

The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court

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I. A “Constitutional” Project

Anchoring this number of the *Texas Law Review* is the latest iteration by Professors Joseph Fishkin and William Forbath of their project on “The Anti-Oligarchy Constitution.”¹ Followers recently heard Professor Forbath describe the project as one more concerned with “growing tea” than “reading tea leaves.”² Rather than trimming and shaping their work to the anticipated pleasure of the Supreme Court, Professor Forbath thus conveyed, the “anti-oligarchy constitution” project aims to turn scholarly attention to the ways and means by which the Constitution figures—not mechanically, but inspirationally and normatively—in processes of public-will formation that ultimately drive our politics and the resulting policies in one or another direction, the Supreme Court notwithstanding.

Progressive-minded scholars as they are, “growing tea” for Fishkin and Forbath means, in the first place, raising up once again from the old sod of American creedal talk the watchword of republicanism—by that term evoking, to be sure, ideas about forms of government but also, of coordinate importance, ideas about forms of social life. Fishkin and Forbath seek a return to a once-held place of high sway in our politics of the call for public policies aimed at an overall social condition of rough equalities—or at least controls on inequalities—of openings to the pursuit of happiness, public and private.³ But the project is not *simply* a reignition in American politics of

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1. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (forthcoming 2017) (on file with the Texas Law Review). For an earlier published emanation, see Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014).

2. He did so in remarks at the *Texas Law Review* Symposium on the Constitution & Economic Inequality for which this Essay was initially prepared. Professor Forbath gave credit for the metaphor to unpublished remarks of Jedediah Purdy. William E. Forbath, Lloyd M. Bentsen Chair in Law, Univ. of Tex. Sch. of Law, Texas Law Review Symposium: The Constitution & Economic Inequality (Jan. 29–30, 2016).

3. “Republican” thematics are strewn through Fishkin and Forbath’s work. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 1) (speaking of things we need to do in order to retain a grip on “our constitutional democracy—our ‘republican form of government’”); *id.* (manuscript at 2) (positing a strong, massive middle class as the foundation for “republican government and . . . fair equality of opportunity”); *id.* (manuscript at 14) (referring to a “founding republican impulse: to dismantle the aristocratic elements of the colonial social order and to broaden the distribution of wealth, power and opportunity, along republican lines”); see also Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEXAS L. REV. 1427, 1429–30 (proposing the Republican

an old-time passion for republican-compatible distributions of wealth, rank, opportunity, and power. It concerns, more specifically, a certain, special, “constitutional” channel for consolidations of public opinion and public will. The business at hand is nothing less than a restoration of the republican ideal to constitutional status and force, as a mandatory guiding norm for the conduct of American government.

We need not here specify in detail the prescriptive content of that norm, to which, in what follows, I will refer simply as “the R-norm.” What we do have to be clear about is this: When our friends claim “constitutional” status for the R-norm, they are not just proclaiming it to be really, really important or really, really true-blue American.⁴ They are out for something more: a recognition of an inscription of the R-norm in that special body of normative material we know and love as the Constitution. They want recognition of the R-norm as a norm of American constitutional law.⁵

That ambition—or so I will suggest—more or less unavoidably puts tea leaf reading back on the table. It does so by force of a stubborn, social fact that our authors do not like but nevertheless feel compelled to face up to. By common name, it is the social fact of judicial supremacy in the United States.⁶ In social substance, it is the fact that these days in America it feels borderline impossible to speak of constitutional law without putting the Supreme Court in charge.

II. “Structural” Constitutional Norms and the New Deal Settlement

The norm our authors seek to put back into play in American constitutional law—the R-norm—is one of a type they classify as “structural” (as in “the structure of our economic life”⁷ and “a structural condition for fair equality of opportunity”⁸). We con law profs typically use “structure” to mean the part of our field that deals with the organization

Guarantee Clause of Article IV, Section Four of the United States Constitution as a textual hook for the constitutional claims advanced by Fishkin and Forbath).

4. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 12) (rejecting for themselves a use of “constitutional” as a merely “rhetorical” device or “a way of putting an emphatic exclamation point on the importance of one’s argument”).

5. See *id.* (manuscript at 2) (favorably recalling an age of “constitutional thinking” in which “arguments based on constitutional text and history . . . as well as arguments in a straightforwardly structural mode” gave the R-norm its place “within the Constitution itself”).

6. See *id.* (manuscript at 66) (tracing to mid-twentieth-century struggles over desegregation the emergence of “the supremacy of the Supreme Court . . . on questions of constitutional interpretation”); Robert Lowry Clinton, *Judicial Supremacy and the Constitution*, NAT’L REV., (May 3, 2010, 4:00 AM), <http://www.nationalreview.com/node/229664/> [<https://perma.cc/ADW2-ELCZ>] (defining “judicial supremacy” as “the doctrine that the Court is the exclusive, ultimate authority on all constitutional issues” and observing that both Court and country have embraced that idea over “the past half-century”).

7. FISHKIN & FORBATH, *supra* note 1 (manuscript at 1).

8. *Id.* (manuscript at 2).

of government and allocations of authority among the components: federalism and separation of powers. Fishkin and Forbath mean the term differently. Primarily, the reference is to *social* structure—to basic facts about distributions, among segments of the population, of wealth, power, status, and opportunity.⁹ What American constitutional discourse long had but has now mainly lost, say Fishkin and Forbath, is responsiveness to perceptions of how a republican *constitutional* order depends on an underlying *political-economic* order—of how, for example, excessive concentration “at the top” of wealth and the powers it brings can lead to destruction of the “broad, open, and secure middle class [that] is itself a political and economic bulwark against oligarchy.”¹⁰ A once-prevalent understanding that “the guarantees of [our] Constitution are intertwined with the structure of our economic life” today, they write, with limited exceptions, “lies dormant.”¹¹

A constitutional R-norm, thus classed as “structural” by Fishkin and Forbath, would still plainly fall within the part of constitutional law we call “substantive,” dictating objectives and effects to be sought or avoided by government action from whatever branch or level. What sets the R-norm, as structural, apart from the rest of what we are accustomed these days to class as substantive constitutional law is that the norm is ultimately concerned not with particularized claims from discrete individuals or groups to preferred or advantageous treatment, but rather with broad-gauged patterns of distribution—of access, opportunity, and so on— affecting society as a whole. What our authors want us to see is that “structural” concerns thus understood have been, at least until fairly recently, a fully accepted and lively part of American constitutional–legal contention and, in their view, rightly so because, as they say, any prescriptive constitutional order must, after all, rest upon and presuppose a political-economic order.¹²

A somewhat jarring question now comes. If Fishkin and Forbath are right, must not Justice Holmes have been wrong in *Lochner*?¹³ No problem,

9. See *id.* (manuscript at 1–2) (distinguishing their use of “structural” from one referring to “institutional relationships within the political sphere”). Fishkin and Forbath may also, secondarily, have in view a “structural” mode of constitutional interpretation, meaning either a method of looking beyond the Constitution’s clauses when taken one by one, to see how meanings emerge from the arrangement of clauses within the writing as a whole and from resemblances and echoes among the clauses, or a method of looking beneath the visible text to premises believed to lie behind it. See *id.* (manuscript at 2, 66) (discussing a “structural mode” of constitutional argument). For leading examples of the use of such methods, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7–16 (1969); Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. 747, 748 (1999); Balkin, *supra* note 3, at 1427–28.

10. FISHKIN & FORBATH, *supra* note 1 (manuscript at 2).

11. *Id.* (manuscript at 1).

12. *Id.* (manuscript at 2–3).

13. See *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

of course, for our authors if Herbert Spencer's *Social Statics* is not in the Constitution.¹⁴ The problem comes with the breadth of the premise from which Holmes apparently drew that conclusion. "[A] constitution," Holmes famously declared, "is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."¹⁵ Fishkin and Forbath say, to the contrary, not only that our Constitution *was* very much so intended from the start, and continued to be widely so understood and deployed through the Gilded Age and the Populist and Progressive Eras and right on into the early New Deal,¹⁶ but furthermore that it has been quite aptly and rightly thus understood.¹⁷

Well, okay, there is Holmes's view, but Holmes could be wrong and so what if our authors take an opposite stance? The *so what* is that the Holmesian wisdom, expelling *laissez-faire* dogmatics from American constitutional law along with political-economic dogmatics altogether, came eventually to gain a devoted following from the American legal mainstream left. We call it the New Deal Settlement: a choice to have the Court "step aside" from the field of political economy and let "other constitutional actors" take over completely.¹⁸ Some of us may feel—as Fishkin and Forbath plainly do feel—that a *Lochner*-minded contingent is chiseling on that settlement now.¹⁹ But they seem to be telling us something more: not just that the settlement is crumbling and so we are excused, but that the settlement, since its inception, has been wrong in principle and unsustainable in law, owing to the point already covered—that the idea of a constitutional-prescriptive order floating free of a political-economic order is a theoretical confusion and a sociological impossibility.²⁰

Are we ready, then, to treat as a regrettable but now easily correctable mistake the Holmesian expulsion of "economic theories" from constitutional law? The hardheaded pragmatist Holmes would not himself

14. See *id.* at 75 ("The [Constitution] does not enact Mr. Herbert Spencer's *Social Statics*.").

15. *Id.*

16. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 54–55, 58–59) (noting how, across this period of time, major issues of American political-economic structure were routinely framed and debated in constitutional terms).

17. See *id.* (manuscript at 3) (calling the constitutional-neutrality view "a profoundly important . . . narrowing of our collective sense of what a constitutional argument is").

18. *Id.* (manuscript at 9, 65).

19. See *id.* (manuscript at 4) ("Today, the contemporary libertarians who are the lineal descendants of . . . *Lochnerism* . . . make an array of constitutional claims that are recognizable as constitutional political economy."); *id.* (manuscript at 77) ("We currently live in a constitutional world in which the judiciary sometimes—increasingly often—recognizes claims that sound in libertarian constitutional political economy. But only rarely and obliquely does the judiciary take any account of the constitution of opportunity tradition.").

20. See *supra* notes 11–12 and accompanying text.

likely have missed the point of the embeddedness of polity in economy, nor would the historical-minded Holmes have been oblivious of the long-standing American practice of structural claiming in the Constitution's name. It would, most plausibly, have been in full awareness of those factors, and not out of blindness to them, that Holmes felt nevertheless impelled to insist that a "constitution" is not "intended" to dictate an economic theory.

There would be nothing against sheer logic in saying so. True as it may be that underlying facts of political-economic structure constrain and limit what can feasibly be given effect as higher, binding constitutional law, it does not follow in logic that political-economic structure therefore must itself be a topic or province of constitutional law. The case might rather be that for some factors that constitutional law has reason to want to control, it either lacks the capacity to control or should not, in all prudence, make attempts to control, or perhaps cannot rightly try to control consistent with pretensions to democracy. Such views would not exactly be foreign to the Holmes we know.²¹

Well, yes, you might reply, but the wisdom there is all premised on a supposition that Fishkin and Forbath do not accept: the premise, that is, that by "constitutional law" we mean, and mean only, a body of higher, binding law under more or less exclusive administration by a court, whose readings and applications must stand regardless of contrary opinion held elsewhere in government and society. It is true that Fishkin and Forbath join heartily in the anticourt-centric conversation that circulates these days around our professoriate, insisting that the Constitution can be law, and is law, and yet is not primarily or exclusively the business of courts of law to construe and apply.²² Nor do they contradict that stance by their aim—to be examined soon below—of engaging courts in the work of effectuation of the structural R-norm in American constitutional law.²³ What we also shall find are signs

21. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run, . . . beliefs expressed in [a] proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

22. See, e.g., FISHKIN & FORBATH, *supra* note 1 (manuscript at 10–11) (decrying the ideas that "the Court, and only the Court, . . . has authority to enforce the Constitution," and that "the only *real* constitutional claims are ones enforceable . . . in courts"); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 30 (2004) (recalling and extolling American ideas of "a constitutional system that [is] self-consciously legal" but also is popularly administered); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 193–94 (1999) (making the case for doing what the title says and showing the feasible institutional means); Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 666–67 (2008) (declining to equate constitutional law with prophecies of what the courts will do in fact).

23. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 12) (admitting an address to courts "from within current conventions of constitutional discourse" as one (if a "narrow[.]" aim of their project).

of our authors trimming their rhetorical sails out of caution against the wrong kinds of judicial involvement. Those signs will prove hard to explain, except in terms of an instrumental calculus of probabilities of response by the judicial powers-that-be to arguments framed one way or another—those “tea leaves” after all demanding attention and having their say.

III. The Uses of the Court

A. *The Bearing of Political Economy on Constitutional Adjudications*

Our authors grant—indeed they insist on—the leading role of democratic politics in resolving, for the ever-changing here and now, the means of implementation by public laws and policies of a republican political economy.²⁴ In that, they are at one with Holmes. Where they seem, though, to part company from him is in their refusal to bar or to excuse courts from the struggle altogether. They take note of the limited capacities in these matters of adjudicative discourses, powers, and remedies.²⁵ But these concessions are qualified, not total. To say that capacities are limited is not to say they are absent or negligible. While our authors plainly side with the calls of others for a resuscitation in American life of constitutional–legal contention outside the courts,²⁶ they do also maintain that acceptance of the R-norm as a part of the constitutional–legal corpus that our courts are responsible to administer could help materially to advance the cause. It still does matter, they say, “what kind of constitutional political economy [the] courts will recognize.”²⁷

They point to three ways in which it does. First, acceptance of a constitutional R-norm would have an important steering effect on judicial interpretations of statutes, particularly statutes by which Congress or a state legislature appears to be responding to the call of the norm.²⁸ We might think here, for example, of *King v. Burwell*,²⁹ the Supreme Court’s second big ACA case. Faced there with a choice between opposing defensible constructions of statutory language, one but not the other of which would have denied health care benefits to certain needy individuals and families

24. *See id.* (manuscript at 32) (“[W]e cannot imagine the courts doing the primary work of choosing among [economic policies] and enforcing the results. And neither could the [historical actors] whose arguments we are about to explore.”).

25. *See id.* (manuscript at 90) (“[M]ost of the work cannot be done, in the first instance, by courts.”).

26. *See supra* note 22 and accompanying text.

27. FISHKIN & FORBATH, *supra* note 1 (manuscript at 77).

28. *See id.* (manuscript at 76) (noting the “supporting role” of the judiciary through “its interpretations of statutes in which Congress attempts to build and maintain the democracy of opportunity”).

29. 135 S. Ct. 2480 (2015).

no less deserving than others to whom benefits would flow, the Court chose the reading that avoids such a result.³⁰ The Court's opinion did not mention constitutional pressure as a part of its reasoning, but the point here is that it might very well have done just that, *if* the R-norm had been a recognized part of our constitutional law.³¹

Second, acceptance of the R-norm as a part of our constitutional law would open a way to judicial invalidation of some legislation that currently passes muster in Bill of Rights review. Fishkin and Forbath point to Jacksonian accusations of constitutional defect in sundry laws deemed hostile to republican political economy, including laws on tariffs, subsidies, exemptions, monopolies, and other corporate privileges.³² For a current example, we can think of "right to work" laws or other kinds of statutory union busting.³³

Third, granting that provision of positive governmental supports for the R-norm is "not, in the first instance, [a project] for the judiciary,"³⁴ a judicially recognized constitutional R-norm could often work to save supportive legislation that judges otherwise might find constitutionally defective, whether for insufficiently justified infringement on some other constitutional protection or for lack of constitutionally granted power.³⁵ For obvious current examples we can think about *Citizens United*,³⁶ *NFIB v. Sebelius*,³⁷ and *United States v. Morrison*³⁸—or the Fifth Circuit's recent deduction, in *Whole Woman's Health*,³⁹ that state laws imposing severe

30. *Id.* at 2496.

31. See Frank I. Michelman, *The Ghost of the Declaration Present: The Legal Force of the Declaration of Independence Regarding Acts of Congress*, 89 S. CAL. L. REV. (forthcoming 2016) (manuscript at 103–05) (on file with author) (presenting and discussing this possibility).

32. FISHKIN & FORBATH, *supra* note 1 (manuscript at 25).

33. See *id.* (manuscript at 78) (labeling state "right to work" legislation as a product of "the old libertarian-conservative constitutional political-economic outlook on unions").

34. *Id.* (manuscript at 76).

35. See *id.* (manuscript at 4) (remarking on the consequences of recognition that "constitutional precepts are at stake on *both* sides" of a case under adjudication, "not only on the side asserting constitutional constraints").

36. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 318–19 (2010) (holding as violative of the First Amendment certain statutory restrictions on corporate spending in elections); FISHKIN & FORBATH, *supra* note 1 (manuscript at 84–85) (criticizing the Supreme Court's campaign-finance cases for failure to give due weight to "the distinctive constitutional principles on the other side of these cases").

37. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (holding constitutional the Affordable Care Act as an exercise of Congress's taxing power); see FISHKIN & FORBATH, *supra* note 1 (manuscript at 86–87) (criticizing the controlling and dissenting opinions in *Sebelius* for failure to see the "constitutional imperative" or "constitutional warrant" for legislation designed to extend access to health care to financially stressed Americans).

38. 529 U.S. 598, 601–02 (2000) (holding unconstitutional parts of the Violence Against Women Act of 1994 because they exceed congressional powers granted by either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment).

39. *Whole Women's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015).

additional expense on access to abortion services cannot, for that reason, be found to impose a constitutionally undue burden on liberty, because those laws are not what make some women too poor to fund the additional expense.⁴⁰

So there we have at least three kinds of possible adjudicative applications of an American constitutional R-norm, “structural” though that norm may be. We can call them by the names, respectively, of “interpretation,” “invalidation,” and “justification” of statutes. All of these uses of the norm—if “constitutional” at all in the sense our authors intend—must depend on some sort of attribution of it to the body of scripted law we call the Constitution. It might be that none of them requires location of the norm in any particular constitutional clause, or even in any combination or relationship of clauses.⁴¹ Perhaps they all could rest, in the end, on a historically informed sense of background presuppositions of American government to which the Constitution presumably is devoted.⁴² What Fishkin and Forbath, at any rate, insist on is recognition of the R-norm as fully a part of American constitutional law.

IV. But not a “Constitutional Right”?

What they never do say, though, is that adherence by the government to the norm is anyone’s constitutional “right.” They use terms like constitutional “principle[],”⁴³ “precept[],”⁴⁴ “reckoning,”⁴⁵ “imperative,”⁴⁶ “dispensation,”⁴⁷ “commitment[],”⁴⁸ “claim[],”⁴⁹ and “obligation[],”⁵⁰ but never “constitutional right.” When they do use the latter term, they apply it only to norms they do not seek to promote, like Lochnerian property and liberty of contract.⁵¹ They do also speak sometimes of “social and economic rights,” but never of those as *constitutional* rights, only as rights created by legislation, which might or might not have been enacted in response to some sort of felt constitutional pressure—but they do not ever

40. *Id.* at 589–91; see Cary Franklin, Professor, Univ. Tex. Sch. of Law, Inequalities: Class, Race, Sex, and Their Constitutional Intersections, Panel at the Texas Law Review Symposium: The Constitution & Economic Inequality (Jan. 30, 2016).

41. See *supra* note 9.

42. See *supra* note 9.

43. FISHKIN & FORBATH, *supra* note 1 (manuscript at 3).

44. *Id.* (manuscript at 3–4).

45. *Id.* (manuscript at 55).

46. *Id.* (manuscript at 86).

47. *Id.* (manuscript at 52).

48. *Id.* (manuscript at 63).

49. *Id.* (manuscript at 72).

50. Fishkin & Forbath, *supra* note 1, at 696.

51. See, e.g., FISHKIN & FORBATH, *supra* note 1 (manuscript at 54) (recalling judicial enshrinement of, “as a constitutional right[,] the worker’s liberty to sell his labor”).

say pressure from a constitutional *right*, only from a constitutional “imperative” or the like.⁵²

So my question is: Why this seeming reticence to come right out and claim republican opportunity as an American constitutional right? Drawing what clues I can from the text we have, I will suggest it results from a mix of concerns about an adverse ideological slant in constitutional-rights talk in the American legal-cultural here and now. We can sort the concerns into three types, which I will call respectively the *grammar*, the *ideology*, and the *court-centricity* of rights.

A. *Hohfeldian Grammar: “Rights” as Divisible Entitlements*

Consider what we might name a “Hohfeldian” grammar of constitutional rights.⁵³ In currently prevailing American legal parlance, our authors might suggest, a “right” figures as a kind of option property. It has an individuated owner, a right holder. What the owner owns is an institutionally enforceable claim to a defined performance (“duty”) owed by another specified person or organization—the performance, however, not *necessarily* to be rendered, but rather to be rendered or not as the right holder arbitrarily may choose. This Hohfeldian idea of “right,” widespread in our legal culture, just does not fit—so might say Fishkin and Forbath—with a leading political-ethical aim of their project, that of restoring to *collective* or *public* concerns and commitments (as distinct from fixations on divisible personal entitlements) a dignity and a priority in the American discourse of constitutional law that they once held there, but have lately and lamentably lost. “Our R-norm,” they might go on to explain, “has primarily in view a certain form of social life to be pursued and cherished *as a form*, as a ‘structure,’ for the sake of its own goodness and rightness and aside from resulting divisible gains to identifiable individuals.” And so, they might conclude, to speak of a constitutional “right” in this connection would be to put the emphasis in the wrong place, on the severable, potentially competitive claims to entitlement coming from discrete individuals, instead of where we want it, on a republican political economy in its character as a nondivisible, “structural,” American patriotic good.

It seems this cannot be the whole story. Fishkin and Forbath plainly envisage interest-bearing individuals and associations going to court to vindicate the R-norm, and thus avail themselves of resulting gains, always potentially at the expense of others. Consider, for example, a labor union

52. *See id.* (manuscript at 59) (noting the failure of the New Deal Congresses to enact into law all of the “new social and economic rights” that FDR maintained were required by true American ideals and values).

53. The term “Hohfeldian” comes from the classic account of dyadic legal relations of the kind described in the text in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (3d prtg. 1964).

seeking invalidation of a “right to work” law that bans agreements between unions and employers for a “closed shop” (union membership required for employment) or a “union shop” (union dues payments required of all employees).⁵⁴ Well, yes, our authors might explain, but we suppose that in such cases the lawsuit will be founded on some *other*, undoubtedly entitlement-granting constitutional right—say, freedom of association or the antislavery right in the Indiana Constitution⁵⁵—and the purely collective-structural R-norm will come into play only secondarily, as an aid to interpreting that other right-granting clause.

But still the question persists: Why should our authors *want* to limit or hamstring the R-norm in this way? They would have reason *if* it were the case that currently entrenched American constitutional-legal culture and practice routinely treated collective goods and personal entitlements as mutually repellent categories, so that a legal norm cannot coherently be understood or construed to be directed to both, but has to choose between them. But that is quite plainly not the case. First Amendment rights of freedom of speech (to take just one example) are commonly explained as resting on structural reasons and concerns—never more needfully and plainly than in *Citizens United*⁵⁶—but no one has qualms about investing correlative Hohfeldian claim rights in individuals and groups having their own, severable stakes in enforcement. In our system, it is entirely acceptable to do so as long as divisible benefits from enforcement do in fact accrue to those claiming the rights in court. Our authors know this well. To the framers of the Reconstruction Amendments, they say, “the political-economic and redistributive dimensions and the rights-conferring dimensions of the enterprise were inseparable sides of the same constitutional coin.”⁵⁷ If so then, why not also now? Why *now* should our authors shrink from following suit? The grammar of rights talk does not alone suffice to give the answer.

B. *Ideological Valence: Constitutional Rights as Tickets Out*

We can add to the mix a more temporally contingent concern about ideological spin. Fishkin and Forbath pick up on Robin West’s observations of a latter-day capture of American constitutional-legal

54. See *Zoeller v. Sweeney*, 19 N.E.3d 749, 751 (Ind. 2014) (upholding Indiana’s “Right to Work” law against a claim that it violated article 1, § 21, of the Indiana Constitution, which provides that “[n]o person’s particular services shall be demanded, without just compensation”).

55. See *id.*

56. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 314, 354 (2010) (maintaining that statutory prohibitions of corporate spending on election-related advertisements are constitutionally objectionable because they “interfere[] with the ‘open marketplace’ of ideas protected by the First Amendment” and deprive “the electorate . . . of information, knowledge and opinion vital to its function”).

57. FISHKIN & FORBATH, *supra* note 1 (manuscript at 48).

discourse by an idea not just of a right as an option property, but of a *constitutional* right as quintessentially an option to “opt out”—a ticket of exemption from democratically authored collective projects or endeavors of the common good.⁵⁸ If or insofar as *that* is the line of thought that talk of constitutional rights these days more or less inevitably sets going, it is clear why Fishkin and Forbath would want to steer clear of it. Not only will the thrust of a claim of a right to government’s compliance with the R-norm most typically be the converse of an opt-out claim, the recognition of opt outs claimed by others—under the rubrics, say, of “liberty” or “property”—can only impede or obstruct, it can never assist or support, the state’s measures undertaken in compliance with the norm.

C. *Constitutional Rights as a Judicial Preserve*

A concern about a current ideological spin of constitutional rights talk could easily connect with a concern about judicial domination in the field of constitutional rights administration. If, as our authors say, Americans who disagree about constitutional meanings are nevertheless agreed on looking to the Supreme Court for decisive resolutions, then it would hardly be a risk-free proposition to join in the libertarian effort to move economic rights out of the New Deal limbo in which they still officially reside, and back into the space of constitutional control.⁵⁹ Fishkin and Forbath may quite possibly have taken on board the cautionary message—be careful what you wish for—that was quite memorably issued some years ago by their UT-Austin colleague Frank Cross.⁶⁰ Professor Cross showed how easily a conservative-leaning, activist judiciary “might use [a] positive right of minimal substance to dismantle the very programs that advocates of [such] rights seek to expand.”⁶¹ Opportunity structure is an idea whose policy implications can cut both ways, as Fishkin and Forbath point out,⁶² and as Professor Cross might be tempted to remind us today. You make that into a constitutional right and you throw the ball right back into the lap of the Supreme Court, and the minimum wage, the ACA, Medicare, and so on all become vulnerable to attack from judges convinced to the depths of their

58. See *id.* (manuscript at 73–74, 81 n.227) (referring to a currently recurrent “ideological frame” in which a “common thread is a right not to be subject to the choices that the political system has made to engage in collective projects” and to refrain from “contributing to some collective endeavor or some social provision for the common good”); Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 894 (2014) (positing a currently ascendant “paradigm” of constitutional rights as rights “to exit” or to “opt out” of some public or civic project).

59. See *supra* note 19.

60. See generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

61. *Id.* at 910; see Frank I. Michelman, *The Property Clause Question*, 19 CONSTELLATIONS 152, 156–57 (2012) (endorsing Cross’s warning and giving real-life examples).

62. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 4) (“[I]t would be wrong to say that nobody [today] is making arguments about constitutional political economy. This form of argument lives on today . . . on the libertarian right.”).

souls that the libertarian path is the straight and narrow to republican opportunity for all.

Are we back, then, to reading tea leaves? It seems “growing tea” should mean producing both the argumentative resources and, through them, the political will to reverse the facts of judicial supremacy and ideological spin that Fishkin and Forbath see standing in the way of fulfillment of the Anti-Oligarchy Constitution. Yet they seem still caught betwixt and between their profound objections against these facts and a lingering sense of need to accommodate their terms of argument to them. Perhaps the wider lesson is something like this: *Constitutional*–legal argument is still *legal* argument; and in legal argument—meaning always argument addressed to some or other temporal institutional decider—the tea leaves will always be out there somewhere, waiting to be read.