

Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality

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In the wake of the crash of 2008, some economic facts have become impossible to ignore: we are becoming a startlingly unequal society, in terms of both wealth and economic opportunity. With post-crash wages stagnant, the vaunted American middle class today is on precarious ground. With opportunities for a middle-class livelihood shrinking, a large part of the former middle class is edging downward toward a more precarious place, closer to that of the poor, while a much smaller group is edging upward toward great wealth. The poor are becoming more geographically concentrated, separate from the rich and even from the middle.¹ The very wealthy are ascending to heights of wealth, power, and influence that recall the last Gilded Age a century ago. And where economics goes, politics seems to follow. As the presidential campaign unfolds, we see candidates whose financing (through Super PACs) depends to a startling degree on a number of wealthy backers you can count on one hand—backers who expect to control their part of the presidential campaign universe the same way they would control their own companies or foundations.² We also have, for the first time in living memory, a serious presidential candidate who speaks openly about “oligarchy” and the connections between economic and political power. “The real struggle,” Bernie Sanders argues, “is whether we can prevent this country from moving to an oligarchic form

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1. See Elizabeth Kneebone, *The Growth and Spread of Concentrated Poverty, 2000 to 2008–2012*, BROOKINGS INST. (July 31, 2014), <http://www.brookings.edu/research/interactives/2014/concentrated-poverty#/M10420> [<https://perma.cc/4WAC-H9KH>] (showing the increased concentration of poverty in distressed and high-poverty neighborhoods).

2. See Julie Bykowicz, *Billionaire Donors Helped Cruz Rise in GOP Presidential Bid*, ASSOCIATED PRESS (Jan. 24, 2016, 3:42 PM), <http://bigstory.ap.org/article/2787cbcd3abd483085a98db0c2f3ce11/billionaire-donors-helped-cruz-rise-gop-presidential-bid> [<https://perma.cc/4BUA-KRR9>] (identifying super PACs that do not simply donate money, but also influence campaign strategies).

of society in which virtually all economic and political power rests with a handful of billionaires.”³

We have been here before. This is certainly not the first time concern about economic inequality and unequal opportunity has spilled over into national politics. Nor is it the first time Americans have struggled with how to steer our collective ship away from the rocks of “an oligarchic form of society.” But one important piece of the story seems different this time. For prior generations of reformers throughout the nineteenth and early twentieth century, economic circumstances like our own posed not just an economic, social, or political problem, but a *constitutional* one. From the beginning of the Republic through roughly the New Deal, Americans vividly understood that the guarantees of the Constitution are intertwined with the structure of our economic life. This understanding was the foundation of a powerful constitutional discourse that today, with important but limited exceptions, lies dormant: a discourse of constitutional political economy.

The essays you are reading in this Symposium Issue of the *Texas Law Review* are the product of a remarkable gathering held in spring 2016 that aimed to rediscover some of these connections. The Symposium brings together constitutional law scholars with scholars whose subjects we no longer understand to be constitutional in nature at all: subjects such as tax policy, corporations, antitrust, labor, and trade policy.⁴ But earlier rounds of debate about these and many other important economic policy questions did have constitutional dimensions. Understanding these dimensions matters if we want to understand what constitutional political economy could look like in the present or future.

As far as we know, this is the first time any law journal has organized a symposium on the Constitution and economic inequality. We suspect it will not be the last. We expect that the trajectories of both our politics and our economic situation, and the connections between them, are likely to lead to a flowering of different types of arguments that begin to reconnect economics or political economy with constitutional law.

The participants in this Symposium are a varied group. Some offer arguments that are more focused on the present; others on the past. All find interesting ways to imagine the connections, which have been latent for several generations, between the Constitution and our economic life, especially inequality and unequal opportunity. The two of us have advised the *Texas Law Review* students organizing the Symposium. We are not exactly disinterested observers; we are hard at work at the moment on a

3. Bernie Sanders, U.S. Senator, Sen. Bernie Sanders at the Brookings Institution (Feb. 9, 2015), <http://www.sanders.senate.gov/bernie-sanders-brookings-institution> [<https://perma.cc/P6BL-9TJ9>].

4. Not all of these are represented among the written contributions to this issue, but most are.

joint book project on many of these themes. One panel's worth of essays from the Symposium discusses our manuscript, which at the time of this gathering was in an early, and partial, draft form. In this short Introduction, we first introduce our own approach to the topic of the Constitution and economic inequality—both so that you, the reader, can understand our own orientation toward this topic, and because one set of participants in the Symposium is responding to our draft. We then describe how the other participants in this Symposium approach their own responses to the connections between the Constitution and economic inequality.

I. The Democracy of Opportunity Tradition in Constitutional Political Economy

First, here is a brief sketch of the kind of constitutional argument that our book project puts front and center. Our approach begins with history. It involves stepping outside the conventions of contemporary constitutional discourse—what a constitutional argument sounds like today and to whom it is addressed (usually, to courts). Our book recovers a different tradition of constitutional argument that we call the “democracy of opportunity” tradition.

Throughout the nineteenth and early twentieth centuries, reformers of widely different stripes confronted crises in the nation's opportunity structure, not unlike the ones today. They responded with constitutional claims. The content of these claims varied. But at the core of these reformers' arguments was an idea that we cannot keep our constitutional democracy—our “republican form of government”—without certain essentials: constitutional restraints against oligarchy and a political economy that sustains a robust, wide-open middle class, broad enough to accommodate everyone. These ideas are deeply intertwined. Too much concentration of economic and political power at the top tends to erode the economic and political standing of those in the middle. And a broad, open, and secure middle class is itself a political and economic bulwark against oligarchy.

A third principle—a principle of inclusion—has a more fraught and complex relationship to this tradition. Sometimes, such as during Reconstruction, this inclusionary principle has been at its core—no less central to the tradition than preventing oligarchy or preserving a broad middle class. But many leading figures in this broad tradition imagined a democracy of opportunity for white men only, and rested their hope of economic independence and equal citizenship for white men on the subordination and exploitation of the labor of women and racial minorities.

For contemporary students of constitutional law, the democracy of opportunity tradition presents many puzzles. The principle of inclusion is familiar, but the others are not. Where in the Constitution are these arguments about oligarchy and a broad and wide-open middle class to be

found? Advocates of the democracy of opportunity tradition made claims on many pieces of constitutional text. But at their heart, these were what we call structural constitutional arguments.⁵ Unlike the structural mode of interpretation familiar to us today, which builds claims about topics like the separation of powers and federalism on institutional relationships within the political sphere, arguments about constitutional political economy begin from the premises that economics and politics are inextricable and that our constitutional order rests on and presupposes a political-economic order.

Here is another puzzle: How are these arguments even constitutional arguments at all, when so often they are aimed not at courts, but, rather, at the political branches? These arguments often spoke in the register of the affirmative constitutional duty of legislators to act, rather than the register more familiar today, of constitutional constraints on what the state can do. The distinction is important. The conventions of our contemporary constitutional discourse hold—to oversimplify slightly—that the only *real* constitutional claims are ones enforceable, at least in principle, by courts. These conventions suggest that constitutional claims are political conversation stoppers that set boundaries on the scope of democratic policy making. Part of the project of our book is to help readers see beyond these current conventions and to recover a different way of thinking about American constitutionalism in general and constitutional political economy in particular. For the proponents of the democracy of opportunity tradition, arguments about constitutional political economy were not outside constraints on democratic politics. They were the substance of a democratic constitutional politics. Far from being conversation stoppers, they were at the heart of one side of a series of great national debates over how to understand the relationship between our Constitution and our economic and political life. The participants in these debates did not view arguments about the affirmative constitutional duties of legislatures and executives as “constitutional” in some merely rhetorical sense. Instead, the political branches were crucial fora in which most important constitutional conflicts and deliberations unfolded.

Justice Holmes famously wrote that the Constitution “does not enact Mr. Herbert Spencer’s Social Statics. . . . [A] constitution is not intended to embody a particular economic theory.”⁶ We think this is right, but with a twist. The Constitution does not enact a specific economic theory, but it does enact a social vision; our great constitutional debates have always been about the nature of that vision. In the past, those debates—and the intellectual work informing them—always addressed and often centered on

5. Frank Michelman explores and offers some questions about this term in his piece in this Symposium. See Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 TEXAS L. REV. 1403 (2016).

6. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

the kind of political economy we need to sustain that vision. The contemporary heirs of the democracy of opportunity tradition, if they hope to continue this work, need to rediscover constitutional political economy.

Today, there is only one group that consistently makes arguments about constitutional political economy: the libertarian right. Libertarians have a substantive vision of a political and economic order they believe the Constitution requires. They have long translated that vision into rights claims that can be enforced in court. In this way, the contemporary libertarians who are the lineal descendants of early-twentieth-century freedom-of-contract and property-rights laissez-faire liberals continue to make an array of constitutional claims that are recognizable as constitutional political economy. (Indeed, these arguments share some important roots with the democracy of opportunity tradition, although they developed in a different and more reactionary direction.) These arguments hang on many different doctrinal hooks. They inform interpretations of the Commerce Clause, the separation of powers, the First Amendment, and even the Equal Protection Clause. Whatever the doctrinal setting, the underlying force of these claims comes from a vision of the relationship between the Constitution and our economic life that would be very familiar to veterans of many nineteenth- and early-twentieth-century constitutional struggles over banking, currency, credit, labor, trusts, and federal power over economic matters.

What is missing are the laissez-faire liberals' traditional opponents: the advocates of the democracy of opportunity tradition. Their descendants live on in our political life, but we have forgotten that their arguments, too, are constitutional arguments. This has enormous implications. In campaign finance law, it means that the Court sees the constitutionally protected liberty to speak and spend,⁷ but cannot see the constitutional stakes on the other side—the way some of the challenged campaign finance laws aim to prevent the emergence of a political-economic oligarchy. In a case like *NFIB v. Sebelius*,⁸ it means the Court writes with the broccoli argument looming in the background,⁹ but without seeing the way the legislation aims to protect a broad middle class by giving millions of Americans a fair opportunity to obtain what has become one of the central hallmarks of middle-class life (decent health insurance).

Ultimately, we think constitutional political economy is not primarily about courts. A central aim of our book is to help recover the idea that

7. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

8. 132 S. Ct. 2566 (2012).

9. See *id.* at 2588–89 (positing that Congress could mandate that everyone buy vegetables to address the problem that many Americans have unhealthy diets, which increases health care costs, under the same logic that would justify a mandate to purchase health insurance under the Commerce Clause).

constitutionalism is not exclusively about what courts do. In the end, we think those who developed this important tradition in American constitutional thought got quite a lot of the big things right. Our constitutional order does, in fact, rest and depend on a political-economic order. That political-economic order does not maintain itself. It requires action by all parts of government.¹⁰ Although the content of what is required changes radically over time as our economy changes, we think the basic principles of the democracy of opportunity tradition remain affirmative constitutional obligations of government: to prevent an oligarchy from amassing too much power; to preserve a broad, wide-open middle class as a counterweight against oligarchy and a bulwark of democratic life; and to include everyone, not just those privileged by race or sex or class, in a democracy of opportunity that is broad enough to unite us all.

By calling these duties constitutional obligations, we mean to elevate them in comparison to the other manifold responsibilities of government. Not every issue—not even every highly important issue—has the same relationship to the political-economic order that constitutes a democratic society. But we do not mean to suggest that constitutional political economy ought to be elevated above the plane of democratic debate. Quite the opposite. It has been the subject of intense democratic debate since the very inception of our constitutional tradition—debate that we once recognized, correctly, as a form of constitutional politics. Today, only the libertarian right is self-consciously engaged in the constitutional politics of these questions. We think that should change. And we think that as our economic and political present increasingly calls to mind the Gilded Age past, it likely will. If the thoughtful and varied responses of the participants in this Symposium are any indication, it would seem that at least in the legal academy this process is already well underway.

II. A Synopsis of the Symposium

The Symposium begins with a set of intellectual and historical points of departure, some with an enormously broad sweep, others more focused and specific. Ganesh Sitaraman views the problem through the widest angle historical lens.¹¹ Drawing on a book manuscript in progress, he argues that constitutional thinkers, beginning in ancient Greece and Rome, have understood that there was a necessary, important relationship between constitutional design and the distribution of wealth. He argues that the old way of managing this relationship was what we might now call consociationalist: it provided representation in government for the wealthy

10. It often requires forbearance from action, as well.

11. See Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEXAS L. REV. 1301 (2016).

and for the poor, and managed their conflicts through constitutional design. He calls the constitutions that reflect this approach “class warfare constitutions,” and contrasts them with “middle-class constitutions,” which assume that their society *will not* have such extreme differentiations in the distribution of wealth. The American Constitution, he argues, is in the latter category—which means it is threatened in a fundamental way by gross inequalities of wealth.

Sabeel Rahman employs a wide lens of a different sort.¹² Drawing on his own book manuscript in progress, he begins with the Progressive response to *Lochner*, especially the hostility of the Progressives and legal realists to the courts. He argues that from this key moment in constitutional and political history we can learn something broader about both social and constitutional change: that restructuring the political economy is a quintessentially democratic process. He argues that we should understand this process—by which democracy asserts itself against various forms of domination—as a constitutional process in a “small-c” sense, as distinct from the “large-C” constitutionalism of constitutional text and constitutional rights.

Mark Graber, by contrast, focuses our attention on a single statute: the Second Freedmen’s Bureau Bill of 1866.¹³ From it, however, he draws some very broad and striking lessons about the actual practice of American constitutionalism. The Second Freedmen’s Bureau Bill implemented the Thirteenth Amendment as the Reconstruction Republicans understood that Amendment. The bill provided people of all races with various goods and services that the Republicans viewed as necessary in order to unwind the economic order of slavery and provide for the full and equal citizenship of both blacks and whites. Part of what Graber explores in this fascinating snapshot of constitutional politics is its partisan nature: it was really the Republican Party, and certainly not the courts, that the Reconstruction Congress imagined would interpret and enforce the guarantees of the Thirteenth Amendment—and the party would do this through legislation that explicitly attempted to intervene in American political economy.

Frank Michelman offers a critical discussion of the sense—if any—in which our argument, as outlined in the Part above, is a *constitutional* argument.¹⁴ He carefully teases out some different senses in which an argument like ours makes claims about the Constitution in court. He asks whether we are essentially opening the door to an unraveling of the New Deal settlement, and a return of what Holmes called “economic theory” to

12. See K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEXAS L. REV. 1329 (2016).

13. See Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEXAS L. REV. 1361 (2016).

14. See Michelman, *supra* note 5.

the work of the courts.¹⁵ And finally, he questions why our argument contains much talk of the Constitution, but relatively little talk of constitutional *rights*.

A series of three papers following Michelman's engage directly with our project, the broad contours of which we outlined very briefly above. For a summary of its scope and its basic shape, you could do worse than beginning with Jed Purdy's essay.¹⁶ Purdy was charged at the Symposium with introducing our project, and here he does that gracefully and swiftly. He emphasizes what we call the "great forgetting"—the disappearance of the discourse of constitutional political economy in the wake of the great triumph of the democracy of opportunity tradition in the New Deal. Purdy's essay imagines what it would mean to recover this tradition and restore its central place in our understanding of our constitution. He imagines both benefits and potential risks, and explores both.

Jack Balkin explores the conceptual foundations of our project, and the argument for understanding the tradition we are sketching as a *constitutional* tradition.¹⁷ He finds that our project fits well with, and indeed exemplifies, his general theory of living originalism.¹⁸ His argument centers on what he calls "republicanism," a set of related principles that the founding generation correctly understood to be part of the ground on which the Constitution necessarily rests. Balkin argues that the affirmative legislative constitutionalism we describe and advocate is best understood as a form of "state-building constitutional construction": it is how Americans build out the specifics of our constitutional order on the foundation of principles that include a commitment to a political economy compatible with republicanism.

Cynthia Estlund focuses on a long-running conflict *within* the democracy of opportunity tradition as we understand it: the perennially fraught relationship between, on the one hand, the principle of inclusion, especially across racial lines, and on the other, a commitment to preventing oligarchy and preserving a broad, open middle class.¹⁹ Using conflicts over labor law as her central case, Estlund argues that the future prospects of the democracy of opportunity tradition are threatened by the same political and economic forces that so often cleave apart economically struggling whites and racial minorities. She then explores the potential implications the

15. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

16. See Jedediah Purdy, *Overcoming the Great Forgetting: A Comment on Fishkin and Forbath*, 94 TEXAS L. REV. 1415 (2016).

17. See Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEXAS L. REV. 1427 (2016).

18. See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

19. See Cynthia Estlund, *The "Constitution of Opportunity" in Politics and in the Courts*, 94 TEXAS L. REV. 1447 (2016).

democracy of opportunity tradition might have for the law of labor and work.

Cory Adkins's and David Grewal's contribution takes the historical recovery of constitutional political economy in the direction of international trade, exploring the changing constitutional status of trade agreements from the Founding Era to the present.²⁰ Until the mid-twentieth century, international commercial agreements were passed as treaties, by two-thirds of the Senate; afterward, such agreements were repackaged as normal legislation; and more recently, "fast-tracked" as "congressional-executive agreements." These agreements also have begun to reach deeply into domestic regulation, in fields like intellectual property, environmental regulation, and consumer protection. Adkins and Grewal examine what accounts for these transformations and what they mean for contemporary constitutional politics. Comparing the constitutional political-economic discourse of the Founders with that of today's policy makers, they observe that amid important continuities, "one of the Founders' major concerns has been left behind, namely that one region's economic interests and institutions should not be aggressively undercut in promoting the interests of another."²¹ The disappearance of this concern, Adkins and Grewal argue, coincides with an international policy that "now privileges the finance and technology sectors" on the two coasts and short shrifts "the decaying industrial heartland."²² "Recovering what Forbath and Fishkin call the 'constitution of opportunity,'" they suggest, "will require examining how these changes . . . have affected the capacity for self-government in the American republic."²³

Jeremy Kessler's essay argues that both our project and the other historical contributions to this Symposium would benefit from revisiting the Marxist tradition's toolkit for understanding the interplay of law and political economy.²⁴ From a Marxist perspective, Kessler suggests, what was afoot in the "constitution of opportunity" tradition we chronicle may have been not so much an egalitarian critique of emerging industrial capitalism as a battle to purge the American legal and constitutional order of the remnants of precapitalist legal and political-economic formations, such as slavery and the quasi-feudal kinds of property interests in labor that imbued nineteenth- and early-twentieth-century labor law. The New Deal, on Kessler's account, may have represented "little more than the achievement of properly capitalist labor relations outside the Jim Crow

20. See Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEXAS L. REV. 1495 (2016).

21. *Id.* at 1498.

22. *Id.*

23. *Id.* at 1498–99.

24. See Jeremy K. Kessler, *The Political-Economic Conditions of "Constitutional Political Economy"*, 94 TEXAS L. REV. 1527 (2016).

South.”²⁵ But even if the New Deal’s version of constitutional political economy had more egalitarian force than that suggests, its “discursive supremacy” was short-lived; it was followed by what we call “the great forgetting.” Kessler argues that our account of that forgetting “neglects the determinate political-economic event of the post-WWII period”: a Cold War “between monopoly capitalism and state socialism launched precisely at the moment when the economically egalitarian interpretation of constitutional political economy apparently became unspeakable.”²⁶ The democracy of opportunity tradition, as Kessler sees it, was not so much forgotten or defeated by forces we highlight, like the anti-New Deal coalition of Jim Crow Dixiecrats and pro-business Republicans; it was purged by Cold War anticommunism. Recovering a more democratic and egalitarian constitutional political economy today, Kessler concludes, may require a direct confrontation with the “material and discursive structures” that anticommunism left us.²⁷

If Kessler’s essay urges us to delve more deeply into Marxism, James Pope’s contribution takes a leaf from the great, unorthodox Marxist thinker, W.E.B. Du Bois, whose insights into the role of race in the formation of the United States’ white working class inform Pope’s answer to the old question: “Why is there no socialism in the United States?”²⁸ Pope’s answer, like Du Bois’s,²⁹ Derrick Bell’s,³⁰ and others in this distinctive tradition,³¹ is that working-class identities in the United States took shape around racial identities; white working people in the United States spurned class solidarity across racial lines, settling instead for the psycho-cultural wages of whiteness, along with the material privileges whiteness brought in a political economy that, for most of U.S. history, relegated African-Americans (and often other racial others) to the most menial and “degraded” labor. Pope’s essay is a ranging synthesis of how centrally law figured in creating and enforcing these racial divisions, from the legal

25. *Id.* at 1532.

26. *Id.*

27. *Id.* at 1554.

28. See generally James Gray Pope, *Why Is There No Socialism in the United States? Law and the Racial Divide in the American Working Class, 1679–1964*, 94 TEXAS L. REV. 1555 (2016).

29. See W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 130–31 (1963) (discussing the history and consequences of racial rifts in the American working class); see also DAVID R. ROEDIGER, THE WAGES OF WHITENESS 11–13 (rev. ed. 2007) (discussing Du Bois’s argument that white supremacy diluted working-class unanimity and inhibited the ability of the working class to confront exploitation).

30. See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 60–61 (5th ed. 2004) (explaining the use of race in “facilitating the settlement of differences between segments of the white society” and identifying the success of these tactics in America over the last three centuries).

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

construction of black slavery in the mid-seventeenth century onward. Like Du Bois, Pope zeroes in on Reconstruction as a moment of possibility, a remarkable experiment in forging a black citizenry and a free black yeomanry and working class, which began forming cross-racial, class-based alliances with the poor whites of the South. Pope's point is that—contrary to Bell's assessment—poor Southern whites were not “easily detoured [from cross-racial cooperation] into protecting their sense of [racial] entitlement” and settling for the wages of whiteness.³² Quite the contrary: while federal courts enforced the era's new civil rights statutes, safeguarding blacks' ballots and freedom of association and assembly against local efforts at disenfranchisement and extralegal white terror, nascent cross-racial movements flourished. But at that critical juncture, Pope argues, the Supreme Court in a series of critical decisions from *Cruikshank*³³ to *Hodges*³⁴ to *Giles*³⁵ tore apart the legal bases of federal protection and fatally wounded these experiments, allowing the official suppression of the black vote and the violent suppression of interracial cooperation to go forward and egging on the other branches of national government in their abandonment of Reconstruction's constitutional commitments before these experiments in creating cross-racial economic associations and a cross-racial “poor man's party” could take root.

Kate Andrias's essay begins with a puzzle: scholars have built a robust set of constitutional claims about labor rights, claims with deep roots in the labor movement's own past struggles and its own traditions of constitutional claim-making.³⁶ Yet, workers' movements today have made no use of these claims, Andrias reports. The reason, she suggests, has to do with the deep mutual hostility between workers' movements and the courts. If past were prologue, workers could at least use such arguments outside the courts, but, she argues, “in our [contemporary] legal culture, constitutional arguments are primarily judicial arguments,”³⁷ and have a way of ending up in court, where workers tend to lose as they have most of the time for more than a century. Thus, it makes sense for workers to avoid constitution talk. At the same time, Andrias argues, to lay the groundwork for any future constitution of workers' rights—rights “to a union and to collective bargaining, to decent wages and benefits, to basic dignity and a measure of democracy at work”—we would need fundamental political changes that

32. Pope, *supra* note 28, at 1559 (quoting DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7 (1992)).

33. *United States v. Cruikshank*, 92 U.S. 542 (1876).

34. *Hodges v. United States*, 203 U.S. 1 (1906).

35. *Giles v. Harris*, 189 U.S. 475 (1903).

36. See Kate Andrias, *Building Labor's Constitution*, 94 *TEXAS L. REV.* 1591 (2016).

37. Kate Andrias, *Building Labor's Constitution*, *BALKINIZATION* (Jan. 24, 2016), <http://balkin.blogspot.com/2016/01/building-labors-constitution.html> [https://perma.cc/EGF6-FK9T].

only organizing can bring about.³⁸ She argues that campaigns such as the Fight for \$15 and the Domestic Workers Alliance, working outside the confines of labor law as it is traditionally understood, may be laying the political groundwork for a future “anti-oligarchy Constitution.”

Brishen Rogers, for his part, addresses what such a future architecture of labor rights might look like, taking account of the contemporary labor market conditions and new kinds of workers’ movements that Andrias describes—and taking account, as well, of the inescapable fact that the relationship among the state, unions, and individual workers is devilishly complicated “in a constitutional culture that prizes individual liberty.”³⁹ In place of today’s archaic and dysfunctional labor law framework, Rogers proposes a model he calls “libertarian corporatism.”⁴⁰ In place of our weak and outmoded forms of decentralized collective bargaining, Rogers’s scheme would encourage, or even mandate, collective bargaining at the occupational or sectoral level. But, also in contrast to today, it would leave workers nearly unfettered choice as to bargaining representatives and thereby draw the sting out of the Supreme Court’s recent neo-*Lochnerian* attacks on what remains of compulsory cost-sharing under the present labor law regime. Finally, Rogers’s model taps into the libertarian strain of contemporary Court doctrine, by removing certain core legal constraints on workers’ concerted action, as a kind of libertarian quid pro quo for eliminating bargaining unit exclusivity and compulsion. No matter that it proceeds in some “conservative” laissez-faire directions, the model would vastly enhance workers’ economic and political clout, and so its real-world salience depends on politics. If the nascent movements that Andrias describes gain steam in the context of a broader progressive revival, then perhaps this may prove a first sketch of some of labor’s planks in a future legislative anti-oligarchy constitution.

Finally, Olatunde Johnson’s essay hones in on the interaction and tensions between class-based and race-based egalitarianism, two threads that any future democracy of opportunity will need to weave together.⁴¹ She argues that geography—place—is the key to both forms of inequality today. Opportunity is tied to place, which is why racial and income segregation each play such a large role in the intergenerational reproduction of inequality. Johnson begins by highlighting empirical data suggesting why neighborhoods with concentrated poverty—which poor black people are much more likely to live in than poor white people—are resistant to

38. Andrias, *supra* note 36, at 1595.

39. Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEXAS L. REV. 1623, 1623 (2016).

40. *Id.* at 1624.

41. See Olatunde C.A. Johnson, *Inclusion, Exclusion, and the “New” Economic Inequality*, 94 TEXAS L. REV. 1647 (2016).

some of the policy solutions on offer that aim either for race-based civil rights or for universal avenues of access to the middle class. She then turns to a set of solutions she views as potentially more promising: efforts by government at both the federal and (especially) the state and local level to “remake place,” edging living patterns toward a future of greater inclusion along lines of both race and class.

All in all, it is a rich and fascinating set of essays, which, on the whole, raise more questions than they settle. We suspect this is not the last symposium that will explore the interplay between the Constitution and economic inequality—let alone the series of related interactions that enrich so many of these essays: race and class, legislatures and courts, history and the egalitarian possibilities of our own time. The gathering in Austin that gave rise to this Symposium was remarkable, we thought, in part because we left with a sense that a large group of scholars, with wildly diverse substantive interests, were converging on a set of related questions that are unlikely to go away in the coming years. We hope this published Symposium is useful to others who wish to engage in, or with, that work.