

## Overcoming the Great Forgetting: A Comment on Fishkin and Forbath

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Fishkin and Forbath's (F&F's) manuscript<sup>1</sup> is a project of recovery. It portrays the present as a time marked by a "Great Forgetting" of a tradition of constitutional political economy. F&F name what has been forgotten the "democracy of opportunity" tradition. Recovering it would mean again treating the following three principles as linked elements at the core of our Constitution: (1) an anti-oligarchy principle that works to prevent wealth from producing grossly unequal political power; (2) a commitment to a broad middle class with secure, respected work; and (3) a principle of inclusion that opens participation in both citizenship and the economic middle class to all, particularly members of historically excluded groups.

This kind of recovery project is also a certain form of imaginative literature. In the spirit of Langston Hughes's poetic call to "let America be America again"—meaning, let America become the country it has never been but always should have been<sup>2</sup>—it invites us to envision and identify with a counterfactual country, also called the United States, with the same constitutional text as ours and much of the same history. What kind of laws, what kind of public culture, and what kind of judges would that country have? This kind of counterfactual narration, like various genres of intentional fiction (sci-fi, utopian literature, and counterfactual history), helps readers get our own world, the actual world, into better focus by deliberately changing a few key aspects of it and asking what else might follow. In F&F's hands, it is also a hortatory and reforming project, urging us readers, much as Hughes did, to put our shoulders to the wheel of constitutional change.

I emphasize this resemblance to counterfactual history and other imaginative genres in part because it should focus us on a question that is not central to F&F's project but nonetheless invites attention. At what juncture did our history diverge from that of a constitutional culture defined by the democracy of opportunity tradition? How did we lose sight of that tradition? What forces and events drove it into retreat? This matters

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1. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2017) (on file with the Texas Law Review).

2. LANGSTON HUGHES, *Let America Be America Again* (1936), reprinted in *THE COLLECTED POEMS OF LANGSTON HUGHES 189–91* (Arnold Rampersad & David Roessel eds., 1995).

because what we take the answer to be will bear on the viability and the manner of a project of recovery like this one, oriented to the tropes of constitutional speech and reasoning.

But before turning to that tradition, let's take up the standpoint of the democracy of opportunity tradition and examine the present constitutional landscape from that vantage. From the standpoint of this tradition, many recent developments in constitutional law look seriously out of whack. Allowing the First Amendment to lay waste to campaign-spending limits flies in the face of the anti-oligarchy principle.<sup>3</sup> Blocking Medicaid expansion (and nearly invalidating the Obamacare individual mandate) on federalism grounds hobbles Washington's role in protecting basic security for a broad middle class.<sup>4</sup> Imposing constitutional opt-outs on public-sector union-dues schemes would have torn another hole in the tattered institutional architecture of a middle-class economy (and of politically empowered worker-citizens).<sup>5</sup> Interpreting Equal Protection doctrine in a narrow, anticlassification key (a.k.a. colorblindness) implies constitutional indifference to the structures of wealth and opportunity that stand in the way of robust inclusion, and even impedes race-conscious efforts to achieve inclusion (i.e., affirmative action).<sup>6</sup>

But, F&F observe, progressives—especially when working with constitutional doctrine, that is, when self-consciously being constitutional lawyers—tend not to think of these as constitutional issues, except in a negative sense: we say, echoing the New Deal Justices, that these are questions where the courts do not belong, where legislatures are constitutionally authorized to act. Armed with the democracy of opportunity tradition, we could say more: that legislatures are implementing a constitutional duty to build a democratic political economy. It would follow that courts must not stop them, but also that every public official,

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3. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441–42 (2014) (striking down aggregate limits on individual campaign contributions on First Amendment grounds).

4. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (holding that the Affordable Care Act's provision granting the Secretary of Health and Human Services the ability to penalize states for not participating in the Medicaid expansion was not a valid exercise of congressional power).

5. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222–26 (1977) (upholding the constitutional validity of compelling employees to pay for collective bargaining representation); *Friedrichs v. Cal. Teachers Ass'n*, No. 14-915, slip op. at 1 (U.S. Mar. 29, 2016) (affirming the Ninth Circuit's ruling that mandatory union fees were constitutional by an evenly divided Court). The Court appeared to be leaning toward deciding that it would be unconstitutional for public unions to charge fees to nonmembers, but the death of Justice Antonin Scalia resulted in *Friedrichs* being decided with an even split. Matt Ford, *A Narrow Escape for Public-Sector Unions*, ATLANTIC (Mar. 29, 2016), <http://www.theatlantic.com/politics/archive/2016/03/friedrichs-supreme-court-decision/470103/> [<https://perma.cc/A6MJ-537K>].

6. See, e.g., *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013) (noting that a benign or legitimate purpose for a racial classification is entitled to little or no weight in the strict scrutiny calculus of equal protection analysis).

perhaps every citizen, has some responsibility to advance democracy of opportunity.

This long-standing line of argument has a small but proud recent presence, in which Willy Forbath's earlier work is central.<sup>7</sup> It has recently taken new urgency from two developments. One is the Supreme Court's eagerness to advance a selective antiregulatory agenda on constitutional terms. (All of the issues cited two paragraphs back are examples.) Another is greatly increased awareness of accelerating economic inequality, which intensifies concerns about oligarchy, the state of the middle class, and the prospects of inclusion. Today, it seems that there is much to do to protect, let alone advance, a democratic political economy, and, at the same time, newly devised constitutional barriers are impeding that work.

### I. The New Deal and LBJ's Great Society

An especially timely aspect of this argument is the interpretation of the "Great Forgetting" in relation to the twentieth-century history of inequality. If one asked why the Constitution proves more useful to opponents of a democratic political economy than to its supporters, the obvious answer would be that it protects individual rights and state prerogatives, thus imposing limits on government (especially federal) power, but does not require any legislative initiative or protect robust "positive rights" (other than some that are necessary to core procedural protections, notably the right to a defense attorney).<sup>8</sup> But, say F&F, this rather restrictive vision is not the only way to understand the Constitution; indeed, many earlier Americans would sharply disagree.<sup>9</sup> They were our imperfect predecessors in the democracy of opportunity tradition. How did even progressives today come to think so differently? This is the question of the "Great Forgetting."

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7. See William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 166–67 (2001) [hereinafter Forbath, *The New Deal Constitution in Exile*] (explaining that the New Dealers championed a vision of the Constitution that placed affirmative obligations on the political branches to facilitate the economic rights of all Americans); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1209–14 (1989) [hereinafter Forbath, *The Shaping of the American Labor Movement*] (arguing that the American labor movement created an alternative constitutional vision, which was subsequently adopted by the nation's elite and found embodiment in New Deal reforms).

8. Compare *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (reaffirming that a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained), and *Goldberg v. Kelly*, 397 U.S. 254, 263–64 (1970) (holding that, as a consequence of the Due Process Clause, evidentiary hearings must be provided to welfare recipients before their benefits are discontinued), with *Bowen v. Gilliard*, 483 U.S. 587, 625 (1987) (Brennan, J., dissenting) (observing that there is no absolute right to receive public assistance).

9. See Forbath, *The New Deal Constitution in Exile*, *supra* note 7, at 166–67 (describing the New Deal constitutional paradigm of a Congress charged with safeguarding positive social and economic rights).

The story begins familiarly enough: the Supreme Court was the last holdout among the three branches in resisting FDR's New Deal.<sup>10</sup> Lawyers, judges, and law professors reacted to the Court's involvement in politics with a theory of institutional competence and constitutional authority that largely wrote courts out of political economy, and out they stayed, for well over a generation.<sup>11</sup> Courts instead set out on a program of rights-based inclusion, felling laws that infringed personal freedom and treated different people inequitably, from *Brown*<sup>12</sup> to *Obergefell*<sup>13</sup> (and from *Buckley*<sup>14</sup> to *Fisher*<sup>15</sup>). And the remit of this program, in the minds of progressives and pretty much everyone else, was just what constitutional law was: a scheme of rights-protecting and power-granting provisions that mostly authorized public action while securing individuals against overt exclusion or deprivation of core negative liberties. Conservatives emphasized different liberties and interpreted the scheme of powers differently, but their Constitution was an alternative version of the liberal one, built to a different shape from the same parts. Moreover, "the Constitution" came to be identified more and more with the constitutional *law* whose development liberal and conservative lawyers were contesting, that is, with the work of courts. The idea that the Constitution contains a vision of social membership that legislatures must vindicate faded from view.

Accordingly, the major progressive initiatives in political economy that followed the New Deal, notably LBJ's Great Society, did not come sporting constitutional colors. They were humanitarian, utilitarian, and managerial improvements, consistent with an increasingly technocratic view of political economy.<sup>16</sup> In these respects, they were marked by a time of high and widely shared growth. We now recognize that time as anomalous, but it then seemed that: (A) there was plenty of social surplus to

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10. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 92 (2010) ("Critics of the New Deal were claiming Roosevelt's programs exceeded constitutional norms. The Supreme Court was blocking the administration and Congress from implementing its most aggressive reforms, such as the [National Industrial Recovery Act].").

11. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 486–88 (1955) (establishing that "the law need not be in every respect logically consistent with its aims to be constitutional"); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (holding that Congress could regulate commodity prices via its power to regulate interstate commerce); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (articulating a general rule—and three limited exceptions thereto—that judicial deference to legislatures is appropriate when there is a rational basis for the legislature's action); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (upholding the constitutionality of Washington State's imposition of minimum wage regulations on private employers).

12. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

13. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

14. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

15. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421–22 (2013).

16. See MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 281–85 (1996) (describing Johnson's "Great Society" and his vision to create a national community through federal programs).

deal around; (B) because a properly governed economy distributed its goods in a tolerably egalitarian way, inclusion plus social provision was the right formula to expand an extant, broad middle class.

It was, accordingly, a time suited for a war on poverty, not a war on inequality; inequality—the problem at the heart of the anti-oligarchy and broad-middle-class principles of the democracy of opportunity tradition—seemed resolved. The distributive battles and questions about legitimacy that pressed earlier generations of progressives toward constitutional principles had relaxed. It was easy to keep regarding the Constitution, 1950s style, as a document of personal liberty and inclusion, the province of courts (which stayed out of the political economy field). And so the tradition of democratic opportunity slept. Now the hour is late, democratic political economy is under libertarian constitutional siege, and F&F sound the tocsin (or, if you are a Tolkien fan, light the beacons).

I am an admirer and fellow traveler of this project. Inspired partly by Forbath's work, I argued for a democratic political economy in both property and constitutional law in 2005–2010,<sup>17</sup> and more recently I've written about the Court's antiregulatory jurisprudence ("neoliberal Lochnerism")<sup>18</sup> and, with David Grewal, about the origins of twentieth-century legal liberalism in the "golden age of democratic capitalism" when the problems of inequality and democratic management of the economy briefly but pregnantly appeared solved.<sup>19</sup> So it is in that spirit that I approach F&F's project.

## II. False Confidence Inequality Had Been Contained

So, what stopped the democracy of opportunity tradition from flourishing on into the twenty-first century and helping to secure a broadly democratic political economy as a constitutional value? Let's take as a starting point the interpretation of the "Great Forgetting" that I've just sketched: the anomalous appearance that inequality had been substantially controlled in the mid-twentieth century relaxed the pressures that had kept the tradition vital, facilitating the split of the inclusionary principle into a constitutional principle of its own, one that often works against democracy of opportunity. This broad account of the mid-twentieth century, however,

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17. See, e.g., JEDEDIAH PURDY, *A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM* 204–06 (2009) (stating that Holmes's dictum in *Lochner v. New York* about the Constitution and economic theory obscures the idea of freedom and economic life); *id.* at 210–13 (arguing for more freedom with intellectual property); *id.* at 215 (arguing that a "more free world" requires answering which political and legal decisions could move citizens closer to that world).

18. See generally Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS., no. 4, 2014, at 195.

19. See generally David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS., no. 4, 2014, at 1.

leaves open a pair of questions. First, what forces played false the confidence that inequality had been contained at last? Second, how did these developments in what you might call real, hard-core, or empirical political economy—as against the normative political economy of the democracy of opportunity tradition—play into the “Great Forgetting” within constitutional language? What was the interaction between macroeconomic events and the direction of constitutional reasoning?

This Essay is not the place to try to parse these questions, but I want to set them out to ensure that they are kept in view as the conversation about F&F’s important project continues. Whatever set of answers one gives will bear on the likelihood that a revival of the language of the democracy of opportunity tradition can contribute to a larger recovery of that tradition, including an effective political response to growing inequality. But for now, with that question in view, let’s return to the somewhat more tractable question of the change in language that F&F propose.

### III. The Relevance (if any) of the Democracy of Opportunity Tradition in Constitutional Adjudication

The big, obvious question is what difference it makes to talk about the democracy of opportunity tradition as *constitutional*. F&F point in two directions here: toward constitutional adjudication, on the one hand, and the constitutional rhetoric and imagination of legislation and movements, on the other.<sup>20</sup>

On the first front—about the courts—I am halfway convinced. Let’s start, however, with a deflationary proposal. Looking back at the last two decades or so of touchstone cases, it seems to me that the “liberal” votes in favor of federal power and government permission to structure elections and economic relations in an equitable fashion would likely add up in the same way even if the Justices had switched from the powers-and-permission language of post-New Deal jurisprudence to the legislative-duties language associated with democracy of opportunity. F&F don’t seem to imagine legislative duties as being judicially enforceable, so the posture of cases seems likely to remain the same in future—hung on the question, “Can the government do this?”—and both New Deal and democracy of opportunity vocabularies seem likely to take Justices to the same answers, at least as long as liberal Justices are basically pro-Washington and pro-equality, which doesn’t seem a stretch.

But what I have just said is the narrowest way to understand the issue. I doubt it covers all the ground. New cases will arise, and the nature and

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20. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 12) (seeking to revive a constitutional discourse that recognizes the important constitutional role of courts but also prioritizes substantive, national debates over what it means to have an appropriate political economy).

stakes of those cases may depend, in part, on the language the Justices have been using to that point. History really is surprising; it does not just seem that way in hindsight. F&F's language might prepare us for welcome surprises, or avert unwelcome ones.

F&F are especially interesting when they turn to the interpretation of certain framework statutes, notably in labor law, arbitration, election law, and antitrust. They treat these statutes, entirely convincingly, as central to the achievement of democracy of opportunity under modern economic conditions.<sup>21</sup> This significantly affects the strength that, say, First Amendment challenges to these statutes should carry: the statutes themselves have constitutional weight.

Setting aside constitutional challenges for the moment, it is equally important in the realm of statutory interpretation not to allow such foundational statutes to be misused to concentrate and reinforce private economic power. Of course, this has happened in both antitrust and arbitration.<sup>22</sup> This is really valuable: to understand not only that the scheme of law at the core of our idea of a democratic economy is mainly statutory, but also that it is constitutionally important to interpret and preserve these statutes in a certain way. I'd note that the attitude being recovered here is really a mid-twentieth century one, as F&F show in recalling Justice Frankfurter's view of labor law.<sup>23</sup> Justices who accepted the post-New Deal role for constitutional courts nonetheless entirely understood the constitutional stakes of these statutes.<sup>24</sup> The "Great Forgetting" took a while, and it may be hard to date convincingly.

#### IV. Beyond the Courts: Political Movements and Legislators

Now let's turn away from the courts. As F&F say, much of the work of their constitutional program needs doing by movements and legislators. Here it's interesting to reflect that there are ways of describing the long tradition of democratic political economy that put much less emphasis on the Constitution than F&F do. There are the many progressive criticisms of the Constitution's democracy-impeding design—not least Woodrow Wilson

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21. *See id.* (manuscript at 77–90) (discussing the intersections between the democracy of opportunity and modern labor law, arbitration law, election law, and antitrust law).

22. *See id.* (manuscript at 87–89) (arguing the Supreme Court has reinterpreted the Federal Arbitration Act beginning in the 1980s to allow forced arbitration, which has greatly benefitted large corporations and inhibited antitrust actions).

23. *See id.* (manuscript at 82–84) (demonstrating that Justice Frankfurter did not believe that the First Amendment exempted workers from contributing to unions' political spending if the workers objected to their political aims).

24. *See* 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 114–21 (1991) (discussing the emergence of the New Deal Court's "rational basis" doctrine in *Carolene Products*, which granted deference to the regulatory legislation, and has since been treated with the same respect by courts as the "freedom of speech").

and Herbert Croly's.<sup>25</sup> I am not well qualified to parse the intellectual history of the New Deal, but despite Roosevelt's occasional use of constitutional language, the Croly–Wilson view—that the spirit of democratic politics was nailed to the cross of constitutional structure, in Roberto Unger's bloody image—mattered a lot in the ferment that produced that great wave of reform.<sup>26</sup> Aziz Rana's in-progress manuscript on nonconstitutionalist movements on the American Left cuts a very different path than F&F's through abolitionism, labor radicalism, and the twentieth century.<sup>27</sup> And today, as it happens, a serious candidate for the Democratic Party's nomination, who comes as close to the democracy of opportunity tradition as any major national politician in decades, has more to say about the Scandinavian model of social democracy than about any specifically constitutional source of his program.<sup>28</sup> In these ways, the prospects for a more democratic political economy today hark back more to the international links that Daniel Rodgers details in his great history of Progressive reform, *Atlantic Crossings*, than to any version of the Constitution.<sup>29</sup>

All of this leads to the question of what it means to call a political program constitutional. It seems to me that F&F's proposal is basically rhetorical. I don't mean it is just about marketing a legislative agenda, but I do want to highlight a couple of contrasts with other kinds of claims. I don't think their historical recovery invokes a historically oriented theory of constitutional authority, in which a past sense of the Constitution would bind the present *just because* it is the past sense of the Constitution. That is, I don't think that, if it could be shown by the criteria they use that a libertarian reading of constitutional political economy were stronger than

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25. See, e.g., HERBERT CROLY, PROGRESSIVE DEMOCRACY 40–47 (1914) (arguing the founders were distrustful of democracy, which manifested itself in inhibitions to the American political system); WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 46–54 (1918) (arguing the Constitution must evolve to continuously meet the present challenges that government is faced with rather than have government be static in the same form as originally established by the Constitution).

26. See ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 47 (2015) (depicting legal institutions as the cross upon which society's interests and ideals are crucified); ERIC ALTERMAN & KEVIN MATTSON, THE CAUSE: THE FIGHT FOR AMERICAN LIBERALISM FROM FRANKLIN ROOSEVELT TO BARACK OBAMA 5–8 (2012) (tracing FDR's New Deal to the liberal philosophies of Herbert Croly and Woodrow Wilson).

27. See generally AZIZ RANA, THE RISE OF THE CONSTITUTION (forthcoming 2018) (on file with author).

28. Jedediah Purdy, *Bernie Sanders's New Deal Liberalism*, NEW YORKER (Nov. 20, 2015), <http://www.newyorker.com/news/news-desk/bernie-sanderss-new-deal-socialism> [<https://perma.cc/5H4W-NZLG>].

29. See generally DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998) (analyzing the “North Atlantic economy” and discussing the exchange of politics and ideas throughout the North Atlantic among countries who had been tied together by trade and capitalism).



F&F allow, they would change their view of what judges or citizens should do.

This point about their theory of constitutional authority also suggests something about their theory of constitutional meaning: as it's now laid out, it doesn't have an error criterion. There's nothing you could show F&F about text, structure, or history that would make them say—whatever their theory of constitutional authority—“Well, you're right: I was wrong about that old Constitution!”

Now, all this is great, and what I am saying is ground clearing, not hostile criticism. F&F, I take it, are in the broad church of Protestant constitutionalism that recognizes that all the major concepts in the constitutional tradition are essentially contested, and that the terms in which they get contested are some of the major lineaments and bounds of American identity and political possibility—which are also essentially contested. The criteria of successful argument are pragmatic and democratic, which is also to say that they are resolved in terms of history, not in terms of concepts. All constitutional argument is gambling with your face toward the future and muttering into the ears of fellow citizens. Although we lawyers and law professors have our own professional orientation in this hurly-burly (and, perhaps, certain kinds of competence), it would be priestly obscurantism to pretend to stand outside it, navigating with hermeneutic astrolabes.

#### V. What Constitutional Language Can Do for Political Reform

So, what does it mean—in these democratic and pragmatic terms—to talk about anti-oligarchy and an inclusive middle-class economy as constitutional issues? Here are the stakes as far as I can make them out.

First, because the Constitution is the basic *political* document of the country, the idea of constitutional political economy emphasizes the interplay between democratic equality and self-rule, on the one hand, and economic order on the other. The insistence that democracy has an economic dimension is at the very heart of this argument, and talking about the economy's constitutional meaning takes us directly to that intersection. In a time when economic argument gets relentlessly tugged in technocratic directions by the gravitational force of the economics profession—even among progressives—the importance of this move is hard to exaggerate.<sup>30</sup> Of course, one could also just talk about a democratic economy, or a fair

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30. See, e.g., Thomas E. Flores, *Never Mind the General, Here Come the Technocrats*, SYMPOSIUM MAGAZINE (Sept. 8, 2013), <http://www.symposium-magazine.com/never-mind-the-generals-here-come-the-technocrats/> [<https://perma.cc/52XG-69U8>] (describing the rise of technocrats to high political office following economic crises).

economy, as our leading social democrat tends to do;<sup>31</sup> but talking about the constitution keeps the *political* character of the stakes in view.

Second, constitutional language points backward in time, and therefore to continuities of argument and aspiration over centuries. This strikes me as valuable in a forgetful culture. The parallels between the laissez-faire jurisprudence of the first and second Gilded Ages, or between radical free labor and the welfare state, are no doubt easy to exaggerate, but I would rather see them exaggerated than forgotten. They are lessons in recurrent patterns of political economy, in its empirical and its theoretical dimensions: how power accumulates, how its apologists justify it, and how it may be resisted.

Third, and speaking more to our special training, constitutional language calls attention to political economy as an object of adjudication. At the very least, this may help to avert unpleasant surprises at the Supreme Court, such as the innovations in Commerce Clause and Spending Power doctrine that set Obamacare somewhat back on its heels.<sup>32</sup> Better—coming back to an earlier observation—it equips judges and advocates for understanding the importance and potentially interconnected coherence of the statutes that halfway secure a half-decent economy. The New Deal constitution of powers, permissions, and inclusion would have been enough if the mid-century economy of widely shared prosperity and growing social provision had kept on trucking. It didn't. Laissez-faire jurisprudence is back in neoliberal form, and judges and scholars need to engage these themes directly.

Last, speaking in constitutional language does, as F&F say early in their manuscript, add an exclamation point—and not just any exclamation point, but one that sounds in that old register of American commonality. This is one of the ways that Americans have said to one another: “These problems are your problems, whether you want them or not; these principles have a claim on you, whether or not you would have chosen them.” Recently, from Benedict Anderson to Ta-Nehisi Coates, we have been getting essential lessons in how these “imagined communities” are artificial and, inasmuch as they are tied to hierarchy, exclusion, and exploitation, also fraudulent.<sup>33</sup> True. But the imagined constitutional community is also one of the ways our movements and prophets call power

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31. Purdy, *supra* note 28.

32. See Nat'l Fed'n of Indep. Bus. v. Sebelius, S. Ct. 2566, 2602–04, 2608 (employing an interpretation of the Commerce Clause and Spending Power that enabled states to opt out of the Medicaid expansion called for by the Affordable Care Act).

33. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6–7 (rev. ed. 2006) (explaining the concept of an imagined community); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 6–7 (2015) (observing that a “government of the people” is divided by hierarchy).

to account and draw ordinary people out of their parochial and self-concerned little carapaces.

A part of me wants to conclude: “That is nothing to set aside lightly.” The sentence writes itself from the rhythm of what precedes it. But another part wants to say: “These aspects of democratic life are too important to mystify with constitutional formulas and encrust with the barnacles of an often terrible history.” (My rationalist side lacks a way with metaphor. Unsurprisingly.) These are, basically, my inner Burke—prizing as a precious achievement the language in which Americans have sometimes moved one another by appeal to principle—and my inner Bentham—calling for more light (that is actually Goethe on his deathbed, but never mind) and disdaining all myth and historical moss. I tend slightly to Burke, but I want to highlight the respective force of both alternatives.

#### VI. Perils of Constitutional Language

In that spirit, let’s list the hazards of constitutional language, which are largely corollaries of the advantages. First, it tends to nationalize responses to the transnational challenges of inequality and the erosion of democracy. Internationalism—communist, reformist, and everything else—characterized much of the Progressive politics of the First Gilded Age, which was also an era of economic globalization and shared crises.<sup>34</sup> Maybe that is the direction in which we should move now. Maybe constitutional language directs our attention to precedents when we should be more interested in models and what allies offer today.

Second, the constitutional register may reduce our interest in historical allies who were themselves not interested in, or were critical of, the Constitution. (As I mentioned earlier, this is the vein that Aziz Rana is now mining.)<sup>35</sup> Yet they might have much to teach us.

Third, attention to constitutional themes will inevitably involve us in motivated historical interpretation. Looking across the room, not just for our friends, but for people and events we can recast as friends, always risks crossing from being intellectually generative to being intellectually distortive. Lawyers’ interpretation of history, like politicians’, seems able to handle only a modest dose of the full picture. And there may be ironic political costs, too. Rana and others have argued recently that the struggle for racial equality has suffered setbacks that began, partly, in embracing the Spooner-and-Lincoln-through-King “redemptive” view of the Constitution

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34. Charles E. Orser Jr., *Why the Gilded Age . . . and Why Now?*, 16 INT’L J. HIST. ARCHAEOLOGY 623, 625 (2012) (describing characteristic features of the First Gilded Age and the connections between the First Gilded Age and the present).

35. See RANA, *supra* note 27 (manuscript at 47–63).

that emphasized the egalitarian potential of old principles and obscured the depth and persistence of political-economic inequality.<sup>36</sup>

Finally, there is the double-sided character of American commonality itself. In a time when we're reminded every week of the exclusion and subordination both within and outside modern polities—from racialized police violence<sup>37</sup> to refugee crises<sup>38</sup> to the revival of herrenvolk nationalism in the Republican primaries<sup>39</sup>—ideas like citizenship, which are touchstones of democratic commonality, have lost some of their all-in-it-together sheen and come under suspicion of being halfway lies inside the borders and stiff-arms outside against the unwelcome.

My own suspicion is that the modern state and its democratic politics remain the field where we need to fight out these issues, albeit with transnational movements and the goal of ultimately building international egalitarian frameworks that match the scale of the global economy. For this reason, I think F&F are right to bring us back to this essentially contested ground, with all its perennial, new, and intensified problems. My cautions are intended to highlight what some of that contestation looks like just now.

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36. *See id.*

37. *See* Aaron Blake, *The Vast Majority of African Americans Say Police Unfairly Target Them*, WASH. POST (Aug. 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/08/11/in-ferguson-an-all-to-familiar-recipe-for-racial-discord> [<https://perma.cc/SM87-ZSMQ?type=image>] (discussing racially charged police violence).

38. *See* Rod Nordland, *A Mass Migration Crisis, and It May Yet Get Worse*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/world/europe/a-mass-migration-crisis-and-it-may-yet-get-worse.html> [<https://perma.cc/K47S-HESK>] (discussing the displacement of 60 million refugees).

39. *See* Eliza Collins, *David Duke: Voting Against Trump Is 'Treason to Your Heritage'*, POLITICO (Feb. 25, 2016), <http://www.politico.com/story/2016/02/david-duke-trump-219777> [<https://perma.cc/XY7W-UHKW>] (reporting on David Duke's support of Donald Trump's candidacy).