound of moral outrage and idealism, on one hand, and hard-nosed political pragmatism, on the other. The outrage flowed over the white South’s intransigent refusal to acknowledge defeat. Southern state lawmakers enacted the Black Codes with the open purpose of reducing ex-slaves to dependent serfs, and local authorities sanctioned and contributed to the violence and subordination that ensued; at the same time, the white South was sending high-ranking Confederate officials to represent them in Congress. In the short term, the answer to this was military occupation, along with a refusal to seat the Southern delegations to Congress, both of which Congress enacted and forced upon a reluctant President Johnson. But in the longer term, how else safeguard the freedmen’s civil rights and how else repay the hundreds of thousands of them who had fought on the Union side but to acknowledge their title to the suffrage? As one moderate explained, “[s]uffrage is the only sure guarantee which the negro can have, in many sections of the country, in the enjoyment of his civil rights.”⁹⁶

The hard-nosed pragmatism entered the picture as Republicans pondered the arithmetic that the 13th Amendment forced on them. Now that African-Americans were no longer three-fifths but whole persons under the Constitution, the Southern delegations in the House and

⁹⁶ Farber & Sherry, at 64.

Electoral College were destined to expand. Given a rough measure of the Democratic vote in the North, Stevens argued to his wavering colleagues, unless blacks were enfranchised or “the basis of representation” somehow changed, the expanded Southern membership “will always give them a majority,” and “at the very first election,” in which Southern voters were allowed participate, they would “take possession of the White House and the halls of Congress.” Constitutional “ruin would follow...oppression of the freedmen; re-amendment of their State constitutions; and reestablishment of slavery...But grant the right of suffrage to persons of color [and there will] always be Union men enough in the South [to] secure perpetual ascendancy to the party of the Union.”

Thus did Stevens and the Radicals lead their party to reprise the Jeffersonian-Jacksonian idea that theirs was no ordinary political party, but instead a party of principle, an indispensable constitutional counter-weight to a new “ruling and dominant class,” a new “oligarchy”—not the financial elite, this time, but the planter elite, the “Slave Power”—hell-bent, even after military defeat, on subverting the constitutional order.

Echoing the Antislavery constitutional narrative party leaders had forged in the 1850s, Stevens proclaimed that the 18th century framers had “repudiated the whole doctrine of the legal superiority of families or races and declared [against] ‘white man’s Government’” in 1776. The time to for restoring the Constitution “to what its framers intended” was now; and the route was amendment to enfranchise the freedmen.

Civil rights and the suffrage, also were not enough, however. The equal citizenship of the freedmen and the independence of their ballots required initial endowments. All agreed on free public education. And some, like Stevens, went further, demanding land redistribution—“forty acres and a mule.” After all, once Secession had cleared the Congress of Southern Democratic votes, the war-time Republicans had followed through on their platform promise and barred slavery from the federal territories, and, Dred Scott to the contrary notwithstanding, enacted the pioneering Homestead Act of 1862, which made free homesteads available to black and white freemen alike. So, too, with the Morrill Act, the Republicans had provided for free higher education via land-grant state colleges. What was good for free labor in the West was good for the freedmen in the South. So, Stevens and other Radicals pressed for redistribution of the large plantations.

For their part, freedmen and women also hewed to the old-fashioned republican view that freedom entailed ownership of productive property; self-ownership alone was not freedom. Many apparently agreed with Stevens on the necessity of confiscating the largest plantations of the South and redistributing them to ex-slaves to secure the African Americans’ liberty. “Only land,” said former Mississippi slave Merrimon Howard, would enable “the poor class to enjoy the sweet boon of freedom.”⁹⁷ In an 1865 “colloquy” with General Sherman and Secretary of War Stanton, twenty “Colored Ministers” concurred. Asked “what you understand by slavery, and the freedom that was to be given by the President’s Proclamation,” ex-slave Garrison Frazier, the group’s spokesman, replied: “The freedom, as I understand it, promised by the proclamation, is taking us from under the yoke of bondage and placing us where we could reap the fruit of our own labor, and take care of ourselves.” “Freedom,” he went on, meant that ex-

⁹⁷ Quoted in Eric Foner, “The Meaning of Freedom in the Age of Emancipation,” Presidential Address of the Organization of American Historians (Apr. 15, 1994), *Journal of American History* 81 (1994):458.

slaves were entitled “to have land, and turn and till it by our labor...and we can soon maintain ourselves.” The land, after all, was not only the property of traitors; it had been bought with the fruits of the bondsmen’s “unrequited” toil.⁹⁸

Most national African American leaders during Reconstruction took a more moderate stand on the land question. They heartily agreed that freedom demanded material independence, but, like most other prominent Republicans, the nation’s most prominent African Americans claimed that as long as they had suffrage, equal civil rights fairly administered combined with a right to “common school” education would suffice for hard-working freedmen and women to become freeholders and free-standing citizens. They urged ex-slaves to labor hard, save their earnings, and buy land on their own.⁹⁹

When Congress made plain its refusal to redistribute the estates of the South, the key sites of argument and struggle shifted. State and local black Republican leaders formed coalitions with representatives of white yeomen and tenant farmers to build up a Southern base for the “party of Free Labor,” the “Black Republicans” or a “poor man’s Party,” as planters scornfully called it. “Black Republican” judges and justices of the peace, along with Freedmen’s Bureau administrators, adjudicated contract disputes between freedmen and former masters in a fashion that confirmed the planters’ worst fears about “Negro rule” and confirmed as well the mutability and distributional consequences of common law doctrine. “Equal rights under law” was anything but self-defining; as always with contract and property relations, the devil was in the details. Called on to apply the principles of free contract and property to the emergent relations between landlord and sharecropper, “Black Republican” judges did so in ways that gave the latter a substantial measure of bargaining power and control over work and crop.¹⁰⁰

As the judges plumbed the meaning of the individual’s “right to the fruits of his labor” and Republican lawmakers enacted redistributive taxes, lien laws and land-lease measures, the planter class and the Democratic Party turned to terror to quell black voting and political associations. The Democrats and the Klan also meted out violence against black property holders and skilled craftsmen, aiming in one freedman’s words, to “[keep us] as the hewers of wood and drawers of water to as mean a class of white men...as live in any one of these reconstructed states.”¹⁰¹

Meanwhile, in the rapidly industrializing North, as the Labor Question began to eclipse the Slavery Question, it too had a constitutional cast. Many abolitionist-bred Republican

⁹⁸ “Colloquy with Colored Ministers,” *Journal of Negro History* 16 (1931):90-1; Foner, *Reconstruction*, 235-37; Leon F. Litwack, *Been in the Story so Long: The Aftermath of Slavery* (New York: Knopf, 1971), 401-04.

⁹⁹ Foner, *Reconstruction*, 54-54; Leon F. Litwack, *Been in the Story so Long*, 399-408.

¹⁰⁰ Foner, *Reconstruction*, 281-411; Thomas Holt, *Black over White: Negro Political Leadership in South Carolina During Reconstruction* (Urbana: University of Illinois Press, 1977); Edward Magdol, *A Right to the Land: Essays on the Freedmen’s Community* (Westport, Conn.: Greenwood Press, 1977); Donald Nieman, *To Set the Law in Motion: The Freedmen’s Bureau and the Legal Rights of Blacks, 1865-1868* (Millwood, N.Y.: KTO Press, 1979); Nieman, “African Americans and the Meanings of Freedom: Washington County, Texas as a Case Study, 1865-1890,” *Chicago-Kent Law Review* 70 (1994); Nieman, “Black Political Power and Criminal Justice: Washington County, Texas, 1868-1884,” *Journal of Southern History* 55 (1989).

¹⁰¹ Peter J. Rachleff, *Black Labor in the South: Richmond, Virginia, 1865-1890* (Philadelphia: Temple University Press, 1984), 65.

lawmakers joined labor's tribunes in weighing the common law of labor and the wage contract against the strictures of the new Reconstruction Constitution. "Equality of rights" between labor and capital demanded an end to "wage slavery" via repeal of many "caste-ridden" common law rules and statutory reconstruction of the labor market, including legal limits to the working day, which Congress enacted for federal workers in 1868, intoning the new constitutional dispensation of universal freedom. President Grant's 1869 National Eight Hour Law Proclamation did the same. Such invocations of constitutional precepts aimed at protecting black ex-slaves to support new rights for white workers in the North were not as farfetched as they may sound. Defending white "Free Labor" had been at the heart of the Republicans' anti-slavery outlook, and leading framers repeatedly declared that the Reconstruction amendments embodied promises, limited to "neither black nor white."¹⁰²

Beyond the unique harshness of the South's post-bellum Black Codes, law and state power could be used to hem white working people into dependent and degraded, caste-like conditions. They could be used to invest groups and classes of the propertied with "peculiar privileges and powers," and enshrine in Representative Thaddeus Stevens' words, "the recognized degradation of the poor, and the superior caste of the rich." This too the new Amendments forbade. Republicans celebrated their constitutional handiwork as a charter of Free Labor aimed at "subduing that spirit" which "makes the laborer the mere tool of the capitalist."¹⁰³ Like the language of Sumner's draft of the 1866 Civil Rights Act, these readings of the new Amendments' bearing on labor and capital echoed the old Jacksonian meanings of "equal protection." Like Sumner's draft, they provided a bridge between new understandings of the constitutional condemnation of "caste" and of "class legislation" (as bearing on racial equality) and old ones (as bearing on economic equality)—between the new inclusionary tradition and the old democracy of opportunity.¹⁰⁴

Some of the main architects of the laissez-faire, "liberty of contract" reading of the 14th Amendment were deeply attuned to both traditions, their constitutional commitments a meld of classical (political-economic) and racial liberalism. Michigan state Supreme Court chief justice Thomas Cooley, for example, authored the late 19th century's leading constitutional treatise, *The Constitutional Limitations Which Rest Upon the Legislative Power of the States of the Union*, the year the Amendment was ratified and saw it through a dozen editions and voluminous citations over the next decades. Cooley's political odyssey was richly typical of these "new liberal" jurists: a radical Jacksonian reformer in his youth; an abolitionist; a Free Soil Party organizer and a founder of the Republican Party, who broke with the Republicans during Grant's

¹⁰² Forbath, "Caste, Class, and Equal Citizenship," 30; Remarks of Sen. Wilson, Jan. 22, 1866, 39th Cong., 1st Sess., *Congressional Globe*, 343, quoted in Lea VanderVelde, "The Labor Vision of the Thirteenth Amendment," *University of Pennsylvania Law Review* 138 (1989) 446; Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: Norton, 1978), 108-40.

¹⁰³ Proposal by Sen. Sumner, Feb. 6, 1866, 39th Cong., 1st Sess., *Congressional Globe*, 674, quoted in Andrew Kull, *The Color-Blind Constitution* (Cambridge, MA: Harvard University Press, 1992), 252 n.27; Remarks of Rep. Stevens, June 13, 1866, 39th Cong., 1st Sess., *Congressional Globe*, 3148, quoted in Foner, *Reconstruction*, 254; Statement of Rep. Shannon, June 14, 1864, 38th Cong. 1st Sess., *Congressional Globe*, 2948, quoted in VanderVelde, "The Labor Vision of the Thirteenth Amendment," 471.

¹⁰⁴ Steven G Calabresi and Larissa C. Leibowitz, "Monopolies and the Constitution: A History of Crony Capitalism," *Harvard Journal of Law and Public Policy* 34 (2013): 1038-40; Steven G. Calabresi and Julia T. Rickert, "Originalism and Sex Discrimination," *Texas Law Review* 90 (2011): 37.

administration; and finally an independent “Mugwump” or new liberal reformer and jurist. Cooley’s judicial opinions during Reconstruction exemplified the highly abstract yet deeply felt fusion of abolitionist and laissez-faire constitutional meanings of “discrimination by the State,” striking down as “class legislation” such measures as Detroit’s school segregation ordinance, along with another township’s use of the tax power to float bonds subsidizing private enterprise. At the same time, Cooley’s 1868 treatise began laying foundations for *Lochner*, characterizing eight- and ten-hour day laws on behalf of various categories of workers as another species of “discriminatory class legislation”—a proposition seized on by employers’ attorneys and state high courts, where *Lochnerism* first took root in the 1880s.¹⁰⁵

Thus, just as Congress and the White House declared the constitutional *imperative* of hours laws, Cooley argued for their constitutional infirmity. From the start, the laissez-faire reading of the new “right of free labor” enshrined in the Reconstruction amendments was contested by another opposing one—holding that, in the words of one prominent labor leader, “legislative bodies [were] bound to interfere” in the name of “equal rights between labor and capital.”¹⁰⁶

Congress and the White House were channeling an emergent constitutional political-economic outlook anchored in the Reconstruction era’s burgeoning labor movement. Here too one found prominent leaders embracing a new racial liberalism. But in contrast to the new liberal jurists’ backward-looking revival of classical/Jacksonian laissez-faire, which was spurred by fears of working-class political activism and the specter of an American replay of the Paris Commune, labor’s tribunes instead linked racial inclusion with a new and more modern take on the democracy of opportunity and the political economy of citizenship.

...

Modernity and Loss – the Two Traditions’ Jagged Paths in the Gilded Age & Progressive Era [From NOMOS essay & Chapter Four]

As we’ve already glimpsed, the late 19th and early 20th century—the Gilded Age and Progressive era—brought an important turn in the democracy of opportunity tradition, one that in many ways recalled Jacksonian constitutional struggles. Decades earlier, at the beginning of the 19th century, the birth of the capitalist market economy had brought forth a crisis of mounting inequality and hardening class lines; Jacksonian Democracy was the polity’s dramatic response. The advent of corporate capitalism at the end of the 19th century produced another such crisis—one that prompted another constitutional reckoning, and ultimately, a reinvention of the ideal of the mass middle class. In the age of Jackson, powerful corporations had taken control of the nation’s banking and finance. Now big firms and nation-spanning corporations had come to dominate the entire economy.

This was the moment when the nation haltingly confronted the fact that the United States, like Europe, was destined to have a vast, permanent class of propertyless wage earners. It was no longer possible to contend that the industrial hiring was on a path to owning his own

¹⁰⁵ Forbath, “Caste, Class, and Equal Citizenship,” 39 n.169.

¹⁰⁶ George E. McNeill, “The Problem of Today,” in *The Labor Movement: The Problem of Today*, ed. George E. McNeill (New York: M.W. Hazen, 1886), 462.

workshop, the agricultural tenant or laborer his own farm. Indeed, the mass of farmers found themselves sinking into debt and tenancy, and a mass migration of young people from the countryside to the industrial centers was underway.¹⁰⁷

From the perspective of the Constitution of Opportunity, then, the dilemma was this: If the promise of equal opportunity meant universal access to middle-class status—and if only a mass middle class could protect the republican Constitution from decaying into oligarchy—then either the vanishing world of small producers and proprietary capitalism would somehow have to be restored, or the mass middle-class would have to be reinvented.

Agrarian Populists, labor advocates, and middle-class reformers, as well as elite attorneys, lawmakers, jurists and political economists were riveted by this problem. Reformers of all stripes—elite and plebian, pro- and anti-corporate, those who were reconciled to the “inevitability of bigness,” and those who deemed it a “curse”—plunged into constitutional political economy. The ideas and arguments differed greatly from earlier battles, but basic elements remained: the concern that economic oligarchy breeds political oligarchy; the idea that political equality and republican self-rule hinge on economic arrangements that sustain a broad middle class; and crucially, the fear that an impoverished and dependent mass of industrial workers and farm laborers or tenants and a moneyed aristocracy spelled *constitutional*, as well as social and political, trouble.¹⁰⁸

But some important things had changed with the rise of national markets and nation-spanning industrial corporations. There was a new sense that some of the constitutionally essential state police power functions had to shift upward to the national plane, or be permanently outmatched by the new scale of concentrated private economic power. Now that the political economy was so thoroughly nationalized, the broad authority and duties of what the framers had called “Police” in the service of “Public Happiness” could no longer rest solely on the states’ shoulders. They had to be shared by Congress.

The Currency Question, the Banking Question, the Trust Question, and the Labor Question were the central issues of the day. All had profound constitutional dimensions, as reformers made claims on the Constitution that we have quite forgotten. That forgetting is unfortunate, because these constitutional debates are surprisingly relevant today. Now that class inequalities have returned to Gilded Age levels, our political system is beginning to refight a number of the great political-economic battles of the late 19th and early 20th centuries—over the regulation of banking and credit, labor standards, unions and employment relations, the political power of corporations, and more generally, conflicts over the proper responses to growing concentrations of wealth and narrowing access to opportunity. A century ago, all sides of these debates were clear that these questions had constitutional stakes. Not so today. Today, some conservatives and libertarians see constitutional stakes in these questions, but most of their opponents do not.

In forthcoming work, we survey the first Gilded Age’s constitutional battles in each of these domains. Here we can glance only at the Gilded Age questions of labor and work. Gilded

¹⁰⁷ Forbath, “Caste, Class, and Equal Citizenship,” 28-9.

¹⁰⁸ See, e.g., Louis D. Brandeis, *The Curse of Bigness*, ed. Osmond K. Fraenkel (New York: Viking, 1934), 72-74.

Age and Progressive Era labor politics were shot through with constitutional claims and counter-claims—in popular and highbrow public discourse and in the courts and the halls of Congress. Here again, we are familiar today with the laissez-faire arguments mounted *against* labor laws. Just last term, the Supreme Court took a critical step toward reviving such arguments.¹⁰⁹

We have forgotten, however, the arguments of labor’s advocates and their allies that the Constitution’s promise of equal citizenship *demand*ed the laws that the courts struck down, demanded safeguards for the rights to strike and organize, demanded hours and wages legislation and demanded social insurance. That is unfortunate; for this was among the most important sites where modern middle-class-ness—and what FDR would come to call the new “economic constitutional” meaning of equal rights, equal opportunity and equal citizenship—were forged.¹¹⁰

The *old idea* had been that ownership of productive property—whether in the form of land or the tools of a trade and a place to ply it—was the material basis of middle-class-ness and of full membership in the political community. Only someone who owned such property, and enjoyed the economic independence that was thought to accompany it, had the minimum social measure of dignity and freedom from domination, as well as the material circumstances and sheer time to develop his capacities for judgment and deliberation sufficiently to participate in civic life.

The *new insight* generated by labor advocates and social reformers of many stripes in this period was this: These citizenly goods do demand an economic base, but that need not mean owning productive property. It all depends on how we order social and economic life and whether our laws and political economy provide for such goods for all.

The rise of large-scale industry and employment relations had upended the old propertied, self-employed household farm or workshop. And good riddance, perhaps, from the point of view of the women and poor laborers, disproportionately poor laborers of color, who had never enjoyed full civic membership in that world of the small producer’s household and the old middle class. A decent livelihood, some leisure for self-improvement, civic life, some control over one’s work life—all these were social resources. None was naturally restricted to any single class. To be a wage earner, these reformers insisted, was not necessarily a life of dependency or servitude. It all depended on whether our laws and political economy provided for such goods for all: “employees” as well as “employers,” women as well as men (although the real change in women’s economic opportunities, and social position, did not occur until the 1970s).

Ironically, it was the readiness of the nation’s courts to enjoin strikes and union organizing, imprison trade unionists, and nullify labor and social insurance legislation—all in the name of employers’ constitutionalized property rights and freedom of contract—that provoked the labor movement and social reformers to delve so deeply into text, history, treatises and

¹⁰⁹ See Cynthia Estlund and William E. Forbath, “The War on Workers,” *New York Times*, July 3, 2014.

¹¹⁰ Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), in *The Public Papers and Addresses of Franklin D. Roosevelt* (New York, Random House, 1938), 1: 752.

precedents to produce a new constitutional narrative of economic and social development, and a new constitutional political economy of equal rights, opportunity and citizenship.¹¹¹

By overcoming grave inequalities of bargaining power and providing the individual worker with real opportunities for “actual liberty of contract,”¹¹² so trade unionists and champions of labor law reform boasted, unions and collective bargaining could (and did) overcome the contradiction between “political democracy” and “industrial tyranny,” bringing all the expectations of living under the Constitution—the freedom to associate and voice grievances, deliberate over common concerns, share authority, choose representatives, and be heard before suffering loss—into industrial life.¹¹³ By combining labor law reform—repealing the old judge-made law of industrial and employment relations—with minimum wages and maximum hours laws, safety standards, and social insurance, the unionists and reformers aimed to transform industrial workers into middle-class citizens. There is some historical truth, in other words, to the bumper sticker slogan that unions brought you the modern middle class, although this achievement had to await the New Deal and World War II.

In the complex trajectory of movements and ideas between Gilded Age radicalism and the New Deal, much was gained and much lost. The racially inclusive Populists and Knights of Labor with their ambitious affirmative constitutional claims for “Reconstruction of the whole social structure” collapsed under the combined weight of terror and mass disenfranchisement in the South, violent state repression of broad strikes and boycotts and broad-based unionism in the North, and race-baiting and racial divisions throughout.

The campaign to “redeem” the South for white supremacy was an elite-led affair, prompted by the threat of a poor people’s party that joined tenants, sharecroppers, and mine and mill workers on both sides of the color line. The Redeemers did not disenfranchise poor blacks alone. To defuse Populism, they also aimed to strip the vote from lower class whites, and they succeeded. The poll tax proved a defining feature of the Jim Crow order, and in many southern states far more whites than blacks—a majority of white voters—were effectively barred from the ballot box. Combined with the all-white primary and racial intimidation, which took precedence in blocking black voter participation, the poll tax would operate during the New Deal era to deprive liberal Democrats of their natural constituency among hard-hit Southerners of both races.

The Supreme Court played an important part in the process, almost strangling the Equal Protection Clause in its infancy, striking down or narrowly reading civil rights statutes, and confirming that the constitutional guarantees of black citizenship would not impede Jim Crow, Klan violence and mass disenfranchisement. The Court thus lent its sanction to the reconstituted caste system of the South; the New South thereby secured a special status as a distinct society within the Union’s new constitutional order. The Court’s bad faith, shared by the other branches, led to a strange anomaly: a reactionary core, the Solid South, at the heart of the New Deal liberal coalition.

¹¹¹ See Forbath, “Caste, Class, and Equal Citizenship,” 43-49, 51-7.

¹¹² That phrase would find a home in the preamble to the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

¹¹³ See Louis Brandeis, Testimony before Comm. on Industrial Relations (1915), in Brandeis, *The Curse of Bigness*, ed. Fraenkel, 72-74.

And yet for all their genuine efforts at cross-racial solidarity, the kind of decentralized, democratic “producers” political economy—the “Co-operative Commonwealth” that the Knights and Populists envisioned—never really had much place for the landless agricultural laborer or the new immigrant factory proletariat. The more statist-leaning Progressives had more to offer. Their translations of the democracy of opportunity were various, but in general, they pushed the tradition toward a greater reliance on welfare-and-regulatory state-building, administration, and social insurance, while still holding out the prospect of a more democratic civil society.

What most separated Progressives from Gilded Age radicals, however, was the death of racial liberalism among white reformers. As the Populist moment passed, the movement’s commitment to multi-racial democracy—always fragile and ambivalent on the part of white Populists—became a dissenting tradition within the tradition of dissent, shunted out of the mainstream of reform ideals by the increasingly virulent racism of white America in the first decades of the twentieth century. When the New Deal brought a thick modern rendering of the democracy of opportunity into the corridors of national power, the inclusionary tradition was barely heard.

The New Deal: Forging a Mass Middle-Class [from NOMOS essay & Chapter Five]

The New Deal brought to a head many of the constitutional and political-economic clashes left simmering from the Progressive Era. Because the Supreme Court’s opposition to the New Deal lent moral and political armor to the “economic royalists,” Roosevelt made his showdown with conservatism on the field of constitutional political economy. Not since Jackson had any President spoken so candidly and starkly about the nation’s class divisions and inequalities. The “economic royalists,” whom Roosevelt likened to “the eighteenth century royalists who held special privileges from the crown,” stood accused of building a “dynastic scheme” that threatened to subvert our constitutional democracy and replace it with a “new despotism”—“a new industrial dictatorship.”¹¹⁴

Here was the original Constitution of Opportunity—and in particular its anti-oligarchic strand—in its purest modern form. Roosevelt’s repeated invocations of the “economic royalists” and their “[n]ew kingdoms” were a story of both economic and political “despotism.” In his speech at the 1936 Democratic Convention, Roosevelt argued that “[f]or too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people’s property, other people’s money, other people’s labor—other people’s lives.” He framed the result in terms of the Declaration of Independence: “[L]ife was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.”¹¹⁵ Roosevelt credited the Populist and Progressive antimonopoly movements for understanding the constitutional stakes. These movements understood that “the inevitable consequence” of placing “economic and financial

¹¹⁴ Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), in *The Public Papers and Addresses of Franklin D. Roosevelt* (New York, Random House, 1938), 5: 230, 231-34.

¹¹⁵ *Ibid.*, 232-33.

control in the hands of the few” was “the destruction of the base of our form of government” and its replacement with “an autocratic form of government.”¹¹⁶

A democratic government, on FDR’s and the New Dealers’ account, had not only the constitutional power but the duty to enact a “Second Bill of Rights.” FDR’s Second Bill embraced a host of broad new social and economic rights: to decent work and livelihoods, to education and training and retraining, to housing, healthcare, and social insurance. These rights, Roosevelt argued, were imperative to restore the “forgotten[] ideals and values,” once secured by the “old and sacred possessive [common law contract and property] rights.”¹¹⁷ Such enabling social and economic rights, FDR explained, amounted to an “economic constitutional order,”¹¹⁸ essential “to protect majorities against the enthronement of minorities” and secure a “democracy of opportunity.”¹¹⁹

The New Dealers proved unable to enact all these rights. Notably, they failed to enact universal health insurance. Still, the Fair Labor Standards Act (FLSA), brought an array of national labor standards like maximum hours and minimum wage laws; the National Labor Relations Act (NLRA) brought statutory and then judicial recognition of new national safeguards for what the New Deal Court now dubbed workers’ “fundamental rights” to organize, build unions, and bargain collectively. Rounding out these measures in the transformation of countless working-class Americans’ lives, from precariousness and near poverty toward a real measure of material security, and dignity and voice at work, was the Social Security Act (SSA). Its nationally administered system of social insurance provided a baseline of material well-being when the (white male) breadwinner was unable to work because of unemployment or old age.

These and other New Deal measures would underwrite the emergence of a new mass middle class. They profoundly changed class relations for the Americans who benefited from them. But they were bought at a high price. They were crafted to exclude African-Americans. At the heart of the New Deal liberal coalition in Congress was the reactionary core of Southern Democrats. Representing an impoverished region, these “Dixiecrats” were staunch supporters of the New Deal until the late ‘30s. They insisted that the key pieces of New Deal legislation we have mentioned—the FLSA, the NLRA along with the SSA’s old age and unemployment insurance—all exclude the main categories of black labor, agricultural and domestic workers. By allying with northern Republicans, or by threatening to do so, the “Dixiecrats” stripped all the main pieces of 1930s New Deal legislation of any design or provision that threatened the separate southern labor market, its racial segmentation, or its low wages.¹²⁰

¹¹⁶ Roosevelt, Address at the Texas Centennial Exposition (June 12, 1936), in *ibid.*, 5: 209, 212 (1938).

¹¹⁷ Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), in *ibid.*, 3:287, 288, 292.

¹¹⁸ Franklin D. Roosevelt, Campaign Address on Progressive Government (Sept. 23, 1932), in *ibid.*, 1: 752.

¹¹⁹ Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), in *ibid.*, 6: 366.

¹²⁰ See, Forbath, “Constitutional Welfare Rights,” 1835–36; James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939*, (Lexington: University of Kentucky Press, 1967), 40–76; Arthur Altmeyer, *The Formative Years of Social Security* (Madison: University of Wisconsin Press, 1966), 15; Kenneth Finegold, “Agriculture and the Politics of U.S. Social Provision: Social Insurance and Food Stamps,” in *The Politics of Social Policy in the United States*, ed. Margaret Weir et al. (Princeton N.J.: Princeton University Press, 1988), 199–234; Ira Katznelson et al., “Limiting Liberalism: The Southern Veto in Congress, 1933–1950,” *Political Science Quarterly* 108 (1993): 283–302; Ira Katznelson, *When*

Keeping African-Americans dependent on local labor markets and local poor relief was the principal reason for the distinctly segmented and caste-ridden system of social insurance and labor rights bequeathed by the New Deal. This also explains why what would come to be known and reviled as the “welfare” portions of the SSA—chiefly the Aid to Dependent Children (ADC, later AFDC, later TANF) program, which provided assistance to single mothers—was designed for local and state authorities to administer, in sharp contrast to the old-age and unemployment programs, which had national administrators (but also excluded blacks). Local southern authorities simply refused ADC assistance to black mothers, keeping them dependent on labor in the cotton fields and white households, on whatever terms the local labor markets would bear. Three decades later, the Great Society’s Medicare and Medicaid programs would be based on just this segmentation of federal support into a contributory centralized, national program, which would come to be called “social security,” and a decentralized one administered by state and local officials in the discretionary fashion of ages-old poor relief, which came to be known and reviled as “welfare.” Medicare would be built on the centralized, national framework of “social security”; and Medicaid on the decentralized, state-administered and stigmatized framework of “welfare.”

During the ‘40s, liberal New Dealers set out to “complete the New Deal” with bills to remedy the (racialized) gaps in the Social Security Act, to enact national health insurance, alongside old age and unemployment insurance, and to commit the federal government to achieve full employment. These were all features of Roosevelt’s 1944 Second Bill of Rights, and they enjoyed broad support. But the measures expired in Congress, as the Dixiecrats joined with conservative Republicans to block them.

Thus, the New Deal constitutional political economy would be built around elevating the white, male workingman or office worker into a middle-class breadwinner. Deeply gendered as well as racially exclusive, FDR’s “democracy of opportunity” proved a kind of affirmative action for white men.¹²¹

...

The Constitution of Opportunity in the Great Society [from Chapter Six]

Over the course of one critical decade beginning around 1963, almost exactly a century after Reconstruction’s birth and untimely death, the United States remade our law of equal opportunity. The main instigator and driver of the change was the civil rights movement. Beginning with the Montgomery bus boycott in 1956, and culminating in the epic confrontation in Birmingham, the wave of sit-ins, demonstrations, and riots that swept the South and the nation in the spring and summer of 1963 pushed open a door to reform that for decades had been shut tight. In the end, all of the branches of the federal government, especially the Congress and

Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America (New York: W.W. Norton, 2005).

¹²¹ See, Marion Clawson, *New Deal Planning: The National Resources Planning Board*, (Baltimore, MD: Johns Hopkins University Press, 1981), 225–36; Stephen Kemp Bailey, *Congress Makes a Law: The Story Behind the Employment Act of 1946*, (New York: Columbia University Press, 1950), 165–67; Richard Bense, *Sectionalism and American Political Development, 1880-1980* (Madison: University of Wisconsin Press, 1984), 152–68; Katznelson et al., “Limiting Liberalism,” 283–302; Katznelson, *When Affirmative Action Was White*.

President Lyndon Johnson, but also the courts, made it through that door, enacting and enforcing a series of enormously important legal changes. Together these changes amounted to what historians call a “Second Reconstruction,” because they substantially advanced the aims of the original Reconstruction.¹²²

At the center of this story is a series of framework statutes: the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and related amendments.¹²³ Both at the time, and today, Americans have understood these statutes to be doing constitutional work. Indeed, these statutes, together with the actions that have upheld and enforced them, have to a large extent forged our modern collective understanding of the constitutional dimensions of equal rights, equal opportunity, and “equal protection of the laws”—of the relationship, in short, between the Constitution and opportunity.¹²⁴ It is an understanding firmly rooted in the Fourteenth Amendment and in Congressional power to enforce that Amendment on behalf of groups that have been excluded, subordinated, or discriminated against—African-Americans first of all, but also others. At the heart of this modern understanding are concepts of antidiscrimination and equal opportunity associated with *Brown v. Board of Education* and the dismantling of Jim Crow.

This modern understanding has been enormously generative. Movements from the women’s movement to the disability rights movement to the LGBT rights movement have built extensively on its jurisprudential and normative foundations. Today, the genre of claims rooted in this modern view—claims about group-based fairness, inclusion, nondiscrimination, and equal opportunity—seems to cover the field. It fairly characterizes not only the main claims of contemporary civil rights advocates in many spheres, but also many of the main claims of their *opponents*, who invoke thinner conceptions of nondiscrimination and equal opportunity as objections to affirmative action, disparate impact law, and other practices rooted in thicker conceptions of the same ideas. In this way, competing versions of these ideas have demarcated the playing field of debates about opportunity and the Constitution for half a century. It is easy to forget that the Constitution of Opportunity ever meant anything else.

And yet this modern understanding is rooted in the peculiar dynamics of the moment in which it was forged. The critical decade from the mid-1960s through the early 1970s was an unusual time. It was a transformative decade for our entire law of equal opportunity, not only the law of racial discrimination and inclusion. This moment saw the birth of the War on Poverty, which greatly expanded the system of federal social provision, establishing large parts of what remains its architecture today: from Medicaid to Food Stamps, Head Start, and Title I funds for the education of poor children. These programs extended the project of the New Deal to many who had been excluded from it. This was, moreover, the start of President Lyndon Johnson’s Great Society, which aimed to make the opportunity structure as a whole more open and

¹²² [The term “Second Reconstruction” comes from C. Vann Woodward, who coined it at the very start of this transformation, before most of what we now conceptualize as the Second Reconstruction had occurred.]

¹²³ [statutory cites]. Framework statutes note.

¹²⁴ The Second Reconstruction arguably begins with *Brown*. But it was the engagement of the other two branches, through a series of lawsuits enforcing Title VI of the Civil Rights Act of 1964, brought by the Justice Department and the Department of Health, Education, and Welfare, beginning a decade after *Brown*, that began to make *Brown*’s promise something like a reality in the South. See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* (1969).

accessible, not only to the poor but to everyone, especially by dramatically increasing federal investment in primary, secondary, and higher education.

Both the War on Poverty and the Great Society more generally were projects of enormous political and public salience, just as the projects of the New Deal had been. But something important was different this time around: they were generally not framed as *constitutional* projects. Presidents Kennedy and Johnson and their congressional allies made the case for these programs to the American people in a distinctively moral register, with claims framed in terms of Americans' aspirations for a society that was fairer and more open, one in which Americans' freedom to pursue their dreams in life would not be as circumscribed by barriers of poverty or race. In Kennedy's voice these arguments sounded in the high moral register of national obligation; in Johnson's they were thicker with blunt and plain talk of human needs, basic fairness, and the hope for a better society. For both of these presidents and their congressional allies, these moral arguments were not, at their core, constitutional arguments. Somehow the moral register and the constitutional register had come apart. Neither these Presidents, nor any other since FDR, has brought a constitutional argument about economic opportunity squarely to the American people in the way that FDR did.

Except on civil rights. Civil rights were, and remain, an unambiguously constitutional domain—and they were to a great extent about economic opportunity. Civil rights claims fit into, and also helped define, a new, post-New Deal paradigm of what a constitutional claim sounds like—as well as a new paradigm of the relationship between the Constitution and opportunity. On the old constitutional terrain, where the New Deal's constitutional battles were fought, the central questions were questions about the structures and institutions that define our economic life: work, labor, and employment, currency, credit, trade, and antitrust, along with an often-countervailing set of claims about economic liberty against the emerging welfare and regulatory state. The paradigmatic judicial intervention on constitutional grounds was economic: intervention to protect, for instance, freedom of contract, of the kind we now associate with *Lochner v. New York*.

But judicial intervention was not the only—or sometimes even the primary—field of constitutional debate. As we have seen, the Constitution of Opportunity was understood by generations of political actors of quite different stripes to be a source of legislative and executive duties as well as judicially enforced constraints. Maximum hours laws like that struck down in *Lochner*, legislation lifting the harsh, judge-made bans on unions and workers' collective action, as well as railroad regulations, anti-trust and currency measures aimed at boosting the opportunities of small producers, new businesses, and the middle classes were thought to flow from such duties—all in the service of constitutional liberty and equal rights. The whole endeavor of constructing a welfare and regulatory state was understood and defended by its proponents as constitutionally required. Both sides, in other words, the defenders of classical liberal restraints and the architects and proponents of Gilded Age, Progressive and New Deal era state-building claimed to be standing on bedrock constitutional commitments. And the most consequential arguments were only occasionally and intermittently in the courts.

Modern, by which we mean roughly post-WWII, constitutionalism looks different. The Constitution itself became increasingly identified with the Constitution *in court*. Lawyers and

judges therefore took on a more indispensable role in the project of constitutional interpretation. For laypeople, the Constitution became an object of reverence and national affiliation, but one whose specific meaning can be known for certain only by consulting experts—and ultimately, by testing arguments in court. Borrowing the religious metaphor that Sandy Levinson has used to great effect, we might describe this new constitutionalism as a more “high church” form of constitutionalism.¹²⁵ It remains dominant today. People disagree today about constitutional meaning in important areas, but they look to like-minded lawyers and judges for needed expertise and to a great extent they look to the Court for a definitive answer—both hallmarks of the new high church constitutional order.

This shift had a number of intertwined causes, which we will discuss below. One of its most important effects was to render non-constitutional (not *unconstitutional*, but *non-constitutional*) many of the most salient constitutional arguments of the prior hundred and fifty years of American constitutional debate, arguments focused on questions of constitutional political economy. Gone was the talk of the oligarchic concentrations of power that threatened our constitutional system. Gone was the idea that a broad and wide open middle class was necessary to sustain our democratic order. On the other hand, the Second Reconstruction, or at any rate a subset of it centered on courts, fit more comfortably with the newly ascendant high church constitutionalism of the day.

Thus the sweeping political-economic changes of the Second Reconstruction and the rest of the Great Society, which were deeply intertwined as a matter of both policy and politics, were bifurcated at their constitutional foundations. The new law and jurisprudence of racial equality—the Second Reconstruction—was built on the foundation of the Reconstruction Amendments, although it relied as well on the new and broader powers of the federal government, especially the commerce power, forged in the New Deal.¹²⁶ The War on Poverty and the Great Society more generally were different: these policy changes were generally understood to be constitutional only in the sense of being constitutionally *permitted*, not in the thicker sense of *doing constitutionally necessary work*.

The institutions and programs built as part of the Great Society substantially advanced the aims of the democracy of opportunity tradition. This work built most directly on the New Deal, but it also began to stitch back together the Reconstruction-era vision of a democracy of opportunity that aimed to open up broad economic opportunities to people of all races, not only to whites. But the Great Society stood in a different relationship to political economy and especially to politics than these precedents. Unlike FDR, Presidents Kennedy and Johnson did not understand themselves to be confronting a class of oligarchs with concentrated economic power. Indeed they imagined that their policies would help business as well as labor. In place of older proposals to break up monopolies and large estates and to tax great wealth—proposals that were once mainstays of the democracy of opportunity tradition—the architects of the Great Society offered across-the-board tax cuts, to individual and corporate rates, and promised a rising tide of growth that would lift all boats.

¹²⁵ SL, Constitutional Faith. Levinson uses the labels “Catholic” and “Protestant” here.

¹²⁶ Bruce Ackerman, vol 3 on New Deal-Civil Rights hybrid

These priorities were the product of a distinctive moment in American economic history, one that may have seemed, at the time, to presage a new postwar economic order of diminishing inequality and strong, broad-based growth. This new order offered what appeared to be a durable expansion of opportunities to join the middle class, with private firms rather than the government providing new benefits such as health insurance, and with collective bargaining securing both good wages and job security for a large subset of workers. Many of the opportunity-expanding policies of the Great Society era were designed around this new economic order, with its increasingly privatized provision of important benefits; these programs aimed to include in this new order some of the groups, especially African-Americans and women, who had disproportionately been left out of it.

As it turned out, this postwar economic order was short-lived. Its unraveling led to the unraveling of a substantial part of the twentieth century version of the democracy of opportunity. The remaining sections of this chapter tell, first, a story of why the postwar expansion of economic opportunity in the Great Society moment took the shape that it did; second, why it no longer seemed to be doing constitutional work; and third, how it came undone. Then in the next, concluding chapter, we turn to what reviving the democracy of opportunity tradition might mean today.

I. The Affluent Society, the Great Compression, and the Democracy of Opportunity [Omitted]

II. The Great Forgetting: How Constitutional Political Economy Receded

Constitutional argument was at the center of party politics for much of the first century and a half of American history. As we have seen, figures from Andrew Jackson to FDR situated constitutional arguments—often, arguments about constitutional political economy—at the center of their parties’ political programs. Indeed, it was constitutional political economy at its most existential that provided the justification for organizing the first true political party in American history: abandoning earlier fears of faction, the first Democrats argued that only by banding together could we save our constitutional order.¹²⁷ The wrenching economic dislocations of the early twentieth century, especially in the 1930s, formed the backdrop for a similarly existential constitutional politics, in which FDR confronted a Supreme Court determined to block the creation of the modern social welfare state and the modern administrative state in the name of constitutional claims of economic liberty.¹²⁸

And then, quiet. In the immediate post-WWII period and thereafter, the constitution receded from the center of party politics. This change parallels and is related to a more general change with respect to partisan divisions: by the standards of most of American history the parties in the postwar period were simply not all that far apart.¹²⁹ Their divisions over economic matters did not disappear, but with the anti-New Deal faction defeated, those divisions were smaller.

¹²⁷ [xref to Van Buren discussion in ch 2]

¹²⁸ [xref to discussion in ch 6]

¹²⁹ [Poli sci footnote—Sarah Binder etc]

Moreover, political disagreements about macroeconomic issues were significantly muted by the rise of professional economists, whose influence grew throughout the twentieth century and who reframed formerly political questions as managerial problems best solved by experts. As we have seen, Democrats in Congress and the White House by the 1960s had eagerly embraced this view of economic management, which thrived in the postwar boom years.¹³⁰ As professional economists' stature and role in governance increased, questions once at the center of American politics, such as the perennial debates about tight or loose monetary policy, were relegated to the fringe, where they have largely remained until very recently.¹³¹

Moreover, and more essential still to our story, by the mid-twentieth century what sounded like a *constitutional* argument had changed. The paradigmatic constitutional battleground was no longer the fight over New Deal economics; those questions seemed settled.¹³² Instead the paradigmatic constitutional battleground was civil liberties, and later, civil rights. The rise of civil liberties claims in the twentieth century, especially free speech claims beginning in the 1930s and accelerating in the 1960s, with free exercise claims following closely behind, underscored the central role of the Supreme Court in American constitutionalism.¹³³ These were cases pitting individuals against the government; the only fair arbiters and constitutional decision-makers in such cases were courts, and ultimately the Supreme Court.

As Aziz Rana perceptively argues in a forthcoming book,¹³⁴ the hotly contested constitutional politics of the early twentieth century, in which many Americans argued for substantial changes to the Constitution, gave way by the mid-twentieth century to a remarkable national consensus. The Constitution became identified with patriotism, "Americanism," and (especially during and after World War II) with equality, fundamental rights, and the rule of law. In part this was a self-conscious and highly successful effort by lawyers and American elites to define the American political and economic system, with the Constitution at its center, in opposition to totalitarianism.

This new image and understanding of the Constitution and constitutionalism were cemented by *Brown v. Board* in 1954, which is surely the most famous and politically salient constitutional conflict of the twentieth century and also the most famous and salient Supreme Court case in our history. *Brown* itself reinforced the idea of the Constitution as fundamentally about equality and fundamental rights. The fights over desegregation that followed *Brown* put a fine point on something else: the supremacy of the Supreme Court, especially over Southern state governments, on questions of constitutional interpretation. After the confrontation in Little Rock, many Americans unlikely to know the Supremacy Clause by name could nonetheless see and understand that the most important arbiter of the meaning of the Constitution was the Court.

Thus, by the postwar era, American constitutionalism looked very different than it had at the start of the twentieth century. It was first of all more court-centered. That meant a larger

¹³⁰ [xref previous section—Keynesianism mixed with what today seems essentially supply-side economics.]

¹³¹ [Footnote tracing hard money / opposition to federal reserve in the 21st century from Ron Paul to Rand Paul and Ted Cruz—today it is certainly much closer to the mainstream of one of the major parties]

¹³² And indeed they were settled—until recently. X-ref to concluding chapter.

¹³³ [Citing cases]

¹³⁴ [Rana, Making American Constitutional Consensus]

role for experts (lawyers) with specialized knowledge of legal doctrines and rules—a more “high church” constitutionalism. It was also inevitably more precedential and doctrinal, and often bound up more closely with constitutional text. Arguments in a less textual, more structural mode continued, but became rarer.

By the mid-twentieth century, then, arguments like many of those in the first two thirds of this book—claims about constitutional political economy, claims that the Constitution requires and rests on a particular economic substratum that legislators and courts must work to maintain—were twice cursed. First, they spoke to problems that seemed solved, in domains that seemed best left to experts in economics. Second, they no longer sounded like constitutional arguments at all, because they spoke primarily to legislatures and executives rather than courts and counseled the enactment and enforcement of laws rather than court-enforced constitutional limits on such actions.

The result was a great forgetting of a whole paradigm of American constitutional argument, one attuned to economic structure and enforced primarily by the political branches, and only secondarily by courts. Fights over economic policy have continued, but they have lost their constitutional dimension.

There are exceptions, and they are instructive. In the late 1960s and 1970s, a welfare rights movement and its legal allies argued that many elements of the War on Poverty had a constitutional dimension—that basic economic protections for the poor were not simply a policy choice but actually a constitutional right. These arguments were generally unsuccessful. Where they did succeed, it was where their claims were the most procedural and judicial—the most focused on due process and courts.¹³⁵ Both then and now, Americans see a constitutional issue when a poor person seeks a hearing or a trial transcript—but not when the same person seeks a job.

Thus, by the early 1970s, laws and courts were doing constitutional work to promote racial inclusion in the postwar economic order, but they were doing nothing to protect the economic foundations of that order. As those foundations eroded, with deindustrialization, globalization, and the decline of unions, the twentieth century version of the democracy of opportunity began to unravel.

III. The Great Unraveling

...

Almost from the start, Great Society liberalism’s many-sided initiatives in the service of a thick, substantive vision of racial equality “in fact and in result” met with white resentment, which politicians like George Wallace were swift to exploit, in the key of populist opposition to elite national actors’—liberal federal judges’, lawmakers’ and attorneys’—“arrogant” interventions in local, white middle- and working-class spheres of governance. These foes of civil rights enforcement drew on some of the legacies of the old Constitution of Opportunity to depict integration and affirmative action as threats to white children’s basic initial endowments of opportunity.

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This move made political sense because of the profound economic changes in post-Great-Society America. By the end of the 1970s, it was becoming painfully clear that employment was not expanding but contracting in the very private sector industries, like automobiles and steel, which were the base of decently-paid blue-collar work. Great Society liberals had believed that no further rounds of New Deal-style political-economic intervention were needed in the American economy; what was needed was to make a prosperous working-class America racially inclusive. But in fact, by the end of the 1970s, instead of an economy of expanding middle-class opportunities, what emerged was a world in which race-conscious measures like hiring quotas and affirmative action in employment appeared to be at the center of an increasingly bitter game of redistribution between white and black workers—a world, in President Obama’s words, in which “opportunity comes to be seen as a zero sum game, in which your dreams come at my expense.”¹³⁶

This was nothing LBJ or the Great Society liberals in Congress intended. But many civil rights leaders could see it coming. Even before the ink was dry on the Civil Rights Act of 1964, figures like Martin Luther King, Bayard Rustin, and A. Philip Randolph warned Congress that achieving “our full citizenship” demanded economic reform as well as civil rights.¹³⁷ It was essential but insufficient to “outlaw discrimination in employment when there are not enough jobs to go around.” Decently-paid industrial jobs, they pointed out, already were dwindling – above all in the nation’s “relatively high-wage heavy industries into which Negroes have moved since World War I.” And nothing was taking their place. “[G]reat city minorities” were feeling “the pressures of increasing poverty and unemployment.” Forcing white workers to make room for blacks in every tier of industrial employment was essential. But, again, leaders like King and Rustin predicted it would not be enough. “[I]t would be dangerous and misleading to call for [enforcement of antidiscrimination norms],” Rustin argued, “without at the same time calling attention to the declining number of employment opportunities in many fields.” “We cannot have fair employment,” he insisted, “until we have full employment.”¹³⁸

The “full emancipation and equality of Negroes and the poor,” Dr. King told rallies and demonstrations, Congress and the White House, demanded a “contemporary social and economic Bill of Rights.”¹³⁹ Like FDR’s Second Bill of Rights, which King was evoking, King’s “Bill of Rights” emphasized decent incomes, education, housing, and full employment for all.¹⁴⁰ By contrast, King and the others argued at Johnson’s 1965 White House Civil Rights Conference, LBJ’s War on Poverty not only fostered the “mischievous” notion that “the War on Poverty is solely to aid the colored poor”—it also provided “job counseling but no jobs.”¹⁴¹ A credible War on Poverty would involve large scale “social investments” to “destroy the racial ghettos and

¹³⁶ Barack Obama, “A More Perfect Union,” March 18, 2008, in *The American Spirit*, ed. Kennedy and Bailey, 663.

¹³⁷ Bayard Rustin, Address to Democratic National Convention, Atlantic City, N.J. (Aug. 1964), in *Bayard Rustin Papers* (Frederick, Md.: University Publications of America, Inc. 1988), Reel 3, 27.

¹³⁸ Bayard Rustin, Draft for Testimony on FEP, in *Rustin Papers*, Reel 4, 4-5, 7.

¹³⁹ Martin Luther King, Jr., *Where Do We Go From Here: Chaos or Community* (New York: Harper & Row, 1967), 193, 199-200.

¹⁴⁰ Forbath, “Caste, Class, and Equal Citizenship,” 87.

¹⁴¹ Rustin, Address to Democratic National Convention, in *Rustin Papers*, Reel 3, 27.

decently house and employ the white and Negro poor.”¹⁴² How otherwise could the President hope to achieve something like “equality as a fact and equality as a result”?¹⁴³

King’s meld of civil rights with New Deal-style demands for social and economic enfranchisement and reconstruction found support in LBJ’s Department of Labor. The Secretary of Labor waged a sustained battle against the “partial and piecemeal” social services/job counseling approach being adopted by the War on Poverty. Offering carefully documented accounts of the “human slag heap” emerging in the nation’s industrial regions, including central cities where black unemployment already had begun to “explode,” the Secretary of Labor, like King and the organizers of the March on Washington, urged a War on Poverty that included regional and sectoral public investment, incentives for job creation, and coordinated employment services and training.¹⁴⁴ But this structural approach to the problems of the millions of black and white poor and working-class Americans, this “New Deal thirty years late,”¹⁴⁵ and the public spending and redistributive measures it demanded, were not in the cards. So, while anti-discrimination law would gain a place in the industrial and public sector workforce for a great many African Americans, a great many were still left out, and poverty in our inner cities only deepened.

Meanwhile, disillusionment with Great Society liberalism did more damage to the fortunes of liberal Democrats than LBJ imagined in his famous prediction that enacting civil rights would cost his party the loyalty of the white South. The conservative appeal of Ronald Reagan completed the unraveling of the old base of solid Democratic support among middle- and working-class whites throughout the nation, who felt that the pro-business, pro-civil rights, pro-“welfare state” liberalism of latter-day Great Society Democrats had too little to offer them—and too much to offer others—during the economic stresses of the late ‘70s and early ‘80s.

And small wonder: the legacy of the open opportunity structure, for white men, and the institutions that had sustained a broadly accessible middle class at mid-century, were coming undone. Deindustrialization and deregulation were setting the stage for a new Gilded Age of global finance. With Reagan’s blessings, business leaders and lawmakers chipped away at the public and private social benefits forged during the New Deal and expansive postwar decades. By century’s end, ordinary Americans’ opportunities for material security and a decent livelihood were a shadow of what they had been. An ascendant conservative movement in these decades cut progressive taxes, dismantled initial endowments in public schooling and mass higher education, and executed a devastating attack on unions’ economic and political power and on many of the cornerstones of middle-class economic security, such as private-sector pension plans, that unions had safeguarded. At the same time, this movement unraveled much of the structure of New Deal-era financial regulation, enabling the financial sector’s meteoric rise. In this narrower and more brittle opportunity structure, and through conservative change in the courts, a thinner, more individualistic, and formalist conception of equal opportunity has taken

¹⁴² Bayard Rustin, Untitled Article on the Freedom Budget, in *Rustin Papers*, Reel 13, 1.

¹⁴³ Lyndon B. Johnson, Commencement Address at Howard University, in *Public Papers of the Presidents, Book II, 1965*, 636.

¹⁴⁴ Memo, Willard Wirtz to Walter Heller, Nov., 19, 1963, Administrative History of the Department of Labor, Vol. III, Documentary Supplement, Sec. III-B, Box 5, LBJ Library, Austin, TX

¹⁴⁵ Rustin, Untitled Article on the Freedom Budget, in *Rustin Papers*, Reel 13, 9.

center stage, harking back to the old liberalism of the *Lochner* Era and its colorblind constitution. The ascendant individualistic, formalistic conception of equality and equal protection condemns racial preferences aimed at undoing the legacies of group exclusion and subordination—just as the individualistic, formalistic conception of equality and equal protection in the *Lochner* Era condemned “redistribution” among economic classes.

Assuming that the nation’s class problems were solved, the Great Society’s Constitution of Opportunity left behind the older traditions of constitutional political economy that addressed them—with thicker conceptions of equal rights and equal opportunity and distributive commitments across class lines. As a result, this version of the Constitution of Opportunity was ill-equipped to cope with the tangled knot of race and class that lay beneath the main problems it aimed to address.

Conclusion - The Constitution of Opportunity Today [from NOMOS essay]

Today, the inclusionary tradition, whose greatest triumphs were secured in the Second Reconstruction, seems an indelible fixture of the constitutional firmament. Martin Luther King has become a kind of secular saint, claimed by all sides of continuing debates about many questions of race and affirmative action. Enormous contestation continues about how best to interpret our constitutional commitment to an inclusionary vision of equal protection anchored in *Brown v. Board*, King, and the Civil Rights Act of 1964 and related statutes. But no one doubts the existence of such a commitment—or its constitutional character. We argue today about how far this commitment extends, whether its core is a principle of colorblindness or one of antisubordination, whether other groups such as gays and lesbians have a claim on this inclusionary tradition that is parallel to the claims of racial minorities, and so on. The shared premise of all sides in these debates is that an inclusionary conception of equal protection and equal opportunity is a core American constitutional commitment, and that questions about the inclusion or exclusion of a set of groups, including but not limited to racial minorities, are questions of fundamental constitutional concern.

To an enormous extent, our current ideas about the relationship between the constitution and equal opportunity still follow the tracks laid down during the Second Reconstruction. And because of this, the older constitutional tradition that has been our main focus in this essay—the democracy of opportunity tradition—remains largely latent. This is unfortunate, because these two traditions can fulfill their fundamental promise only in concert.

The idea that these two American constitutional traditions, the inclusionary one and the democracy of opportunity one, must work together rather than separately has been forcefully articulated at several critical junctures in the trajectory of both. In Reconstruction itself, some of the earliest advocates of black equality argued that only with the redistribution of land and capital to the landless, poor freedmen would it be possible to fulfill the guarantees of the Fourteenth Amendment; this led them into nascent “free labor” political alliances with poor white tenant farmers and laborers—alliances that the resurgent white, wealthy “redeemers” in the South crushed as Reconstruction receded.¹⁴⁶ The great labor and agrarian reform organizations of the Gilded Age—the Knights of Labor and the Populists—both stood for a union of the

¹⁴⁶ Forbath, “Caste, Class, and Equal Citizenship,” 32-34, 49-50.

inclusionary tradition and the democracy of opportunity tradition, outfitted for an industrial America. And finally, in the Second Reconstruction, as we have seen, some (including King) argued for broad redistributions of opportunity that would have bound the inclusionary tradition once again to the democracy of opportunity tradition.

But that is not what we got. There are many reasons why. One thread of the story is [the shift described above]: While the Constitution of the Populists and the New Dealers was largely a charter to be fulfilled with legislation and executive action, which courts needed to approve (and interpret) but not initiate, the past half-century has been dominated by a much more court-centered constitutionalism. This approach places the burden of constitutional decision-making entirely in the hands of the branch least equipped to consider systemic questions of the shape of the political-economic order. Moreover it is a branch whose past forays into constitutional political economy—especially in the *Lochner* era—have come to stand as anti-precedent. Thus, a turn toward complete judicial dominance over the field of constitutional interpretation and construction is almost certain to mean an eclipse of the democracy of opportunity tradition.

The inclusionary tradition has never been an exclusively judicial, court-centered constitutional tradition. Framework statutes such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 stand as perhaps the paradigmatic modern examples of legislation that does constitutional work—in the sense that they do not simply enforce the judiciary’s judgments about constitutional meaning, but make constitutional meaning themselves.¹⁴⁷ Still, quite a bit of the inclusionary tradition does run through courts, as current court fights by same-sex couples for inclusion in the institution of marriage attest.

The democracy of opportunity tradition has a much more limited judicial footprint—by necessity. It is no coincidence that the Populist anti-monopolists called for an end to the judiciary’s “monopoly” over constitutional interpretation as part of their constitutional program. In general, most interventions in our political economy require action by the political branches, not (only) the courts. This is true of the changes to currency, banking, tax policy and antitrust law that the Populists saw as key restraints on oligarchy. It is equally true of the state action required to create pathways to middle-class livelihoods, for instance in the educational sphere. These and other major components of the democracy of opportunity tradition are not, in the first instance, projects for the judiciary. But the judiciary often must play some supporting role—at a minimum, through its judgments about Congressional authority to intervene in our political and economic order. For this reason, losing the democracy of opportunity tradition, or writing it out of our understanding of American constitutionalism, would have profound consequences *in court* as well as elsewhere.

The work of entwining the democracy of opportunity tradition with the inclusionary tradition is more urgent now than it has been for generations. The reasons are ones the Populists and other Gilded Age reformers would have found familiar. Our present economic and political moment is marked by deep anxiety about economic opportunity. It is far from clear that the broad middle class that has been the backbone of our democratic political-economic order will

¹⁴⁷ William Eskridge and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven, CT: Yale University Press, 2010); Bruce Ackerman, *We the People, Volume III: The Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2014).

survive another half-century. It is likewise far from clear that in our politics we will avoid the gradual slide toward oligarchy. A democracy of opportunity is no longer something we can take for granted, as many of the architects of the Great Society more plausibly could and did half a century ago.

Rebuilding the democracy of opportunity tradition, and entwining it with the inclusionary tradition, is a multifaceted project. It entails building paths from poverty to the middle class, and even to the height of “wealth and distinction,” compatible with our contemporary economic order—while at the same time undoing old decisions, many of them dating back to the New Deal, that concentrate the supports for a middle-class life, especially health care and social security, in occupational categories that are disproportionately white and male. Entwining these two great traditions means identifying and ameliorating the barriers that prevent people from pursuing these paths, *especially but not only* those barriers that have group-based exclusionary effects. It also involves reversing the processes of concentration of economic and political power in few hands. The core idea of the democracy of opportunity tradition is to alter the *tilt* of our political economy: from a political economy that tends to concentrate economic and political power to one that tends to disperse it.

Rising levels of inequality bring many old problems to the surface in new forms that require novel responses. Consider the problem of initial endowments. Most forms of economic independence two centuries ago required land and tools—which some could not afford except by credit on onerous terms. From the early republic through Reconstruction, states and federal government attempted to regulate the availability of these basic building blocks of economic independence through both constitutional and statutory means. Over time, secondary education came to play the same role—leading to a successful effort to spread free, public secondary education, as a basic endowment for all citizens, across the nation, in part through state constitutionalism. Today, higher education plays the same role. It is the starting point for so much of the spectrum of productive work that it is becoming a kind of gateway to a middle-class life. But the expense of higher education means that many people’s economic prospects once again turn heavily on the terms of credit, in the form of student loans. Some recent salutary changes to the federal student loan program have attempted to ameliorate this problem, with income-based repayment and loan forgiveness for students who work in public service jobs. Such efforts are important; they show that the political system is beginning to understand the magnitude of the problem; and they do work that has (unacknowledged) constitutional significance. But to make these fundamental building blocks of access to a middle-class life universal, we would need to do much more, perhaps replacing our current system of paying for higher education primarily through tuition (and loans) with a system, echoing the common school, of paying for higher education through taxation, perhaps through taxes on those who are economically successful after earning college degrees.

Building a democracy of opportunity today would likely entail a fundamental shift in the distribution of the tax burden. Today we tax labor—especially middle-class labor—far more heavily than we tax wealth. Indeed, we essentially do not tax wealth at all: states and localities tax some specific forms of property, primarily real estate; and both states and the federal government attempt to tax the *return* on capital in the form of interest, dividends, and capital gains. But no one taxes capital itself. A century ago, the increasing concentration of wealth in a

few hands spurred Progressive reformers to enact what was initially simple legislation, but eventually became an Article Five Amendment in response to an intransigent Court, to tax income from any source.¹⁴⁸ Today we need to begin to find appropriate ways to tax capital wealth. There are many, the simplest of which is probably a less-loophole-ridden estate and gift tax. Rather than attempting to account for and tax wealth every year, such an approach taxes it once a generation. If such a tax had a high enough top rate, and could not be evaded through trusts and other devices, over time it could meaningfully mitigate both oligarchy and unequal opportunity. It could shift the tax burden from the workers of the present toward the accumulated concentrations of capital of the past.

As our political economy shifts, many sets of questions once old—questions of banking, currency, and credit, of labor and the suppression or protection of unionism—are new again. For instance, the Constitution of Opportunity should prompt us to revisit the constitutional foundations of antitrust, which began not as a technocratic regime focused on consumer surplus, but as a bulwark against firms so large they tend to find it too easy to crush competitors and capture governments. A constitution of opportunity today would revitalize and deepen legislative and regulatory commitments such as the Community Reinvestment Act, which distribute access to credit on good terms more evenly throughout society. This was an Act born to expiate the sins of racial discrimination in lending—that is, it began as part of the inclusionary tradition. But it is at the intersection of both traditions that it makes the most difference.

In these examples—and many others—the Constitution of Opportunity today depends on federal Congressional power to solve national political-economic problems. That much has been clear since the New Deal. And that is why we must return, finally to courts. Today, courts are the arbiters of the scope of Congressional and executive power over domestic policy. And so, paradoxically, the courts may be where that it makes the most difference that the Constitution of Opportunity tradition is a *constitutional* tradition.

So, let us conclude by considering the court cases with which we began, *Citizens United* and its offspring, and the Obamacare case, *NFIB v. Sebelius*. The thrust of recent Supreme Court decisions in cases such as *Citizens United* and *Arizona Free Enterprise* and *McCutcheon v. FEC* has been the wholesale rejection of statutory efforts to in any way equalize political influence—among donors, among candidates, among citizens.¹⁴⁹ In a variety of contexts, the Court has analyzed these efforts similarly. The Court reasons that government has a legitimate policy goal of preventing corruption, although it defines corruption in an exceedingly narrow way. However, the Court holds that this effort to prevent corruption must come to terms with a powerful force: the Constitution. The sole constitutional value in play in this story is First Amendment protections for free speech.

The democracy of opportunity tradition we have been chronicling can help us understand the distinctive constitutional principles on the other side of these cases. It is not a coincidence

¹⁴⁸ *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895); U.S. Const. Amend. XVI.

¹⁴⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (deeming it unconstitutional for the government to suppress corporate political speech); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett* 131 S. Ct. 2806, 2818 (2011) (declaring state campaign finance rules burdensome to candidates who spent large amounts of personal money to finance their campaigns).

that the Montana campaign finance law the Court struck down in 2012 in *American Tradition Partnership v. Bullock*,¹⁵⁰ was enacted in 1912, at the height of Progressive constitutional agitation to undo the oligarchic power structure of the railroad barons and corrupt party officials who dominated the politics of the West.¹⁵¹ The statute was an urgent response to the fact that one company “clearly dominated the Montana economy and political order” —owning or controlling “90% of the press in the state and a majority of the legislature.”¹⁵² Bribery and campaign contributions by large corporations had “convert[ed] the state government into a political instrument” serving the interests of absentee stockholders rather than the people of Montana.¹⁵³ Restoring popular sovereignty in Montana required circumventing the legislature, using the Progressives’ new invention, the initiative process, through which Montana passed a number of reforms including primary elections; the direct election of Senators; and the Montana Corrupt Practices Act, the campaign finance law in question. The Corrupt Practices Act had a constitutional aim—not only in the sense of being constitutionally permissible, but in a more demanding sense: this statute actually implemented the Constitution as a reform-minded public then understood it, informed by the anti-oligarchy constitutional precepts of the day. In other words, it was an Act that did constitutional work, protecting the political economy on which the Constitution rests.

To a majority of the current Supreme Court, *American Tradition Partnership* was simply a case that followed from *Citizens United*; there was nothing new to see, and the Montana Supreme Court’s decision upholding the law was summarily reversed.¹⁵⁴ That is because the current Court’s campaign finance jurisprudence sees only one aspect of the Constitution in play: the First Amendment liberty to speak and spend.¹⁵⁵ How different this jurisprudence would look if the Court could see the real constitutional stakes on *both* sides by considering not only individual First Amendment liberty, but also the constitutional problem that aroused the voters of Montana in the first place. Like the Jacksonians before them, and like the New Dealers later on, the Montana reformers who created the initiative process and used it to enact the Corrupt Practices Act were attempting, in an innovative way, to rebuild the democratic political economy the constitution requires, in response to new economic and political conditions that threatened it.

A Supreme Court that took seriously this important piece of the American constitutional tradition would not necessarily develop an elaborate doctrine of anti-oligarchy, with new doctrinal tests and tiers of scrutiny. But neither would such a Court simply set the anti-oligarchy constitution aside. Anti-oligarchy principles are too fundamental to the American constitutional order and to our democracy of opportunity tradition of constitutional argument. Mindful of the three branches’ joint and several obligations to uphold the anti-oligarchy principle, such a Supreme Court would reason very differently about the interplay between its own decisions and

¹⁵⁰ *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (applying *Citizens United* and striking down the Montana law).

¹⁵¹ Larry Howell, “Once upon a Time in the West: *Citizens United*, *Caperton*, and the War of the Copper Kings,” *Montana Law Review* 73 (2012): 27-28.

¹⁵² *W. Tradition P’ship v. Att’y Gen. of Mont.*, 271 P.3d 1, 8 (Mont. 2011) (internal quotation marks omitted) (quoting Michael Malone and Richard Roeder, *Montana: A History of Two Centuries* 176 (Seattle: University of Washington Press, 1976)), *rev’d sub nom. Am. Tradition P’ship*, 132 S. Ct. 2490.

¹⁵³ *Ibid.* 9.

¹⁵⁴ *Am. Tradition P’ship*, 132 S. Ct. 2490.

¹⁵⁵ *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

the political economy. When confronted with legislation whose aim and effect is to act as a constitutional bulwark against oligarchy, such a Court would weigh this heavily, applying a strong presumption, with deep roots in our constitutional tradition, toward upholding the law.

If *Citizens United* and its offspring return us to the Progressive Era, the Obamacare case calls on us to retrace tracks laid down in the battles over the New Deal. In particular, the case was litigated as a dispute about the scope of federal power—the power to tax, to spend, and to regulate commerce. From this perspective, the Constitution enters the picture only as a constraint: the constitutional question is whether limitations on Congressional power *permit* the law’s enactment.¹⁵⁶ Justice Ginsburg plainly saw the stakes in the Court’s tightening of these constraints, and noted ominously that both the Chief Justice’s opinion and the Joint Dissent “bear a disquieting resemblance” to the “long-overruled decisions” of the *Lochner* era.¹⁵⁷

There were only the barest hints of the constitutional argument on the other side: that the Affordable Care Act (the ACA or Obamacare) might itself address infirmities that are of constitutional importance. Even among commentators and political activists outside the court, those who did articulate a constitutional imperative for the ACA did so in terms of an individual “right” to health care. The *structural* constitutional stakes were absent.¹⁵⁸

Yet when viewed through the lens of the Constitution of Opportunity, that is just where the most profound constitutional implications of the case can be found. In the New Deal fights over the scope of Congressional power, the stakes on *both* sides were plain. The question was whether we would continue to have a Constitution of Opportunity that sustained a broad middle class. As the scope of health care itself has expanded over the past half-century, both access to care and the potentially ruinous cost of large medical expenses have loomed ever larger over the nation’s opportunity structure. Medical debt and bankruptcy have become an important component of all debt and bankruptcy; health insurance has become a central marker of the security of middle-class jobs. But this is a double-edged sword: employer-based health insurance had also, in the pre-ACA world, become a driver of “job-lock,” where people’s opportunities to pursue a new career path or set out to start a business of their own are thwarted by the need to keep their health insurance. With health care now accounting for, in the Court’s telling, “17.6% of our Nation’s economy,”¹⁵⁹ “its high cost, its unpredictability, and its inevitability” have made health care and health insurance central to the economic life of every American, and a key criterion on which Americans evaluate all job opportunities.

Meanwhile, before the Medicaid expansion, the pre-ACA Medicaid program was plainly inadequate as a means of providing health care to the American “working poor.” The Social Security Act and other New Deal measures were crafted in ways that tended to exclude African-Americans; the Medicare/Medicaid distinction reproduced this divide, with the Medicaid program subject to far more limitations and state control. The inadequacy of pre-ACA Medicaid

¹⁵⁶ See *Sebelius*, at 2257 (“We ask only whether Congress has the power (under the Constitution to enact the challenged provisions.”)

¹⁵⁷ *Ibid.*, 2629

¹⁵⁸ The closest anyone comes to acknowledging such stakes is one oblique sentence, in which Justice Ginsburg states that the “Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy in the interest of those who labor to sustain it.”

¹⁵⁹ *Ibid.*, 2609.

left many working Americans unable to afford health insurance; they were compelled to pursue their lives and ambitions under the enormous and avoidable burden and peril of going without it. This flouts what Americans long understood as a bedrock constitutional commitment to a political economy in which hard work earns one a decent and dignified livelihood. Exactly what that means has changed according to the standards of one's day. But in today's America, a worker without access to health insurance is recognizably lacking the economic and physical security that are among the basic components of what we now understand to be a middle-class life.

The ACA addresses these problems. An in-kind basic entitlement to health care from the state, even if filtered through the private insurance industry, functions as a kind of initial endowment for the modern era, a down payment on what is needed to successfully navigate today's opportunity structure. Both the so-called "individual mandate" and Medicaid expansion, in other words, were doing constitutional work that the Court in *NFIB* did not acknowledge.

The Medicaid expansion in particular had a constitutional warrant that the Court overlooked, one that straddles the divide between the inclusionary tradition and the democracy of opportunity tradition. The law brings poor Americans into the common constitutional destiny of work and opportunity, along a path the Great Society began to chart.¹⁶⁰ This is a project for both the inclusionary tradition and the democracy of opportunity tradition. Extending the health-insurance preconditions of a middle class life past the boundaries of recalcitrant states is not just government action absent constitutional constraint. It is an attempt, at the federal level, to use federal power to compel states to set up their medical infrastructures in a way that promotes rather than diminishes equal opportunity. This ought to have inflected many major features of the Court's analysis in *NFIB v. Sebelius*.

The question of whether a state's medical system will reinforce inequality of opportunity or diminish it—especially for citizens who have long been disproportionately excluded from major dimensions of middle-class life—is not merely a question of public policy. It is also a constitutional question, one that sits squarely at the intersection of the inclusionary and democracy-of-opportunity strands of our constitutional tradition. We have spent more than a century now arguing about the shape of these constitutional commitments. These arguments are unlikely ever to end. Reviving the full Constitution of Opportunity—both great strands of this essential American constitutional tradition—can help us understand the import of policy choices and legal and constitutional doctrines in this and many other fields. The regulation of such diverse fields as health care, education, banking and credit, antitrust, and campaign finance often seem quintessential areas in which the state makes policy choices, constrained occasionally by constitutional limits enforced by courts. But that story is incomplete, and obscures some of the deepest and most important relationships between each of these fields and our constitutional order. The choices we make in all of these fields shape our constitutional political economy in ways that many past generations of Americans recognized, and that we ought to recognize again, shaping the opportunities each of us enjoys for liberty and the pursuit of happiness.

¹⁶⁰ Sadly enough, it was a path shadowed by the New Deal's accommodations to Jim Crow thirty years earlier. After the Medicaid decision in *Sibelius*, the segmented racialized divisions of New Deal social policy continue to shape and undermine the constitutional fortunes of health insurance for poor Americans today.