
TO: BERKELEY CSLS COLLEAGUES

FROM: WILLY FORBATH

RE: WEALTH, COMMONWEALTH & THE CONSTITUTION OF
OPPORTUNITY

Below you'll find a forthcoming article; it's a first installment of Joey Fishkin's and my book-in-progress, *The Constitution of Opportunity*. My talk will draw on the article but mainly it will sketch a few more elements of the larger project. I am looking forward to your criticisms and suggestions. We will put them right to work.

THE ANTI-OLIGARCHY CONSTITUTION

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INTRODUCTION

The Great Recession has awakened us to something new in the nation's social and economic development. Inequality has been rising for decades, but recent shocks have laid bare what this means for our social structure: a shrinking middle class and an increasingly entrenched wealthy elite. Americans remain profoundly attached to an idea of America as a middle-class nation, with very few of us on the economic margins, abundant opportunities to raise oneself or one's offspring into the middle classes, and everyone enjoying a fair shot at wealth and success. In fact we are becoming the opposite. The number of Americans facing real 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 have grown increasingly narrow and brittle, and class differences have widened, the 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.

Not a republic? That claim sounds constitutional in nature. And indeed it is. But it is a claim rooted in a constitutional tradition that we have forgotten – one that this Article argues we ought to reclaim.² Throughout the nineteenth and early twentieth centuries, waves of reformers of widely different stripes responded to crises in the nation's opportunity structure like the one we are experiencing today with *constitutional* claims about equal opportunity. These reformers argued essentially that we cannot keep our constitutional democracy – our "republican form of government" – without constitutional restraints against oligarchy and a political economy that maintains a broad middle class, accessible to everyone.

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,³ arguments about

¹ See, e.g., TIMOTHY NOAH, *THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT* 10-27 (2013); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2013).

² This Article is the first installment of a larger project aiming to recover this constitutional tradition. See JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE CONSTITUTION OF OPPORTUNITY* (forthcoming 2015).

³ For what is perhaps the *locus classicus* of this important form of constitutional argument, see CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (2000).

constitutional political economy begin from the premises that economics and politics are inextricable, and that our constitutional order rests on a political-economic order. The constitutional problem of oligarchy is the danger that concentrations of economic power and political power may be mutually reinforcing – and that because of this, sufficiently extreme concentrations of power may threaten the Constitution’s democratic foundations.

How, exactly, does a political-economic problem become a *constitutional* problem? In at least two ways, according to the advocates of the set of constitutional arguments we will call *the Anti-Oligarchy Constitution*. First, they contend that sufficiently great concentrations of economic power undermine political equality by creating a “moneyed aristocracy”⁴ or “economic royalists”⁵ – plutocrats who dominate and control our polity and government. In this way concentrated wealth could destroy the promise of equal citizenship at the foundation of our democratic Constitution. This argument begins with economic relations but locates the constitutional problem squarely in the political sphere.

Second, generations of reformers argued that gross class inequalities and oligarchic concentrations of economic power undermine fair equality of opportunity within the economic sphere – and that this, too, is a constitutional problem. 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 linked to the Fourteenth Amendment’s promise of equality. In the early republic “equal protection” and “equal rights” played a rather different role in debates about opportunity in both legislatures and courts.⁶ The Constitution was understood to protect the rights of white men to a fair or equal chance to join the “middling classes” that were the bulwark of republican government. Avenues to wealth and distinction had to be open to ordinary Americans, not just the privileged few; the roads to a middle-class life had to be wide open and broad enough to accommodate everyone. The Constitution required these things, reformers argued, in order to protect the fair equality of opportunity at the heart of the political-economic order on which the Constitution rests. Moreover, to return to the first argument, an America without these things would become an oligarchy or “moneyed aristocracy” rather than a republic.⁷

The reformers who made these constitutional arguments against oligarchy in the nineteenth and early twentieth centuries were interpreting the Constitution as they understood it. 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. But their project was not exclusively interpretive. These reformers also offered

⁴ See *infra* Part I.

⁵ See *infra* Part III.

⁶ See, e.g., *infra* Part I.

⁷ See *infra* Part I.

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.

Today there remains broad agreement across much of the political spectrum that it is important to promote opportunity, avoid oligarchy, and build a robust middle class. Amid disagreement about how to vindicate these principles, the principles themselves remain mainstays of our politics. However, we have lost the crucial idea that these are *constitutional* principles.

Today, from the left, the dominant story of the relationship between the Constitution and the problem of oligarchy goes 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 reducing inequalities in political influence is not even a permissible *goal* for campaign finance regulation.⁸ In this story the Constitution makes an appearance only at the very end. The problem of oligarchy is not itself a constitutional concern; the Constitution’s only role is to constrain what legislators can do in response. Those who tell this story argue that, rightly interpreted, the Constitution should be less of a constraint.

For an affirmative argument about the demands the Constitution makes on political economy and the opportunity structure, today the best place to look is 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 Even where such claims cannot be enforced in court, they can at least *inflect* court decisions, the way libertarian freedom of contract looms behind *National Federation of Independent Business v. Sebelius*.⁹ This libertarian

⁸ See *infra* Part IV (discussing the implications of the anti-oligarchy principle for campaign finance law).

⁹ All of the opinions in the case other than Justice Thomas’s discuss the libertarian dystopian hypothetical of a government that requires individuals to purchase broccoli. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (“But cars and broccoli are no more purchased for their ‘own sake’ than health insurance.”); *id.* at 2619-20 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that, although individuals may elect not to purchase broccoli during their lifetimes, they are certain to use healthcare services); *id.* at 2650 (joint dissent) (positing that, even if individuals elect not to purchase broccoli, such an election is not an activity that the government can regulate). Justice Kennedy focused on a problem quite far from the doctrinal surface of the case but near the heart of a libertarian’s concerns: that Obamacare “changes the relationship between the citizen and the Federal Government in a fundamental way.” *The Affordable Care Act Cases – Opinion Announcement (Justice Kennedy, Dissenting)*, OYEZ, at 00:01:20 (June 28, 2012), http://www.oyez.org/cases/2010-2019/2011/2011_11_400.

school has drawn on Jacksonian constitutionalism, but it has done so in a partial and sometimes misleading way. However, this tradition does get one big thing right: the Constitution really can be understood to make substantive demands on our political economy.

The project of this Article is modest. The Article begins to tell the story of anti-oligarchy as a constitutional principle. We do this through a series of snapshots in time. We begin with the distinctive political economy of the Jacksonian Democrats and their vision of equal protection. We then skip forward to Populist constitutionalism, then to the Progressives, and then to the New Deal. The Constitution meant different things to these movements in their respective moments; the central constitutional issues of the day have shifted with political change. But a recurring theme has been the idea that the Constitution makes demands on our economic and political order – and that among those demands is the need to avoid oligarchy. We sketch the story of this idea through the examples that follow. We then conclude with a brief discussion of how this form of constitutional argument was lost – and why it might matter to recover it.

I. JACKSONIAN EQUAL PROTECTION

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 a constitutional provision aimed against laws that injure groups defined by race and sex and other “discrete and insular minorities.”¹⁰ But there was also another equal protection, *before* the Equal Protection Clause. For Andrew Jackson and his followers, equal protection was a constitutional principle about protecting the “poor” many against class legislation that privileged the “rich” few.¹¹

Today, when we read about Jackson’s war on the Bank, and the fights from that era about tariffs and internal improvements, we think we see a story about states’ rights and the limits of national power, and we understand it largely in terms of a Southern elite determined to keep Congress’s hands off slavery.¹² But that is only half of the story. Entwined with those battles was a different strand of constitutional debate, one about the nation’s distribution of

¹⁰ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

¹¹ Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 576, 590 (James D. Richardson ed., Washington, D.C., U.S. Gov’t Printing Office 1896) (vetoing an act to establish the Bank of the United States).

¹² See RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS* 198 (1987) (“The nullifiers . . . used the concept of states’ rights not simply as a way of denying the authority of the federal government, but also as a way of getting the federal government to protect and even endorse the institution of slavery, particularly on the question of its expansion into the territories and on matters involving comity.”).

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.¹³ The new “paper-money system,” Jackson told the nation in his Farewell Address, threatened “to undermine . . . your free institutions” and place “all power in the hands of the few . . . to govern by corruption or force.”¹⁴

The Bank controversy perfectly distilled the Jacksonians’ fears. 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.”¹⁵ 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.”¹⁶

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.”¹⁷ Such laws created “inequalities of wealth and influence” that would lead “inevitably” to the invasion of the rights of the “weak” by the “strong.”¹⁸ Specifically, such laws would enable an emerging oligarchy – the “moneyed aristocracy”¹⁹ – to amass economic and political power over the “middling and lower classes.”²⁰ In

¹³ Andrew Jackson, Farewell Address (Mar. 4, 1837), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, *supra* note 11, at 292. *See generally* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN, 179-518 (2005).

¹⁴ Jackson, *supra* note 13, at 302.

¹⁵ William Leggett, *The Monopoly Banking System*, EVENING POST, Dec. 1834, *reprinted in* 1 A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT 96, 103 (Theodore Sedgwick, Jr. ed., New York, Taylor & Dodd 1840).

¹⁶ *Id.*

¹⁷ *Id.* at 97.

¹⁸ William Leggett, *The Reserved Rights of the People*, EVENING POST, Dec. 13, 1834, *reprinted in* DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY 7, 8 (Lawrence H. White ed., 1984).

¹⁹ William Leggett, *Despotism of Andrew Jackson*, EVENING POST, May 23, 1834, *reprinted in* 1 A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT, *supra* note 15, at 285, 290.

²⁰ William Leggett, *The Division of Parties*, EVENING POST, Nov. 4, 1834, *reprinted in* 1 A COLLECTION OF THE POLITICAL WRITINGS OF WILLIAM LEGGETT, *supra* note 15, at 64, 66.

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.”²¹

The Jacksonians viewed the direction of economic development that this would-be oligarchy was charting with a distinct sense of *constitutional* crisis: they argued that it subverted the nation’s republican Constitution. 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 regardless 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.”²² 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”²³ threatened to create “a dangerous connection between a moneyed and political power.”²⁴ The “moneyed interest”²⁵ 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.”²⁶ This is, in short, the problem of oligarchy.

These concerns became the mainspring of a distinctive Jacksonian constitutionalism. They inflected other 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).²⁷ 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

²¹ Jackson, *supra* note 11, at 590 (emphasis added).

²² 8 REG. DEB. 3348, 3357 (1832) (statement of Rep. Bell).

²³ Andrew Jackson, Seventh Annual Message (Dec. 7, 1835), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, *supra* note 11, at 147, 164.

²⁴ *Id.* at 167.

²⁵ Jackson, *supra* note 13, at 305.

²⁶ Jackson, *supra* note 23, at 165.

²⁷ Jackson, *supra* note 11, at 582-84, 590 (rejecting Congress’s power to delegate authority over currency through the Necessary and Proper Clause).

purposes.”²⁸ 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.²⁹

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,³⁰ 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 enjoyment of republican liberty and citizenly independence.³¹ It was not the Jacksonians but instead their Whig foes and abolitionist critics who first probed the contradictions between championing an egalitarian political economy for the white “laboring classes” and perpetuating black bondage;³² 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.³³

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.

To respond to this threat, the Jacksonians created the first modern mass political party.³⁴ Such a creature seemed to its conservative foes a

²⁸ *Id.* at 590.

²⁹ *Id.*

³⁰ For this critical perspective on Jacksonian democracy, see DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 347-49, 352-65 (2007); ALEXANDER SAXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC: CLASS POLITICS AND MASS CULTURE IN NINETEENTH-CENTURY AMERICA* 247 (1990).

³¹ SAXTON, *supra* note 30, at 148-54 (explaining the various forms of political racism prevalent among Jackson’s supporters and opponents); *see also* STEPHANIE MCCURRY, *MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS, AND THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY* 92 (1995) (“The yeomanry’s position . . . incorporated the very values on which yeoman and planters found agreement—that the control of property and dependents alone conferred the rights of freemen and masters . . .”).

³² HOWE, *supra* note 30, at 586 (describing the Whigs’ lack of enthusiasm for slavery and Henry Clay’s early criticism of it).

³³ *Id.* at 837-49 (detailing the emergence of the women’s rights movement in the mid-nineteenth century).

³⁴ GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* (2002) (describing Martin Van Buren’s role in forging and justifying the first permanent mass party).

constitutional nightmare: a permanently organized faction.³⁵ But 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 to save the republic from the new "[a]ristocracy of wealth."³⁶

II. THE GILDED AGE CRISIS AND THE ANTI-OLIGARCHY CONSTITUTION

The late nineteenth century saw the beginning of a second great crisis of mounting inequality and hardening class lines. As in Jackson's day, the Constitution's guarantees of equal opportunity and democratic citizenship seemed at stake; the republic seemed in real danger of becoming an oligarchy. While Jacksonians had worried about the rise of big corporations astride the nation's banking and finance, the Gilded Age saw nation-spanning firms coming to dominate much of the industrial economy.³⁷ Centralized private corporate power over the nation's banking, currency, and credit – and alternatives to it – resumed its central place in political and constitutional battles, but now the power of big corporations and concentrated wealth seemed to extend over the whole economy.³⁸ In the words of Justice Peckham, deciding one of the Court's first cases under the new Sherman Anti-Trust Act, "corporate aggrandizement" drove "out of business . . . worthy" small producers and the "ruin of such a class . . . by an all-powerful combination of capital" was among the evils that Congress aimed to avert.³⁹ The new trusts and monopolies, cobbled together out of scores and often hundreds of hitherto competing firms, reduced the independent producer and proprietor to "a mere servant . . . of a corporation."⁴⁰ Doing so, they seemed to tear down the nation's republican political economy, making "our government," in the words of Justice Field's increasingly influential *Slaughter-House* dissent, "a republic only in name."⁴¹

From the early republic through the Civil War, the economic mainstay against oligarchy in the tradition we are sketching here was a broad middle class composed of propertied producers: "[t]he planter, the farmer, the

³⁵ *Id.* at 43.

³⁶ *Id.* at 162, 173; see also MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* 376 (1867) (arguing that the political system, if "honestly administered," would enable public opinion to trump the "contracted rule of a judicial oligarchy . . . acting in concert with the monetary power").

³⁷ James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 258 (1989) (discussing the shift away from a small business economy to one dominated by large centralized firms).

³⁸ *Id.*

³⁹ *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 322-23 (1897).

⁴⁰ *Id.* at 324.

⁴¹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 110 (1873) (Field, J., dissenting).

mechanic, and the laborer,” whose political equality hinged on their economic independence.⁴² Equal rights were thought to safeguard that independence.⁴³ The Gilded Age and Progressive Era marked the period 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.⁴⁴ President Lincoln’s “free labor system” – and its promise of propertied, middle-class independence for every “poor man” who labored hard and earnestly – was no more.⁴⁵ It was no longer possible to contend that the industrial hireling was on a path to owning his own workshop, the agricultural tenant or laborer his own farm.⁴⁶ 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.⁴⁷

From the perspective of the Anti-Oligarchy Constitution, then, the dilemma was this: If the constitutional 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 anticorporate, 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.⁴⁸

⁴² Jackson, *supra* note 13, at 305.

⁴³ *Id.* at 304-05.

⁴⁴ See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 20 (1999).

⁴⁵ *Id.* at 28.

⁴⁶ *Id.*

⁴⁷ See *id.* at 29.

⁴⁸ See, e.g., LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* 72-74 (Osmond K. Fraenkel ed., 1934) (“The grave objection to the large business is that, almost inevitably, the form of organization . . . prevent[s] participation, ordinarily, of the employees Thus we lose that necessary co-operation . . . which the American aspirations for democracy demand. It is in the resultant absolutism that you will find the fundamental cause of prevailing unrest . . .”).

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 else be permanently outmatched by the new scale of concentrated private economic power.⁴⁹ There was a new sense that the Constitution itself had to be changed in order to provide new constitutional bases and machinery for the old Anti-Oligarchy Constitution.⁵⁰ This era saw hundreds of proposals for state and federal constitutional amendments, an unprecedented number of which were enacted.⁵¹ The push of these developments was to rebuild government in ways adequate to reshape and regulate the emerging political economy to avoid a world of “industrial slavery” and new corporate oligarchs.⁵²

Populism and the People’s Party arose out of agrarian hardship and discontent in the 1880s and ’90s; the movement’s leaders and activists reached out from their agrarian base to forge alliances with Gilded Age unions and industrial workers.⁵³ Populist reformers responded to the distinctive and alarming political economy of the Gilded Age with scores of books and entire weekly and monthly journals whose densely argued pages melded constitutional, political-economic, and sociological arguments in the service of their versions of the Anti-Oligarchy Constitution.⁵⁴ Along with labor tribunes and middle-class reformers, lawmakers and jurists, Populists developed arguments for the democratization of a range of national institutions: the banking and currency systems, corporate law, railroad regulation, industrial relations, and the constitutional framework itself.⁵⁵

⁴⁹ See Christopher Tiedeman, *Government Ownership of Public Utilities from the Standpoint of Constitutional Limitations*, 16 HARV. L. REV. 476, 481 (1902) (calling for government regulation of monopolies as opposed to grants of private statutory monopolies).

⁵⁰ See ROBERT D. JOHNSTON, *THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON* 115-76 (2003) (detailing political movements and constitutional measures aimed at empowering citizens to confront corporate power).

⁵¹ See Forbath, *supra* note 44, at 48-49 (describing various proposed constitutional amendments).

⁵² *Id.* at 47 (arguing that the Constitution empowered Congress to act in favor of labor interests and that Congress’s failure to do so violated its obligations to the people).

⁵³ CHARLES POSTEL, *THE POPULIST VISION* 208 (2007) (giving examples of trade unions uniting with Populists in order to take political action); see also MATTHEW HILD, *GREENBACKERS, KNIGHTS OF LABOR, AND POPULISTS: FARMER-LABOR INSURGENCY IN THE LATE-NINETEENTH-CENTURY SOUTH* 11 (2007) (detailing agrarian discontent and its influence on labor organizations in the 1880s). For a discussion of union involvement, see MICHAEL PEIRCE, *STRIKING WITH THE BALLOT: OHIO LABOR AND THE POPULIST PARTY* (2010).

⁵⁴ See, e.g., POSTEL, *supra* note 53, at 30-37 (indicating the importance of newspapers and journalism to the growth of the Populist movement).

⁵⁵ See HILD, *supra* note 53, at 86, 96.

These Gilded Age reformers' account of constitutional crisis was twofold. "Equal rights," "equal opportunity," and the very standing of farmers and working people as citizens were in jeopardy because of corporate power.⁵⁶ So, too, was popular sovereignty: corporate power had combined with an overweening judiciary and a corrupt party system to shatter the sovereign people's control of the state and federal governments that were meant to carry out their will. The Populists held that the "doctrine of equality laid down in the Declaration of Independence was not limited to a dogma that all men should be made equal before the law."⁵⁷ The "real theory" of constitutional equality was this: "[I]n our Constitution the principle is imbedded" of securing "the widest distribution among the people, not only of political power, but of the advantages of wealth, education, and social influence."⁵⁸ Only thus could the Nation "maintain the practical equality of all the people . . . and still remain a democracy."⁵⁹ Some Populists explained the primacy of this principle in the constitutional scheme in terms of the Declaration, arguing that "the inequalities that characterize our rich and poor" contradict "the ideas that the founders of this Republic saw when they wrote that 'All men are created equal.'"⁶⁰ This political-economic understanding of "equal rights," one Populist constitutional thinker argued, echoing Justice Field's famous *Slaughter-House* dissent, was the "great basic idea of our laws, the very corner-stone of the republican structure."⁶¹

⁵⁶ See POSTEL, *supra* note 53, at 222 (describing the felt threat of corporate power to constitutional liberties following the Supreme Court's and federal government's interventions against the Pullman boycott).

⁵⁷ James F. Hudson, *Railways: Their Uses and Abuses, and Their Effect upon Republican Institutions and Productive Industries (No. 1)*, NAT'L ECONOMIST, May 11, 1889, at 113, 114.

⁵⁸ *Id.* at 113.

⁵⁹ *Id.* at 114.

⁶⁰ *American Municipalities League Holds Its Third Annual Meeting at Syracuse – Mayor Jones on Patriotism*, N.Y. TIMES, Sept. 20, 1899, at 5 (quoting Mayor Samuel M. Jones, Address at the Third Annual Convention of the League of American Municipalities: The New Patriotism; A Golden Rule Government (Sept. 19, 1899)); see Michael Illuzzi, A Conceptual History of Equal Opportunity: Debating the Limits of Acceptable Inequality in U.S. History 66 (2008) (unpublished Ph.D. dissertation, University of Minnesota). Jones used the principle of equal opportunity as constitutional underpinning for his reform agenda. For this reason, Jones advocated for reforms that he insisted were constitutional essentials: "[D]irect nomination of candidates . . . ; public ownership of all public utilities; union wages and conditions better for skilled labor, and a living wage for unskilled labor; . . . and immediate measures for the relief of the unemployed." *Jones Before the Ohio Voters*, N.Y. TIMES, Nov. 6, 1899, at 6.

⁶¹ James F. Hudson, *Railways: Their Uses and Abuses, and Their Effect upon Republican Institutions and Productive Industries, No. 2*, NAT'L ECONOMIST, May 18, 1889, at 137; see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting) (arguing that equal protection extends beyond the context of freed slaves).

That structure was at risk. Corporations had arrogated to themselves the tools of industry, transportation, communication, and finance. By concentrating “egregious wealth in the hands of the few at the cost of creating a proportionate poverty among the many,” Populists argued, corporations would destroy the democratic social fabric. “[T]his departure from the fundamental intent and purpose of our republican system, is produced not by the failure of the constitution and laws themselves, but by the failure of this Nation to enforce and maintain them.”⁶²

To those who made these arguments, the idea of enforcing the Constitution to thwart these new threats of oligarchy was not abstract or rhetorical; it was a practical approach to the most important questions the nation faced. The central issues of the day were the Currency Question, the Trust Question, and the Labor Question.⁶³ All three had profound constitutional dimensions. In all three, Gilded Age reformers’ constitutional arguments centered on the anti-oligarchy principle; and in all three instances, we will note, variations on these arguments were later taken up by Progressive reformers in both major parties as well as their third-party colleagues.

By the end of the Progressive Era, with passage of the Federal Reserve Act of 1913⁶⁴ and the ratification of the Sixteenth Amendment, the basic architecture of banking, currency, and taxation would never again come up for grabs in American politics. But throughout these decades, it was all up for grabs. Would the federal government have the power to tax the incomes of the rich? Would government or private bankers, or some collaboration of the two, control the nation’s currency and its credit system? How centralized or decentralized would that control be? How democratic or oligarchic? Did the Constitution require hard money – or prohibit it?

The constitutional debate over currency, gold, and silver was as pitched in the Gilded Age as in Andrew Jackson’s era.⁶⁵ But the new economic order meant that the political-economic valences of hard and soft money had flipped. The Jacksonians had feared paper money because they thought it facilitated the growth of a centralized and elite-controlled financial system. In Gilded Age

⁶² Hudson, *supra* note 61, at 137; *see also* G. Campbell, *The Early History of the Farmers’ Alliance*, *ADVOCATE* (Topeka, Kan.), Apr. 8, 1891, at 1, 2 (1891) (claiming that private railroad and banking corporations usurp functions assigned by the Constitution to the government); *Some Questions Answered*, *NAT’L ECONOMIST*, June 22, 1889, at 214-15 (arguing that corporate monopolies on “any field of labor” abridged the right of the citizen in the “pursuit of happiness” and were “consequently unconstitutional” (internal quotation marks omitted)).

⁶³ *See* Forbath, *supra* note 44, at 43-44 (discussing each of these issues and the reactions to them in the Gilded Age).

⁶⁴ Pub. L. No. 64-43, 38 Stat. 251 (codified in scattered sections of 12 U.S.C.).

⁶⁵ Norman W. Hawker, *Triumph of the Whigs: The Fifty-Fifth Congress and the Bankruptcy Act of 1898*, 15 *MIDWEST L. REV.* 109, 110 (1997) (“Consequently, as in the Jacksonian era of a half century before, the financial system provided the Gilded Age with its major political issues.”).

America, with that system well developed, hard money had become the cause of those with capital – big bankers and big business.⁶⁶ On the other side, the Populists, in 1892, and then the Democrats, in the fateful election of 1896, under Populist-Democratic fusion candidate William Jennings Bryan, attacked hard money in ringing constitutional terms.⁶⁷ Bryan proposed to restore what he called “the money of the Constitution,” which would protect the economic citizenship of “the producing masses” rather than “the idle holders of idle capital.”⁶⁸ And Populist and Democratic congressmen and senators continued to press the case.⁶⁹

The constitutional debate over the banking system itself was similarly intense. By the late nineteenth and early twentieth centuries, all sides in this debate had arguments of roughly equal economic sophistication. Indeed, some of the most sophisticated ideas about elastic currency and inter-convertible bonds, which eventually made their way into the Federal Reserve System, originated with the radical labor and agrarian champions of a public subtreasury system, whose original design aimed at a supple and sound, but dramatically decentralized financial order in the name of “economic opportunity . . . available to all and political power . . . held by each” and in the service of a more decentralized path of industrial development, hospitable to mid-sized firms and workers’ and farmers’ cooperatives.⁷⁰ The Constitution, these greenback political economists argued, “granted these powers to Congress for the public good, and not for the benefit of any privileged class of individuals or corporations.”⁷¹

These arguments were part of a broader Populist critique of the constitutional implications of the growth of the power of trusts. The Populists’ arguments gained heft from the claims of leading Gilded Age proponents of *laissez-faire* constitutionalism, such as constitutional treatise writer Christopher Tiedeman, who argued that granting corporations “private monopolies” was a “patent and unmistakable violation of our constitutional

⁶⁶ See JAMES LIVINGSTON, *ORIGINS OF THE FEDERAL RESERVE SYSTEM: MONEY, CLASS, AND CORPORATE CAPITALISM, 1890-1913*, at 100 (1986) (“[T]he advocacy of ‘sound money’ was part of a larger defense of a modern or corporate-industrial investment system, as against a system of resource allocation based on dispersed assets and competition between small producers.”).

⁶⁷ See William Jennings Bryan, *The Cross of Gold: Speech Delivered Before the National Democratic Convention in Chicago (July 9, 1896)*, reprinted in WILLIAM JENNINGS BRYAN: SELECTIONS 37 (Ray Ginger ed., 1967).

⁶⁸ *Id.* at 43-45.

⁶⁹ See Gerald D. Magliocca, *Constitutional False Positives and the Populist Movement*, 81 NOTRE DAME L. REV. 821, 846 (2006) (describing Democratic and Populist senators’ critiques of the gold standard).

⁷⁰ See GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA, 1865-1896*, at 194 (1997); see also *id.* at 186-94.

⁷¹ ALEXANDER CAMPBELL, *THE TRUE AMERICAN SYSTEM OF FINANCE* 29 (Chicago, Evening Journal Book & Job 1864).

guaranty of equal privileges and immunities.”⁷² Tiedeman argued that the solution was *government* monopolies, if monopolies were necessary; indeed, he argued that general incorporation statutes themselves violated “the constitutional guarant[ee] of equality,” because they constituted state action essential to the very existence of the equality-destroying concentrations of wealth and power all across the economic landscape.⁷³

A leading Populist lecturer explained, “the development of corporations under our laws has created especial advantages for the accumulation of property in the hands of a favored class . . . and increased the[ir] political and social power.”⁷⁴ Yet the very purpose of the Constitution’s principle of equality was “to secure a general diffusion of wealth and to maintain the practical equality of all the people.”⁷⁵

Antitrust law had its origins in this political moment; it had thick constitutional dimensions we have now largely forgotten. Like the agrarian radicals, Republican Senator John Sherman claimed that the concentration of power in the new corporations was “fast producing [a] condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.”⁷⁶ Servitors were not citizens; for Sherman, protecting the “industrial liberty of the citizens” was essential. “[I]ndustrial liberty,” he argued, “lies at the foundation of the equality of all rights and privileges.”⁷⁷ Industrial liberty was not freedom from government restraint: It was a “right of every man to work, labor, and produce in any lawful vocation,” with some measure of substantive economic independence.⁷⁸ Achieving this required disrupting the growing economic power of the trusts.⁷⁹ Sherman disagreed with many of the radicals’ proposals, such as nationalizing the railroads and dismantling centralized private banking.⁸⁰ But he shared the radicals’ sense that the oligarchic power of the trusts was a constitutional crisis.

The Anti-Oligarchy Constitution loomed large, as well, in state courts and state legislatures that joined the antitrust crusade. Many state constitutions contained detailed antitrust provisions, which lawmakers and state attorneys linked to more general guarantees of “equal rights.” From the legislative committee that authored New York’s stringent 1897 antitrust measures to Missouri’s celebrated 1905 antitrust suit against Standard Oil, one finds the

⁷² Tiedeman, *supra* note 49, at 481.

⁷³ *Id.*

⁷⁴ Hudson, *supra* note 57, at 114.

⁷⁵ *Id.*

⁷⁶ 21 CONG. REC. 2461 (Mar. 21, 1890) (statement of Sen. Sherman).

⁷⁷ *Id.* at 2457.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

same doctrine of constitutional political economy: political liberty is linked to industrial freedom, and equal rights linked to equal opportunities.⁸¹

Throughout these decades, the Labor Question was similarly shot through with constitutional claims and counterclaims. Today we are familiar enough with one side – the *laissez-faire* arguments *against* labor laws. But we have forgotten the reformers' arguments that the Constitution demanded the laws that the courts struck down: that it demanded hours and wages legislation and safeguards for the right to strike and organize. These arguments offered a different response to the tension between "industrial absolutism" and "political liberty."⁸² The old idea – still present, as we have seen, among many prominent political-economic thinkers of the Gilded Age – had been that restoring a political economy conducive to equal citizenship required restoring an economic order of independent producers and property holders. The new idea, in this period, was that democratic citizenship did *not* require us to restore such an economy. Being a wage earner did not have to mean dependency or servitude, without authority at work and without the material security, respect and freedom to be a democratic citizen.⁸³ It all depended on how we set up our political economy.

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 the Constitution. The conservative bar and bench in this period constantly invoked a narrative of boundless individual opportunity through property acquisition and contract – a narrative that had its roots in Lincolnian ideas of free labor.⁸⁴

In response, trade unionists and middle-class social reformers delved deeply into text, history, treatises and precedents to produce a new constitutional narrative of economic and social development; a new path away from the perils of oligarchy; a new political economy of equal rights, opportunity and citizenship. Trade unionists and champions of labor law reform boasted that by overcoming grave inequalities of bargaining power and providing the

⁸¹ See May, *supra* note 37, at 336-38.

⁸² U.S. COMM'N ON INDUS. RELATIONS, S. DOC. NO. 26-6936, at 7659-81 (1915) (testimony of Justice Brandeis), *reprinted in* BRANDEIS, *supra* note 48, at 73-74.

⁸³ *Id.* ("There must be a division not only of profits, but a division also of responsibilities. The employees must have the opportunity of participating in the decisions as to what shall be their condition and how the business shall be run.").

⁸⁴ William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 798. The Gilded Age courts served "'new liberal' wine in 'Free Labor' bottles." *Id.* The courts said they were keeping the avenues of entrepreneurial opportunity open for wage earners by striking down labor laws. "Wherever a piece of labor legislation was found to interfere with the capitalist's property rights, it was found also to infringe on the worker's right to 'dispose of' his 'property' – that is, his labor – as he saw fit." *Id.*

individual worker with the rights granted to them by the Constitution, unions and collective bargaining could (and did) overcome the contradiction between “political liberty” and “industrial absolutism.” They brought employees’ civil and political rights as citizens, 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.⁸⁵ Along with hours laws, safety standards, and social insurance, labor law reform, by safeguarding unions and collective bargaining or “industrial democracy” promised to transform industrial employees into middle-class citizens.⁸⁶

Like the Gilded Age labor and agrarian spokespeople, Progressives rejected the courts’ view that constitutional liberties were only “negative.” Their constitution had significant “positive” elements: in particular, a reconstructed political economy that would topple corporate oligarchs and secure constitutional norms of decent livelihoods, independence, responsibility, and dignifying work. The federal courts remained hostile to much of this agenda.⁸⁷ In the face of adverse court decisions, labor and agrarian antimonopolists, followed by the Progressives, declared that “[o]ur constitutional government has been supplanted by a judicial oligarchy”⁸⁸ acting on an “entirely . . . self-assumed”⁸⁹ monopoly on Constitutional interpretation, for which could be found “no shadow of a warrant in the Constitution” itself.⁹⁰ By amending the state and federal constitutions, they sought to restore “a constitutional government of three separate and coordinate branches” and to reclaim for “the people wh[o] are sovereign” and “who make the Constitutions” their power as “its rightful interpreters.”⁹¹ The constitutional amendments they championed to “tame” the judiciary and to restore popular sovereignty included election of federal and state judges; abolition or curtailment of judicial review of various classes of reform statutes; direct election of senators; provisions for the initiative, referendum, and recall in state constitutions;⁹² and, as Theodore

⁸⁵ BRANDEIS, *supra* note 48, at 74.

⁸⁶ Forbath, *supra* note 44, at 57 (recounting Progressives’ insistence that “industrial democracy” was necessary to ensure that America “produce not only goods but citizens”).

⁸⁷ *See id.* at 46 (pointing out that courts struck down Progressive initiatives despite popular support for them).

⁸⁸ Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550, 558 (1895).

⁸⁹ *Id.* at 552.

⁹⁰ *Id.* at 551.

⁹¹ SYLVESTER PENNOYER, INAUGURAL ADDRESS TO THE LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON 17, 19 (Oregon, Frank C. Baker 1887).

⁹² *See, e.g.*, JOHNSTON, *supra* note 50, at 119-26 (providing examples of direct democracy measures). The valence of Progressive direct democracy reforms – the initiative and referendum – has shifted dramatically with the rise of paid signature gathering and televised advertising. The Progressives who championed these reforms would no doubt be dismayed to learn that, over time, they have become vehicles that wealthy and powerful

Roosevelt recommended in 1912, means for “the people themselves . . . to settle what the proper construction of any Constitutional point is” by being “given the right to petition to bring [high court decisions] before the voters.”⁹³ Freed from the judicial “throttle upon the popular will,” reformers could set about lawmaking to restore and renew farmers’ and workers’ equal citizenship.⁹⁴

The great battles over constitutional political economy from the Progressive era were left essentially unresolved. Progressives made headway on many fronts, including dramatic changes to state constitutions that included the creation of modern direct democracy in the West. They achieved some important changes to the U.S. Constitution in this period through Article V Amendments: the income tax and the direct popular election of U.S. Senators were both passed in 1913.⁹⁵ Meanwhile, states began to enact elements of the Progressives’ substantive vision, including minimum wage laws and workers’ compensation and social insurance.⁹⁶ By 1920, the Nineteenth Amendment was ratified through the efforts of the women’s suffrage movement, which overlapped with and allied with the Progressives.⁹⁷ But the federal courts did

interests often use to set the political agenda. *See* Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999). Nonetheless, direct democracy does continue to serve part of its Progressive purpose: it continues to provide a route to legislate around elected officials.

⁹³ Theodore Roosevelt, *A Charter of Democracy – Address Before the Ohio Constitutional Convention*, 100 OUTLOOK 390, 391 (1912). Addressing the Ohio Constitutional Convention in February 1912 as a presidential candidate, Roosevelt offered his counsel to the state constitution makers about what precepts and institutions were essential to a Progressive Constitution. Roosevelt’s vision of “pure democracy,” *id.* at 390, went beyond the republican view that conflicts over constitutional meaning would unfold among the branches of the federal government, where the people were the ultimate authority, but with a role mediated by party councils and all the inherited ways the federal Constitution filtered popular input. Instead, he declared that nothing short of “genuine popular self-government” was adequate “to establish justice” or secure the general welfare, *id.* at 391. If “the American people are fit for complete self-government,” then they must be able not only to amend but also “to apply and interpret the Constitution.” *Id.* at 399. They must be “the masters and not the servants of even the highest court in the land, and . . . the final interpreters of the Constitution,” *id.* at 399, as “the American people as a whole have shown themselves wiser than the courts in the way they have approached and dealt with such vital questions of our day as those concerning the proper control of big corporations and of securing their rights to industrial workers,” *id.* at 400. For a critical perspective on Progressive efforts to undo judicial finality, see William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967 (2006).

⁹⁴ PENNOYER, *supra* note 91, at 19.

⁹⁵ U.S. CONST. amends. XVI, XVII.

⁹⁶ *See* ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 82 (1983).

⁹⁷ U.S. CONST. amend. XIX.

not adopt the constitutional political economy that the Progressives (and the Populists before them) had advocated. World War I intervened, the Roaring '20s dampened reform energies, and class inequalities widened.⁹⁸

III. THE NEW DEAL AND THE ANTI-OLIGARCHY CONSTITUTION ASCENDANT

The New Deal finally brought these great clashes over constitutional political economy to a head. World War I had given Americans of all classes a brief but formative new experience of national government's capacity to regulate the economy and social order far more than previously had been imaginable outside "advanced" Progressive circles.⁹⁹ Then the Great Depression struck, throwing millions out of work and revealing the scanty resources of state and local officials – and the inability of the business leaders atop the broken financial order and corporate economy to right themselves. This lent unprecedented urgency and heft to the idea of ratcheting up – in peacetime – the national government's responsibility for and authority over economic and social life.¹⁰⁰

The Supreme Court's opposition to the New Deal lent moral and political armor to the "economic royalists"; in response, Roosevelt made his showdown with conservatism on the field of constitutional political economy.¹⁰¹ Not since Jackson had any President spoken so candidly and starkly about the nation's class divisions and inequalities. The "economic royalists," who 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."¹⁰²

Here was the Anti-Oligarchy Constitution 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."¹⁰³ 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."¹⁰⁴ He framed the result in

⁹⁸ NOAH, *supra* note 1, at 15.

⁹⁹ See PAUL D. MORENO, *THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL* 163-76 (2013).

¹⁰⁰ See Michael R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 *TEX. L. REV.* 67, 72-73 (1983).

¹⁰¹ See Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), *reprinted in* 5 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 230, 231-34 (Samuel I. Rosenman ed., 1938).

¹⁰² *Id.*

¹⁰³ *Id.* at 232.

¹⁰⁴ *Id.* at 233.

terms of the Declaration: “[L]ife was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.”¹⁰⁵ 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 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.”¹⁰⁶ He argued that Americans were “committed to the proposition that freedom is no half and half affair.”¹⁰⁷ “If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place.”¹⁰⁸ Social and economic citizenship were simply inseparable from political citizenship, and the government had “inescapable obligations” to protect both.¹⁰⁹ Against economic autocracy and its threats to political democracy, “the American citizen could appeal only to the organized power of government.”¹¹⁰

In 1936, Roosevelt was forced to confront the Court’s invalidation of key New Deal measures. The business elite, the Republicans, and the business-sponsored Liberty League all embraced the Court’s Constitution in their campaigns against him.¹¹¹ Roosevelt thus framed his constitutional project squarely in opposition to the constitutional vision of the federal courts – the “new despotism wrapped . . . in the robes of legal sanction.”¹¹² This configuration of the constitutional fight meant that the meaning of the New Deal for American constitutionalism would always be, in part, a story of a triumph of legislative power over judicial resistance. But it is a serious misstatement of the constitutional stakes of this fight to frame the story here as *simply* a triumph of legislative power against court-made constitutional constraint.

Both sides of the great battle that ended in 1937 were implementing visions of the Constitution and its requirements. Those visions were radically different. Thus, looking back in early 1937 at their crushing electoral victory, Roosevelt and the New Dealers in Congress framed their “great revolution” this way: the “dominant five-judge . . . economic-social-constitutional philosophy . . . was repudiated by the people of America.”¹¹³

¹⁰⁵ *Id.*

¹⁰⁶ Franklin D. Roosevelt, Address at the Texas Centennial Exposition (June 12, 1936), reprinted in 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 101, at 209, 212.

¹⁰⁷ Roosevelt, *supra* note 101, at 234.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 233.

¹¹¹ William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 181 (2001).

¹¹² Roosevelt, *supra* note 101, at 232.

¹¹³ *Radio Address by Hon. Hugo L. Black of Alabama* (WOL Radio Broadcast, Feb. 23,

The New Dealers framed much of their legislative agenda in terms of vindicating constitutional demands. Robert Wagner made the case for the National Labor Relations Act in terms of the constitutional imperative – under the First, Thirteenth, and Fourteenth Amendments – of safeguarding workers’ “fundamental rights” to strike, organize, and bargain collectively. But the case for unions was also a case against oligarchy. Much as Jacksonians had defended their new mass political organization as a constitutionally necessary counterweight to the economic and political pretensions of the “moneyed aristocracy,” so New Dealers defended the new industrial unions.

Roosevelt himself preferred the general welfare clause, equal protection, and what Chief Justice Marshall called constitutional “first principles” as he focused on the broad new social and economic rights – to decent work and livelihoods; to education, training, and retraining; and to housing, healthcare, and social insurance – which he deemed imperative to restore the “forgotten[] ideals and values,” once secured by the “old and sacred possessive [common law contract and property] rights.”¹¹⁴ Such enabling social and economic rights, Roosevelt explained, amounted to an “economic constitutional order,”¹¹⁵ essential “to protect majorities against the enthronement of minorities” and secure a democracy of opportunity.¹¹⁶

In many ways, we continue to live in the legal and constitutional world the New Deal created. But the past forty years have seen the erosion or dismantling of many of its egalitarian and anti-oligarchic features. Banking regulation – the repeal of Glass-Steagall¹¹⁷ – is an obvious example. Moreover, the National Labor Relations Act has been gutted – and this, as it turns out, has had enormous consequences. The destruction of private-sector unions in the United States over the past forty years sets the United States off from other advanced capitalist nations in a way that the best empirical work suggests explains a large part of why, even in a globalized world, inequality is increasing much faster in the United States than elsewhere.¹¹⁸ Moreover, the

1937), reprinted in 81 CONG. REC. app. at 307 (1937).

¹¹⁴ Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), reprinted in 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 101, at 287, 288, 292.

¹¹⁵ Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), reprinted in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 101, at 742, 752.

¹¹⁶ Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), reprinted in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 366 (Samuel I. Rosenman ed., 1941) (“The Constitution of the United States was a layman’s document, not a lawyer’s contract.” *Id.* at 362.).

¹¹⁷ See Financial Services Modernization (Gramm-Leach-Bliley) Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (repealing 1933 Glass-Steagall provisions blocking commercial banks from engaging in riskier investment banking).

¹¹⁸ See, e.g., Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 519 (2011).

evisceration of American labor has left us without a critical political bulwark against oligarchy. In the decades after the New Deal, it was unions that did much of the political work of pressing for state and national policies that broadly distributed the rewards of our national economic life.¹¹⁹ Like the then-new mass parties created by the Jacksonian Revolution, the then-new mass unions created by the New Deal had many flaws, but they had the organized political clout to prod Congress and state lawmakers to attend to the economic needs and aspirations of poor and working-class Americans. They served the nation for a long season as a critical safeguard against the threat of oligarchy posed by the political power of concentrated wealth.

IV. THE ANTI-OLIGARCHY CONSTITUTION TODAY

Today, as class inequalities have returned to Gilded Age levels, our political system is beginning to refight a striking number of the great political-economic battles of the late nineteenth and early twentieth centuries – over the regulation of banking and credit; the political power of corporations; and more generally, policy responses to heightened economic inequality, both in terms of mounting poverty and economic insecurity and in terms of concentrations of wealth and power at the top. As they did a century ago, Members of Congress and the President now debate these questions with a real sense of political urgency. We all can see that our political economy has changed, and many fear that the changes point toward concentrations of political and economic power that Americans a century ago called oligarchy.

But something major is different this time around: we have lost the sense that these questions have constitutional stakes.

How did this happen? One key part of the answer is this: Americans now have a different understanding of “the Constitution” – a different sense of what a constitutional argument *is*. This understanding is more clause-bound, and much more closely tied to what courts enforce, than anything nineteenth-century Americans would have recognized. The story of how this change occurred is too large a story for us to tell here in a full way. It is entwined with the great story of American constitutionalism in the twentieth century: the story of the ascendant Supreme Court.

In 1937, one would not have predicted that the story of American constitutionalism in the twentieth century would be a story of the Court ascendant. In 1937, the Court’s most important decision was to step aside and allow a politically engaged national majority, led by President Roosevelt, to

¹¹⁹ See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 217-51 (2008) (describing the waning of union political influence since the late 1970s as an important factor tilting government policy in favor of the rich and against working-class wage earners). For an argument that increasing income inequality will only exacerbate existing disparities in political voice, see Task Force on Inequality & Am. Democracy, Am. Political Sci. Ass’n, *American Democracy in an Age of Rising Inequality*, 2 *PERSP. ON POL.* 651, 655-58 (2004).

implement the Anti-Oligarchy Constitution to an extent not seen before or since. Congress and the President implemented the Anti-Oligarchy Constitution by enacting statutes that intervened in our political economy – statutes whose constitutional implications Roosevelt and the New Deal Congress were not shy about articulating.¹²⁰ Even when it came to civil liberties and civil rights, New Dealers expected the constitutional safeguards to come from legislation and new administrative agencies attuned to the rights of religious and racial minorities and the poor, not from the courts, who seemed hostile or indifferent.¹²¹ Looking forward from that moment, one might have expected that for the rest of the century, and even today, we would view the Constitution largely, or even primarily, as a set of principles to be implemented through federal legislation, with anti-oligarchy prominent among them. That is not what happened.

In 1954, the Court decided *Brown v. Board of Education*,¹²² which not only forever changed the law of racial equality in America, but also forever changed American perceptions of the Court and its constitutional role.¹²³ As Bruce Ackerman explores in his important new book *We the People, Vol. III: The Civil Rights Revolution*, “the paradoxical legacy of Warren Court activism,” and especially *Brown* itself, was that it established an idea of the Court as “the unique spokesman for We the People of the twentieth century” – an idea that it is the Court, and only the Court, that has the authority to enforce the Constitution.¹²⁴ In post-*Brown* America, Ackerman points out, even when Congress and the President acted in concert to enforce constitutional values, we have instead credited the Court with their successes. The end of the poll tax, for instance, was in part a story of federal legislation – the Voting Rights Act¹²⁵ – and Article V Amendment.¹²⁶ But we remember the Supreme Court case that finished the job, *Harper v. Board of Elections*.¹²⁷

¹²⁰ See *supra* Part III (considering the New Deal and the rationales Roosevelt articulated in support of his policies); see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 333-35 (1998), discussed in WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 61-65 (2010).

¹²¹ See Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. (forthcoming 2014) (manuscript at 46) (“It was only within the structure of the Board’s novel administrative process – not within the halls of Congress or the federal courts – that such individual rights would be realized.”); Laura Weinrib, *Civil Liberties Enforcement and the New Deal State 3* (unpublished manuscript) (on file with authors) (“The same actors who called for active intervention in the economy also demanded active intervention on behalf of disfavored ideas. . . . And many sought to implement that vision in spite of, rather than through, the courts.”).

¹²² 347 U.S. 483 (1954).

¹²³ *Id.* at 495 (striking down the doctrine of “separate but equal”).

¹²⁴ 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 105-06 (2014).

¹²⁵ Voting Rights Act of 1965 § 10, 42 U.S.C. § 1973h (2012) (declaring the view of Congress that poll taxes threaten the constitutional rights of citizens, and authorizing lawsuits by the Attorney General to strike down poll taxes for this reason).

This Court-centered perspective leads contemporary Americans to de-emphasize, if not forget, many of the kinds of arguments about the Constitution that were dominant in our constitutional politics during the nineteenth and early twentieth centuries. In particular, this new perspective has caused us to lose sight of the Anti-Oligarchy Constitution. Addressing the problem of oligarchy in a modern capitalist society necessarily requires legislative and executive action. The Jacksonians may have believed that one could implement the Anti-Oligarchy Constitution largely through vetoing and striking down as unconstitutional the laws that handed excessive power and privilege to the “moneyed aristocracy,” but in truth, even they believed that a significant amount of affirmative legislation was required to ensure a wide distribution of opportunity.¹²⁸ By the time the anti-oligarchy principle confronted the economic consolidations and dislocations of the Gilded Age, it was obvious that new affirmative laws would be needed. Courts by themselves could not produce the Sherman Act, the income tax, or, later, the NLRA. Altering or restoring a nation’s constitutional political economy is an enormously difficult task for government; it is an impossible task for courts acting alone. Thus, if “the Constitution” *means* the Court-enforced Constitution, then contemporary Americans will never reinvigorate the anti-oligarchy tradition in American constitutional thought.

We think that is a mistake. Something important is lost when we excise the Anti-Oligarchy Constitution from our memory and from our common sense of what the Constitution means. The Anti-Oligarchy Constitution may not fully lend itself to judicially elaborated constitutional doctrines and tests of the kind we now expect provisions of our Constitution to generate. But there is a reason that generations of Americans have turned to the Anti-Oligarchy Constitution – especially in periods that, in political-economy terms, shared some salient features with our own.

The reason is this: There is actually a lot of truth to the idea that the American constitutional order rests on a substratum of constitutional political economy. Presidents Andrew Jackson and Franklin Roosevelt disagreed about a great deal, and from our perspective today, there is much that both got wrong. But they both were right about something fundamental. Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity. In this way, oligarchy is incompatible with, and a threat to, the American constitutional scheme.

In the middle decades of the twentieth century, Americans had less need for the Anti-Oligarchy Constitution for a simple reason: the threat of oligarchy had

¹²⁶ U.S. CONST. amend. XXIV (prohibiting poll taxes in federal elections).

¹²⁷ *Harper v. Bd. of Elections*, 383 U.S. 663, 666 (1966) (“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee of an electoral standard.”); *see* ACKERMAN, *supra* note 124, ch. 6.

¹²⁸ *See* FISHKIN & FORBATH, *supra* note 2.

receded. The period from World War II through the mid-1970s is now known among economists as the “great compression” in the nation’s distribution of wealth and income.¹²⁹ This was the political economy the New Deal built, with widespread employment, rising wages, and relatively high levels of unionization, at least among white men.¹³⁰ In this period, it was possible to believe that America had built the political economy of a middle-class democracy and that the work that remained was to dismantle the racial and gender exclusions that severely limited access to the rich opportunities this economy offered – and to full citizenship in the American polity.

The political and legal project of dismantling racial and gender exclusion was not exclusively a project of litigation and court decisions. Congress passed landmark civil rights, voting rights, and education statutes whose constitutional significance was apparent; Presidents Eisenhower, Kennedy, Johnson, and Nixon helped build the civil rights Constitution through executive and agency action.¹³¹ This was, and remains, the greatest modern precedent – even if it is an imperfect precedent – for imagining a Constitution that is not limited to judicially enforced doctrine. The Second Reconstruction was a constitutional project that harked back to the first Reconstruction, and aimed, finally, to vindicate it. This required action by all the branches of government. Moreover, the architects of the Second Reconstruction understood that its political and economic dimensions were intertwined. Only by extending new antidiscrimination requirements to federal contractors and then to all private enterprises throughout the nation – as well as to schools, colleges, and vocational training programs – would it be possible to give all Americans access to the forms of economic citizenship that the political economy of this period still seemed to make possible.

All this now seems a world away. The “great compression” is over; it has been for forty years.¹³² The secure paths to a middle-class life that were so abundant in the postwar decades are now far fewer and narrower; in economic terms, we are returning to the distributive patterns of the Gilded Age.¹³³ With these changes, many old problems have become new again. In particular our politics has returned to debates about oligarchy that would, in some respects, sound familiar to an observer from a century ago. But what they would not

¹²⁹ Claudia Goldin & Robert A. Margo, *The Great Compression: The Wage Structure in the United States at Mid-Century*, 107 Q.J. ECON. 1, 1 (1992) (“The Great Compression – our term for the narrowing of the wage structure in the 1940s – followed the Great Depression of 1930s and produced a wage structure more equal than that experienced since.”).

¹³⁰ *See id.* at 32.

¹³¹ *See* ACKERMAN, *supra* note 124.

¹³² *See* Goldin & Margo, *supra* note 129, at 3.

¹³³ *See* STIGLITZ, *supra* note 1, at 7-8 (highlighting the growth in income disparities in the United States).

hear, this time, is the form of constitutional argument this Article has highlighted. They would not hear about the Anti-Oligarchy Constitution.

We think quite a lot might be at stake in recovering this lost form of constitutional discourse, and with it the idea that the problem of political and economic oligarchy has constitutional stakes. Part of the stakes here are for the Constitution *outside* the courts. Congress and the President are obligated as a matter of constitutional duty to implement the Constitution – including the Anti-Oligarchy Constitution. There is much to be done.

But since we, too, are products of the post-*Brown* world, let us end by emphasizing that recovering the Anti-Oligarchy Constitution also has important implications *inside* the courts. Even when they are not articulated in terms of Supreme Court doctrinal tests of their own, background constitutional principles inflect how courts evaluate many constitutional questions. Consider just one example: the Court's campaign finance jurisprudence.

The thrust of recent Supreme Court decisions in cases such as *Citizens United*, *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.¹³⁴ In a variety of contexts, the Court has analyzed these efforts similarly. The Court reasons that the government has a legitimate policy interest in preventing corruption – while defining corruption in an exceedingly narrow way. The Court holds, however, 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 Anti-Oligarchy Constitution can help us understand the distinctive constitutional principles on the other side of these cases. It is not a coincidence that the Montana campaign finance law the Court struck down in 2012 in *American Tradition Partnership v. Bullock*¹³⁵ was enacted in 1912, at the height of Progressive constitutional agitation to untangle the oligarchic power structure of the railroad barons and corrupt party officials who dominated the politics of the West.¹³⁶ The statute was an urgent response to the fact that one

¹³⁴ *McCutcheon v. FEC*, 82 U.S.L.W. 4217 (2014) (plurality opinion) (striking down, on First Amendment grounds, aggregate contribution limits that aimed to limit the political dominance of the largest donors by prohibiting any donor from contributing more than a set amount to federal candidates and parties each cycle); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011) (striking down, on First Amendment grounds, a program that aimed to mitigate inequalities by awarding a campaign matching funds in response to its opponents' spending); *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (extending First Amendment protection to corporate political speech).

¹³⁵ *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (applying *Citizens United* to invalidate Montana's campaign finance law).

¹³⁶ Larry Howell, *Once upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 MONT. L. REV. 25, 27-28 (2012) (discussing the extensive political corruption that led to the passage of the campaign finance law deemed unconstitutional in *American Tradition Partnership*).

company “clearly dominated the Montana economy and political order”¹³⁷ – owning or controlling “90% of the press in the state and a majority of the legislature.”¹³⁸ Bribery and campaign donations had “convert[ed] the state government into a political instrument” serving the interests of absentee stockholders rather than the people of Montana.¹³⁹ 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 in the case).¹⁴⁰ The Corrupt Practices Act had a constitutional aim – not only in the sense of being constitutionally permissible, but in a more demanding sense that may be difficult for readers in the present moment to appreciate: this statute implemented the Anti-Oligarchy Constitution. It was part of 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.¹⁴¹ That is because the current Court’s campaign finance jurisprudence begins from the premise that the only aspect of the Constitution in play is a First Amendment liberty to speak and spend.¹⁴² How different this jurisprudence would look if the Court could see the real constitutional stakes on *both* sides – 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. This is the Anti-Oligarchy Constitution in action.

A Supreme Court that took seriously this important piece of the American constitutional tradition would not necessarily develop an elaborate doctrine of anti-oligarchy by building up doctrinal tests and tiers of scrutiny, in the way we now expect the Court to do with constitutional protections. But neither would such a Court simply set the Anti-Oligarchy Constitution aside. It is too fundamental to the American constitutional order and to our tradition of constitutional argument. Mindful of the three branches’ joint and several

¹³⁷ *W. Tradition P’ship v. Att’y Gen.*, 271 P.3d 1, 8 (Mont. 2011) (internal quotation marks omitted) (quoting MICHAEL MALONE & RICHARD ROEDER, *MONTANA, A HISTORY OF TWO CENTURIES 176* (1976)), *rev’d sub nom.*, *Am. Tradition P’ship*, 132 S. Ct. 2490.

¹³⁸ *Id.*

¹³⁹ *Id.* at 9.

¹⁴⁰ *Id.*

¹⁴¹ *Am. Tradition P’ship*, 132 S. Ct. 2490.

¹⁴² *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

obligations to uphold the anti-oligarchy principle, such a Supreme Court would reason very differently about the interplay between its own decisions and 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.