

The “Constitution of Opportunity” in Politics and in the Courts

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Here is a proposition that most American progressives today would endorse: Widely shared economic opportunity and a broad middle class flanked by neither an underclass nor an oligarchic overclass are essential to the health of our polity. Joseph Fishkin and William Forbath, in their book in progress,¹ are brilliantly excavating a once-powerful, mostly forgotten vein of constitutional thought that so held. What has been mostly forgotten, and what Fishkin and Forbath hope to revive, is precisely the constitutional import of issues of political economy—of economic inequality, mobility, and opportunity. The forgetting is part of what they are up against in persuading readers that the constitutional register, in which such arguments were made for much of American history, really matters. But there are deeper challenges in store for Fishkin and Forbath’s constitutional vision.

I confess to being largely in thrall to the Fishkin–Forbath view of things—moved by their retelling of American political and constitutional history, and largely in tune with both their regrets about the past and their hopes for a future resurgence of a progressive rival to the neo-libertarian constitution. In particular, I admire the authors’ effort to braid together the two histories of struggle for equal opportunity—the struggle against discriminatory exclusion and the struggle for broadly shared economic opportunity. Those two struggles—here called the “constitution of inclusion” and the “constitution of opportunity”—often struggled with each other throughout American history, and Fishkin and Forbath are very frank about the extent to which various strains and bearers of the constitution of opportunity narrative were deeply compromised by exclusionary impulses and commitments. Jefferson the slave owner and Jackson the slayer of Native-Americans are problematic heroes, and Fishkin and Forbath do not run away from that.

Unfortunately, the two strains of egalitarianism—the struggle for greater economic equality and the struggle for inclusion—still clash. Racially inflected fears and resentments and illiberal cultural commitments are among the forces that divide the political coalition that would be necessary to enact the redistributive reforms called for by the constitution of

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

opportunity. Indeed, even among the progressives who would lead the charge for inclusive egalitarianism, there is tension between those two strains of political-economic thought. But I am getting ahead of myself.

I begin by probing one central issue in the book: Why did those two strains of political-economic thought diverge so dramatically after the New Deal on just the dimension the authors stress—the extent to which their proponents recognized and emphasized the *constitutional* stakes of these struggles? Second, I examine some of the related challenges to the project of reviving the constitution of opportunity in the political domain, where it will necessarily rise or remain largely dormant. Finally, in a more optimistic vein, I explore what the constitution of opportunity could amount to as a *legal* matter, particularly in the labor arena.

I. The “Great Forgetting”: Why and When?

The high water mark of the constitution of opportunity in the Supreme Court might be its blockbuster *Jones & Laughlin Steel*² decision upholding the National Labor Relations Act (NLRA) against both Commerce Clause and liberty of contract objections.³ The biggest surprise was the decision’s broad reading of Congress’s commerce power, for the constitutional liberty of contract had been cut down to size two weeks earlier in *West Coast Hotel Co. v. Parrish*,⁴ which upheld a state minimum wage law against the claim that it infringed the constitutional liberty of both parties to the employment contract to set whatever terms they chose.⁵ But *Jones & Laughlin* decimated what remained of the liberty of contract in upholding an order to reinstate employees fired for union activity.⁶ Not so many years earlier, in *Adair v. United States*,⁷ the Court had struck down a ban on anti-union discrimination, holding that “it is not within the functions of government . . . to compel any person, in the course of his business and against his will to accept or retain the personal services of another.”⁸ The author of *Adair* was Justice Harlan,⁹ who would have upheld the maximum-hours law struck down in *Lochner*.¹⁰ If the liberty of contract meant anything, in short, it meant the liberty not to contract at all.

The Court in *Jones & Laughlin* thus had to extend its repudiation of the constitutional construct of liberty of contract in order to uphold the NLRA and its fettering of employers’ freedom to fire employees at will.

2. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

3. *Id.* at 30, 45.

4. 300 U.S. 379 (1937).

5. *Id.* at 395–400.

6. 301 U.S. at 47–49.

7. 208 U.S. 161 (1908).

8. *Id.* at 174.

9. *Id.* at 166.

10. *Lochner v. New York*, 198 U.S. 45, 65, 74 (1905).

And it did so rather breezily. Citing the statute's central aim "to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer," the Court intoned: "*That is a fundamental right.* Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."¹¹

In Fishkin and Forbath's account, this was an explicit, but now forgotten, recognition of workers' *constitutional* freedom to form unions and bargain collectively and an affirmation of constitutional claims being made at the time by many unionists and worker advocates on behalf of the right to organize.¹² That is a fair reading. What else would it mean in our legal culture to call a right "fundamental"? But I suspect that the Court's choice of words reflected some equivocation about where the Constitution stood in debates about workers' collective rights. Workers' "fundamental" rights might counter the Lochnerian constitution and might help justify Congress's protection of those rights against employer reprisals (and that in turn might be just the sort of work that Fishkin and Forbath's constitution of opportunity can do). In declining to describe those collective rights themselves as constitutional, however, the Court may have betrayed some reluctance to jump back into the very constitutional thicket from which it was in the process of extricating itself—the thicket of constitutionalized claims about the proper organization of economic life.

Of course, we now know that the Court was poised to jump head first into another constitutional thicket that was hardly unrelated to the organization of economic life: the effort to dismantle American apartheid. That is the point at which the two "equal opportunity" narratives diverged in their invocation of constitutional claims. Fishkin and Forbath explore several reasons for the post-World War II eclipse of the constitution of opportunity—of explicitly constitutional arguments for broadly shared economic opportunity—just as the constitution of inclusion began to shape the agenda of all three branches of the federal government.¹³ But they give short shrift to one possible reason, perhaps because it is too familiar and conventional: The traumatic rise and fall of *Lochner* may have transformed conceptions of the proper role of constitutional argumentation even more dramatically than they admit.

Many of us can recite by heart the edict of *Carolene Products*,¹⁴ issued a year after *Jones & Laughlin*: Constitutional scrutiny was to be redirected away from regulation of "ordinary commercial transactions"—including

11. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (emphasis added).

12. FISHKIN & FORBATH, *supra* note 1 (manuscript at 80).

13. *Id.* (manuscript at 61).

14. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

labor market transactions—and toward a narrower set of legal controversies: laws conflicting with a “specific prohibition” of the Constitution and its Bill of Rights; laws restricting the political process; and laws directed at racial minorities, prejudice against whom “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”¹⁵ That formula neatly distinguished the coming judicial assault on racial segregation and discrimination from other controversies over the shape of the political economy and the distribution of opportunity.¹⁶ Exclusion of African-Americans from whatever economic opportunity structure was enjoyed by white people offended our *constitutional* commitments in a way that defects in that opportunity structure itself did not.

It is true, of course, that the familiar Footnote Four categories were meant to discipline the scope of judicial review, not to exhaust the meaning of the Constitution for all political actors.¹⁷ But that may understate the lesson learned from *Lochner* and the constitutional crisis over the early New Deal. That era had exposed—arguably for the first time, and especially for progressives—the really dangerous potential of constitutionalizing arguments about how the economy should be governed. Even if constitutional arguments need not be directed to judges, they tend to empower judges, given the institution of judicial review.¹⁸ Judicial review can become judicial supremacy, and can frustrate democracy, if the Constitution is read to govern too much. Better to adopt a more spare constitutional vision that leaves the great bulk of social and economic policy making to the political process and that constrains the political process mainly when it is manifestly prone to failure, as in the case of stigmatized and marginalized minority groups.

For judges and scholars that lesson resonated for many decades, and we can probably all hear its refrains echoing in our heads. I hear them in the voice of my constitutional law professor, Robert Bork, and in the words of John Hart Ely, whose scholarly elaboration of the logic of Footnote Four in *Democracy and Distrust* posed the most cogent challenge to the Court’s expansive constitutional decisions in the realm of reproductive autonomy,

15. *Id.* at 152 n.4.

16. The Court had already tentatively begun this undertaking, for example, in striking down the all-white primaries in the Texas Democratic Party in *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

17. Hence the upsurge of scholarship on “the Constitution outside the courts.” See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 218–20 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 168 (1999); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1003–06 (1998).

18. Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 TEXAS L. REV. 1403, 1404 (2016).

for example.¹⁹ It is almost embarrassing to return to those familiar refrains here, in the face of Fishkin and Forbath's profoundly learned plea for a more fulsome, though less court-centered, vision of what the Constitution requires of our political-economic arrangements. But the ghost of *Lochner* may still be haunting the halls of academe and public discourse, and inhibiting the proponents of wider economic opportunity and equality from making their arguments in constitutional terms.

II. The Fraught Politics of Opportunity and Inclusion

The logic of leaving the great bulk of economic and social policy making—including the constitution of opportunity agenda—to elected legislators and democratic politics is powerful, and Fishkin and Forbath do not deny it. The biggest challenge for their project, and for the future of constitutional arguments about the structure of economic opportunity, does not lie in a restrained judicial conception of the Constitution's demands. (On the contrary, Fishkin and Forbath might wish to revive that once-conservative commitment to judicial restraint, the political valence of which shifted some time ago, in a colossal case of Balkin-style “ideological drift.”)²⁰ The greater challenge lies in an American electorate that appears sharply divided, even in this era of reawakened anxiety about inequality, over the redistributive, anti-oligarchy agenda that Fishkin and Forbath argue is essential to the vitality of a republican form of government.²¹ Survey data suggest more widespread concern about inequality, and greater receptivity to government intervention to address it, than one might expect given the anti-tax, anti-redistributive agenda of the party that currently controls Congress and over thirty state governorships.²² That suggests an opportunity for the constitution of opportunity agenda, which should appeal

19. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 15, 248 n.52 (1980); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 11 (1971).

20. Jack M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 *CONN. L. REV.* 869, 870–71 (1993).

21. For example, in a recent Gallup poll, 52% of Americans opined that Americans should heavily tax the rich to redistribute wealth, while 45% disagreed. Frank Newport, *Americans Continue to Say U.S. Wealth Distribution is Unfair*, GALLUP (May 4, 2015), <http://www.gallup.com/poll/182987/americans-continue-say-wealth-distribution-unfair.aspx> [<https://perma.cc/KZ37-DP8W>].

22. For example, while 90% of Democrats think that the government should take action to reduce the wealth gap, only 45% of Republicans agree. Even within the Republican Party, there are stark divides between Tea Party and non-Tea Party Republicans on issues like the minimum wage. Additionally, Republicans do not see reducing “poverty” (where only 13% think the government should do nothing) and reducing “the gap between the rich and everyone else” (where 33% think the government should do nothing) as the same thing. *Most See Inequality Growing, but Partisans Differ Over Solutions*, PEW RES. CTR. (Jan. 23, 2014), <http://www.people-press.org/2014/01/23/most-see-inequality-growing-but-partisans-differ-over-solutions/> [<https://perma.cc/WMG8-X9KQ>].

to all but the most privileged citizens—the overwhelming majority that has missed out on the outsized gains at the top. Unfortunately, the most eloquent contemporary exponents of that agenda have not been able to win many general elections outside of Vermont and Massachusetts.²³

That is the steepest hill that Fishkin and Forbath’s constitutional agenda has to climb, and they have much to say about why that is so. For one thing, racial divisions, resentments, anxieties about immigration, and the zero-sum politics that they have fueled cloud the prospects for a redistributive agenda. The constitution of inclusion has not utterly conquered the hearts and minds of the whole citizenry, which is sharply split over whether American ideals require greater receptivity to immigration and immigrants, or rather a greater commitment to preserving jobs and economic opportunity for American citizens.²⁴ So too, sharp and sincere disagreements over the meanings of equality and inclusion divide the necessary coalition for an economically egalitarian agenda. Does Equal Protection require “color blind” equal treatment or rather a race-conscious offensive against continuing disparities?²⁵

In short, the people need to be persuaded by the constitution of opportunity agenda before it can do much more than fend off or neutralize its neo-libertarian constitutional counterpart. Indeed, it probably can’t do even that without gaining much greater popular traction than it now enjoys. Of course, it is among the highest callings of intellectuals to change the public conversation. But it is also among the most challenging of callings, and the challenges faced by the Fishkin and Forbath agenda are daunting indeed.

Many white Americans who are struggling to keep their heads above water are more inclined (and are encouraged) to blame others—racially and ethnically distinct others—who are engaged in that same struggle than those who are pulling the strings at the top. The history that Fishkin and Forbath recount shows those divisive and exclusionary impulses at work even among the foremost expositors of the constitution of opportunity, and

23. I refer to Bernie Sanders and Elizabeth Warren, both elected as Senators in two of the most liberal states in the nation.

24. See Jens Manuel Krogstad, *On Views of Immigrants, Americans Largely Split Along Party Lines*, PEW RES. CTR. (Sept. 30, 2015), <http://www.pewresearch.org/fact-tank/2015/09/30/on-views-of-immigrants-americans-largely-split-along-party-lines/> [https://perma.cc/KNV4-PSMP].

25. For example, while a majority of Americans support campus affirmative action, there are sharp racial disparities: While 55% of whites support campus affirmative action, 84% of blacks and 80% of Hispanics believe these programs are a good idea. Bruce Drake, *Public Strongly Backs Affirmative Action Programs on Campus*, PEW RES. CTR. (Apr. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus/> [https://perma.cc/V3EY-TVSP]. Additionally, support is considerably less for affirmative action when the issue is minority preference (especially in hiring) instead of academic affirmative action. *Public Backs Affirmative Action, But Not Minority Preference*, PEW RES. CTR. (June 2, 2009), <http://www.pewresearch.org/2009/06/02/public-backs-affirmative-action-but-not-minority-preferences/> [https://perma.cc/5T8A-PG4D].

indeed sometimes tightly interwoven into their agenda.²⁶ Indeed, across the whole expanse of American history that they survey, at least until the Civil Rights Revolution, the voices that support a genuinely inclusive commitment to broad-based economic opportunity are few and far between, and never commanded a sturdy political majority.²⁷ Reconstruction might be an exception, but it required the temporary disenfranchisement of white Southerners; the New Deal, for all its virtues, excluded most Southern black workers—then-disenfranchised, and confined to agricultural and domestic work—at the insistence of a later generation of white Southerners.

Today most progressive intellectuals and opinion leaders would gladly sign on to an inclusive opportunity agenda—one that integrated both constitutional narratives of equal opportunity. But that is not as straightforward as it might sound, and as Fishkin and Forbath might wish, once one moves past general principles to priorities and policy specifics. Those progressives who harken mainly to the unfinished business of the civil rights movement in dismantling racial and gender hierarchies are likely to have different priorities than those who seek to build a wide coalition of the not-rich against growing economic inequality. Witness the 2016 Democratic presidential contest, in which Hillary Clinton, fighting to shore up black support, attacked Bernie Sanders for focusing too much on bashing the banks and too little on redressing continuing racial injustice.²⁸ Similarly, “Occupy Wall Street” and “Black Lives Matter,” though often uttered in the same breath as signs of a rising tide of progressive mobilization, have rather different goals and constituencies.²⁹

Fishkin and Forbath themselves can play a crucial role in helping progressive intellectuals rethink the relationship between the constitution of inclusion—especially the thicker versions of it that call for affirmative race-conscious remediation of past discrimination—and the struggle for greater economic equality for the broad sweep of working people. Just to take a single obvious example close to home: Should race-based affirmative action

26. See, e.g., FISHKIN & FORBATH, *supra* note 1 (manuscript at 67) (“[F]oes of civil rights enforcement drew on some of the legacies of the old Constitution of Opportunity to depict integration and affirmative action as threats to white children’s basic initial endowments of opportunity.”).

27. See *id.* (manuscript at 7) (“There have always been some individuals and organizations who understood the democracy of opportunity project and its democratic character in these terms, but usually—with the extremely important exception of Reconstruction—these were dissenting views.”).

28. Nicholas Confessore & Yamiche Alcindor, *Hillary Clinton, Shifting Line of Attack, Paints Bernie Sanders as a One-Issue Candidate*, N.Y. TIMES, Feb. 13, 2016.

29. See generally Peter Dreier, *Black Lives Matter Joins a Long Line of Protest Movements That Have Shifted Public Opinion—Most Recently, Occupy Wall Street*, SALON (Aug. 15, 2015), http://www.salon.com/2015/08/15/black_lives_matter_joins_a_long_line_of_protest_movements_that_have_shifted_public_opinion_most_recently_occupy_wall_street/ [https://perma.cc/DN4A-2T9H].

in university admissions give way to class-based affirmative action?³⁰ Of course, one might contend for “both–and” rather than “either–or.” But the two strategies for expanding educational opportunity compete for a scarce commodity: tolerance in the academy and society for departures from conventional predictors of academic success, such as grades and test scores.

Assuming that Fishkin and Forbath and other progressive opinion leaders can fashion a fully integrated and inclusive opportunity agenda, they will face challenges in selling it to the people. The political majority of not-rich people that would need to come together in support of the opportunity agenda is fractured along both racial and cultural lines. For cultural conservatives, issues like abortion, gay rights, gun control, and a larger governmental role in health care are not mere distractions from the economic interests that non-elites share.³¹ Fishkin and Forbath would rightly respond that a progressive agenda constructed around the constitution of opportunity would better the prospects for bridging those cultural divisions. But query whether that means soft-pedaling reproductive rights and the rights of sexual minorities, central to the contemporary constitution of inclusion.

Demographic diversity and divisions are part of the challenge here. It is an unfortunate fact of human history, so far, that building a broad constituency for a thick set of tax-supported social entitlements is much harder in a society that is highly diverse along racial, ethnic, and religious lines than in one that is relatively homogeneous.³² Indeed, it has never been done. The countries of northern Europe that provide the familiar models of generous and egalitarian social welfare policies developed those policies, and the politics that supported them, within strikingly homogeneous societies.³³ Mass immigration and the much greater diversity it has brought about have put those policies under serious political pressure.³⁴ (It seems that some elements of “American exceptionalism” are not so exceptional anymore.)

30. For a thoughtful meditation on some of the dilemmas, see generally Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEXAS L. REV. 1847 (1996). Fishkin himself has addressed this issue in his excellent book, JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014). It will be interesting to see how the Fishkin–Forbath team recasts the issue.

31. For an example, see THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004).

32. I have made this point before in commenting on Professor Fishkin’s book, FISHKIN, *BOTTLENECKS*, *supra* note 30.

33. See Ulf Hedetoft, *Denmark: Integrating Immigrants Into a Homogenous Welfare State*, MIGRATION POL’Y INST. (Nov. 1, 2006), <http://www.migrationpolicy.org/article/denmark-integrating-immigrants-homogeneous-welfare-state> [https://perma.cc/8BXZ-UK5L].

34. See *id.* (noting that Danish “citizens and political actors have started to focus on (and often ideologically exaggerate) the financial burden newcomers place on the welfare system”).

It might be too easy for the highly educated liberal elites who would lead the charge for an inclusive constitution of opportunity to ascribe those illiberal impulses to sheer racism or ignorance, though those are still in wide circulation. Too easy in part because it is illiberal attitudes and practices within some immigrant communities that have contributed to an anti-immigrant backlash in societies committed to gender equality and freedom of expression.³⁵ Diversity can bring real differences in beliefs, behavior, language, family arrangements, and cultural practices; some of those differences challenge deep-seated assumptions about who is deserving of societal support, and who is the “us” to whom solidarity should extend. And when borders seem porous and immigration flows uncontrolled, people wonder even how many of “us” there are.³⁶ The very future of humanity may depend on widening the reach of empathy, generosity, and solidarity—not just in sentiments and attitudes, but in willingness to make tangible sacrifices—across lines that have long divided people. That is a challenging project that we have only begun.

Returning to the vocabulary of the Fishkin–Forbath project, the constitution of opportunity is still entangled and in tension with the constitution of inclusion in the diverse United States and beyond.³⁷ All of this means not that the constitution of opportunity agenda is doomed, but only that the interplay and tension between these two strands of modern liberalism will continue even if Fishkin and Forbath and their allies succeed in restoring the constitutional weight and resonance of arguments about economic inequality. No surprise there, certainly not to the authors themselves.

35. Apart from ongoing controversies over female circumcision, headscarves, and burqas, there are more tragic recent examples: the murderous rampage in Paris triggered by satirical depictions of Mohammed (and fed by anti-Semitism), and a misogynistic outburst in Cologne, Germany, involving asylum-seekers of Arab and North African descent. See Dan Bilefsky & Maïa de la Baume, *Terrorists Strike Charlie Hebdo Newspaper in Paris, Leaving 12 Dead*, N.Y. TIMES (Jan. 7, 2015), <http://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html> [<https://perma.cc/Q24H-G3PQ>]; Jim Yardley, *Sexual Attacks Widen Divisions in European Migrant Crisis*, N.Y. TIMES (Jan. 13, 2016), <http://www.nytimes.com/2016/01/14/world/europe/a-climate-of-fear-widens-divisions-in-europes-migrant-crisis.html> [<https://perma.cc/W7RZ-RS9P>].

36. That appears to have been a concern with regard to recent entrants to Germany from points east. See Anton Troianovski, *Number of Migrants Coming to Germany Slows in Recent Weeks*, WALL ST. J., Dec. 7, 2015.

37. That tension could be mitigated if it were possible to finance the project of bringing up the bottom by soaking the rich at the top. But that is probably not possible, either economically or politically. See, e.g., William G. Gale et al., *Would a Significant Increase in the Top Income Tax Rate Substantially Alter Income Inequality?*, BROOKINGS (Sept. 28, 2015), <http://www.brookings.edu/~media/research/files/papers/2015/09/28-taxes-inequality/would-top-income-tax-alter-income-inequality.pdf> [<https://perma.cc/ZJS6-LDKV>] (finding that a sizeable increase in the top income tax rate with proceeds directly transferred to the poor ultimately results in a very limited impact on income inequality).

III. The Legal Uses of the Constitution of Opportunity

But I want to turn to a more optimistic and lawyerly response to the Fishkin–Forbath project. A central question to which they must respond, and that animates much of the commentary on their project, is, “What does it mean, and how does it matter, to call their egalitarian agenda ‘constitutional’?” For now, let us put to one side the use of that agenda to change political discourse and add heft to political efforts to create a more egalitarian society; that does not sound very legal, much less “constitutional,” to many readers. And let us put to the other side, for now, the potential use of the constitution of opportunity by courts to overrule the legislature, which Fishkin and Forbath largely abjure.³⁸

That leaves at least two more conventionally legal deployments of the constitution of opportunity, both explored by Fishkin and Forbath. The first is as a resource in statutory interpretation—especially in interpreting some of the grand framework statutes, enacted decades ago, that still govern vast swaths of our economic life, such as labor relations, antitrust, and arbitration. The constitution of opportunity might offer weighty reasons to construe ambiguous or open-textured provisions of those statutes in ways that expand the economic opportunities of the many or that restrict the economic power of those with a lot of it to constrain the entitlements or rewards of those with much less of it.³⁹ The second is to counter the neo-libertarian uses of the Constitution, especially the First Amendment, when it is deployed to constrain the political branches. Fishkin and Forbath offer the constitution of opportunity as a reason, more substantive and more powerful than judicial restraint, to defer to the political branches when they act to expand the economic opportunities of ordinary citizens or to constrict the economic clout of those at the top. Let us take up some examples.

In the field of money and politics, Fishkin and Forbath rightly trace the difficulty of building political support for redistributive policies partly to the ability of wealthy actors to skew the political process and public debate away from serious threats to their privileges and perquisites. (They sometimes do so by exploiting cultural, racial, and other divisions and tensions.) The ability of wealth to skew politics strikes at the heart of the constitution of opportunity that Fishkin and Forbath want to revive: it is precisely because the distribution of wealth and economic opportunity is bound to affect the distribution of political power that the former was viewed by many founders, and many of their successors, as a matter of profound constitutional import.⁴⁰ So the constitution of opportunity agenda

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

39. For a precursor, see Clyde Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 695–96 (1987).

40. FISHKIN & FORBATH, *supra* note 1 (manuscript at 13–15, 27–29).

seeks not only to engineer a more equal distribution of wealth and economic opportunity, but also to interrupt the mechanisms by which wealth warps politics. The latter effort has sometimes managed to attract the necessary votes to become law, whether through legislation or referendum, but those majoritarian efforts to constrain the role of money in politics have been blocked in recent years by the Supreme Court in the name of the First Amendment.⁴¹

A striking example discussed by Fishkin and Forbath is the Court's 2012 decision in *American Tradition Partnership v. Bullock*,⁴² which invalidated a Montana law prohibiting corporate contributions in support of political candidates. The majority issued a terse one-paragraph *per curiam* decision citing *Citizens United*: “[P]olitical speech does not lose First Amendment protection simply because its source is a corporation.”⁴³ Four dissenters would have instead reconsidered *Citizens United* itself.⁴⁴ As Fishkin and Forbath show, however, Montana's citizens held a radically different view of the Constitution when they enacted the law in question. The law was adopted, not by the legislature but by popular initiative, “in 1912, at the height of Progressive constitutional agitation to undo the oligarchic power structure of the railroad barons and corrupt party officials who dominated the politics of the West.”⁴⁵ The Montana law “actually implemented the Constitution as a reform-minded public then understood it, informed by the anti-oligarchy constitutional precepts of the day”; it “protect[ed] the political economy on which the Constitution rests.”⁴⁶ That is just the sort of popular constitutionalism that Fishkin and Forbath hope to revive outside the courts. But the Court's 2012 decision to strike down the law underscores the work that the anti-oligarchic constitution of opportunity can do inside the courts as well: it could and should counter the increasingly full-throated neo-libertarian conception of the First Amendment that constitutionalizes the market as the proper organizing principle for politics as well as economics.⁴⁷

41. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014) (striking down statutorily imposed aggregate limits on political donations); *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490, 2491–92 (2012) (striking down state prohibition against corporate expenditures in support of political candidates); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341–45 (2010) (striking down limits on independent corporate political expenditures).

42. 132 S. Ct. 2490, 2491 (2012).

43. *Id.* (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010)).

44. *Id.* at 2491–92 (Breyer, J., dissenting).

45. FISHKIN & FORBATH, *supra* note 1 (manuscript at 41).

46. *Id.* (manuscript at 42).

47. On the neoliberal premises of many recent constitutional decisions, see David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS., no. 4, 2014, at 1, 3; Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS., no. 4, 2014, at 195, 198.

Even the most court-centered understanding of what counts as constitutional argumentation must recognize this role for the constitution of opportunity, and for the long historical tradition that stands behind it. In particular, the constitution of opportunity narrative could help to justify greater deference to the political branches when they act to limit the power of wealth in politics. That counter-narrative would not automatically trump all First Amendment objections to regulating the expenditure of money on speech; in particular, the much-reviled notion that “money is speech” cannot be wholly dismissed.⁴⁸ But the Fishkin–Forbath counter-narrative might move the dial toward a more balanced approach to the issue.

In the post-Scalia era, it is not so hard to imagine a decision by the Supreme Court reversing course in the field of campaign finance, and affording greater latitude for legislative efforts to limit the ability of rich people and corporations to influence political outcomes. That decision could be based not only on a more restrained sense of the judicial role vis-à-vis the political branches, but on an affirmative constitutional vision—a constitutional counter-narrative to neutralize the prevailing libertarian attachment to the freedom to buy political clout.

Such an opinion might contain echoes of the Court decisions that gave a green light to the New Deal—decisions that were informed by, even if they did not explicitly embrace, constitutional arguments about the entitlements of workers and the need to rebalance the scales of power. Like *Jones & Laughlin Steel*, it would counter the claimed liberty to speak through money with a competing fundamental interest—that of the majority of ordinary people to ensure that their voices are not drowned out by the amplified voices of the rich few.⁴⁹ And like *West Coast Hotel*, such an opinion might turn the central metaphor of the opponents of regulation against them: that decision famously not only rejected the notion that a minimum wage forced employers to subsidize poor workers, but portrayed substandard wages as a forced subsidy from the public to greedy employers.⁵⁰ An opinion allowing the people greater power to constrain the role of wealth in politics might similarly turn around the question of who was silencing whom: instead of seeing an unconstitutional effort to silence the rich, it might portray the ability of wealthy interests to buy the loudest megaphones, or to saturate the airwaves, as effectively silencing less moneyed voices.

48. For acknowledgments that regulation of money in politics sometimes is regulation of political speech, see ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 6 (2014); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 118–20 (2010).

49. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (recognizing the interest of employees to choose their own representatives for labor unions without their employer’s interference).

50. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

These arguments for regulation of campaign finance and expenditures have been around for decades, and they have sometimes been made in explicitly constitutional terms.⁵¹ But a more deeply historicized constitutional narrative of the sort that Fishkin and Forbath are trying to revive might underscore the danger—the constitutional danger—that unconstrained money in politics poses to democratic self-rule and government by and for the people. In the right political context with the right constellation of judges, that could make a difference.

My own primary field of labor law is in dire need of a counter-narrative, and of normative support for statutory interpretations that support rather than undermine workers' organizations and collective action. Indeed, this is where Fishkin and Forbath commence their survey of potential uses of the "democracy of opportunity tradition" in the courts.⁵² They are right to do so. Indeed, labor law might be an unusually fertile field for the somewhat oblique sort of constitutional argumentation that might flow from the constitution of opportunity. Over the past eight decades, both individuals and unions have raised many constitutional objections to the NLRA; yet no provision of the statute has ever been held unconstitutional. Sometimes the Court has been too deferential to "Congress' striking of [a] delicate balance" in an industrial arena that was long a site of wrenching conflict.⁵³ Sometimes, however, the Court has resorted to creative statutory interpretation under the shadow of constitutional concerns, as it did in implying a "duty of fair representation" on the part of unions toward all members of the bargaining unit;⁵⁴ in narrowly reading the ban on secondary pressures to allow some consumer publicity and even picketing;⁵⁵ and in

51. See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (arguing that the constitution should "guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot"); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1385 (1994) (likening campaign contributions to votes subject to the constitutional principle of "one person, one vote"); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (1982) ("Campaign spending reform is imperative to serve the purposes of freedom of expression.").

52. FISHKIN & FORBATH, *supra* note 1 (manuscript at 56–59).

53. NLRB v. Retail Store Emps. Union, 447 U.S. 607, 617 (1980) (Blackmun, J., concurring in part).

54. The issue was first decided under the Railway Labor Act (RLA) in *Steele v. Louisville R.R. Co.*, which found a duty of fair representation on the part of an all-white union toward the black workers whom they represented under the RLA's "exclusivity" principle. 323 U.S. 192, 198 (1944). The Court noted that "constitutional questions [would] arise" in the absence of such a statutory duty. *Id.* The implied duty of fair representation was extended to the NLRA without reference to the constitutional concerns that motivated its recognition in *Steele*. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 343 (1953).

55. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988); *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 72–73 (1964).

construing the Act to prohibit union security agreements that require objecting employees to support unions' political and ideological activities, as discussed below.⁵⁶ The canon of "constitutional avoidance" has proven to be a powerful tool for bending the meaning of the statute, often without a precise theory of unconstitutionality or even of state action behind it. The Court's willingness in the labor arena to give weight to constitutional concerns through avenues other than direct judicial review might soften the ground for a Fishkin–Forbath constitutional counter-narrative that seeks to incline statutory construction in favor of workers' organizing and bargaining efforts, and to counter constitutional claims that would frustrate those efforts.

Consider first the D.C. Circuit's recent decision in *National Ass'n of Manufacturers v. NLRB*⁵⁷ (*NAM*), striking down on First Amendment grounds an NLRB rule requiring employers to post in the workplace an official notice of employee rights under the NLRA.⁵⁸ In the court's view, employees' interest in knowing about their statutory rights to join with coworkers in support of mutual interests was trumped by the employer's interest in refusing to cede one-and-a-half square feet of wall space to display a message to which it objects—a message that merely describes employees' rights under the NLRA.⁵⁹

Wow. That is an astonishing application of the neo-libertarian right to opt out of a regulatory requirement that happens to take the form of "speech," and a vivid demonstration of the weightlessness of employees' collective labor rights in the constitutional calculus of conservative judges. A constitution of opportunity narrative, if it gained traction, might recalibrate the scales, and both support an interpretation of the statute that permitted the NLRB's rule and counter the claim that it unconstitutionally compelled employer speech. Information about employee rights under the NLRA is essential to enabling workers to counter employer power with their own collective power. If the latter were understood as a "fundamental right," as per *Jones & Laughlin Steel Corp.*,⁶⁰ or as a constitutionally compelling societal interest, then the idea that employers had a constitutional right to refuse to display an official notice of those employee rights would be exposed for the nonsense that it is. Like the claim that employers had a constitutional right to fire union supporters, the "compelled speech" claim in *NAM* would ring hollow to a Supreme Court

56. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (relying on *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961)).

57. 717 F.3d 947 (D.C. Cir. 2013).

58. *Id.* at 967.

59. *Id.* at 950, 967.

60. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

that was newly cognizant of the fundamentality of workers' rights to form and act through unions.

Let us turn to the *Friedrichs*⁶¹ case, recently before the Supreme Court, and discussed by Fishkin and Forbath as “a good occasion to recall the constitutional work that the democracy of opportunity tradition assigned to unions, since this is the side of the ledger that has been largely erased in our constitutional discourse.”⁶² In American labor law in both the public and private sectors, a union chosen by a majority within an appropriate “bargaining unit” becomes the exclusive representative with a duty to fairly represent all in the unit.⁶³ Across all those labor law regimes, the Court has long held that unions and employers can agree to require employees to pay a “fair share” agency fee for the costs of collective representation, but not to support the union’s ideological or political activities.⁶⁴ That split verdict, extended to the public sector in *Abood v. Detroit Board of Education*, was grounded in both the limited free speech interests at stake in the ordinary process of collective bargaining and interests at stake in the ordinary processes of collective bargaining and representation and the importance of preventing “free riders”—those who would take the benefits of union representation without bearing their fair share of its considerable costs.⁶⁵

A constitutional litigation campaign against mandatory union fees, now in its seventh decade, has the *Abood* compromise in its crosshairs, and appeared on the verge of victory until Justice Scalia’s death. A conservative majority of the Court in *Harris v. Quinn*,⁶⁶ two terms ago, questioned *Abood*’s major premises in refusing to apply it to the unusual case of home-care workers.⁶⁷ *Friedrichs* gave the same majority the chance to overrule *Abood* altogether. On one side was the ever-expanding and ever-more-sanctified First Amendment right to opt out of collective institutions and democratic decisions that have an expressive component. On the other side, along with the combined force of stare decisis, federalism, and separation of powers, were the state’s interests in allowing

61. *Friedrichs v. Cal. Teachers Ass’n*, No. 14-915, slip op. at 1 (U.S. Mar. 29, 2016).

62. FISHKIN & FORBATH, *supra* note 1 (manuscript at 79).

63. See Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 127 (1992). The federal and state statutes that govern public sector relations nearly all follow suit by adopting the model of exclusive recognition with bargaining units. Joseph R. Grodin et al., *Collective Bargaining in Public Employment*, in LABOR RELATIONS AND SOCIAL PROBLEMS 41 (3d ed. 1979).

64. See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 754–56 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961).

65. See *Abood*, 431 U.S. at 221–22 (discussing interests at stake in collective bargaining).

66. 134 S. Ct. 2618 (2014).

67. *Id.* at 2627. The court was able to frame the issue in *Harris* as whether to extend *Abood* because the workers in *Harris* were employed by the state only for purposes of collective bargaining over limited terms and conditions of employment, and were otherwise employed by their individual clients or their families. *Id.* at 2624–26.

the agency fee. But the latter were reduced in *Harris* to empirical propositions, and questionable ones at that: was the state's interest in "labor peace" within its workforce seriously threatened by allowing individuals to take the benefits of union representation without bearing their fair share of its costs?⁶⁸ Was the mandatory agency fee really *necessary* to the *survival* of public sector unions? From the oral argument in *Friedrichs*, it appeared that *Abood's* days were numbered.

Scalia's unexpected death changed the calculus dramatically. The current eight-member Court includes the four *Harris* dissenters who vigorously defended *Abood*, as well as four who criticized it. That evenly divided Court produced a summary affirmance in *Friedrichs*, and postponed the resolution of this issue. It may thus fall to the next Court appointee to determine the fate of the agency fee.⁶⁹

Consider now how a decision upholding the agency fee might read—next term or beyond—if the constitution of opportunity became as salient in our legal and political culture as its New Deal version was in the 1930s. A counter-narrative informed by the constitution of opportunity would recognize a societal interest in enabling workers to aggregate, amplify, and coordinate their own voices and bargaining power vis-à-vis the powerful entities that employ them—an interest wholly absent from the conservative majority's calculus. To be sure, that counter-narrative, and especially its anti-oligarchy strain, is less potent in the public sector, where workers face off against elected public officials and taxpayer-citizens, rather than against aggregations of capital. But history suggests that the constitutional campaign against unions and union fees will turn to the private sector whenever the opportunity presents itself.⁷⁰

The constitution of opportunity would also back up union members' interests in amplifying their own *political* voices through the union. As Fishkin and Forbath recall, the New Deal proponents of the NLRA had believed that "citizen-workers, by and large, could not enjoy a constitutionally fair measure of either bargaining power or political clout without laws that enabled them to choose to forge robust secondary associations" such as unions.⁷¹ Contrast the view of the *Friedrichs* petitioners: The Court need not worry that unions, if deprived of agency

68. *See id.* at 2640–44.

69. That could happen as soon as next term if the Court sets the case for re-argument. If the vacancy is filled by a Democratic appointee, those on and off the Court who oppose *Abood* might choose to keep these cases away from the Court rather than risk reaffirmation of *Abood*.

70. The "right-to-work" advocates have not hesitated to embrace radically capacious theories of state action—to the discomfort of some conservative allies—in order to support constitutional arguments against mandatory fees in the private sector. *See* SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 122 (2014) (depicting multiple right-to-work theories of state action).

71. FISHKIN & FORBATH, *supra* note 1 (manuscript at 82).

fees, will be unable to perform their collective bargaining functions; they need only to divert some of the money they are now spending on political activities into representing non-fee-paying objectors.⁷² That is, they will merely have to sacrifice their own members' freedom to participate collectively in the political process, and divert monies intended for that purpose into subsidizing free-riding nonmembers whom the union has a duty to represent.⁷³

Far from this appalling denigration of workers' freedom of association and collective expression, a constitution of opportunity narrative would instead see workers' ability to speak through unions in the political domain as an indispensable counterweight to the political clout of the bosses.⁷⁴ That narrative might even support the mandatory exaction of dues for political activities, given the minimal imposition on individuals' actual freedom of expression and belief; after all, no individual is thereby compelled to espouse or display a message with which she disagrees.⁷⁵ That has been ruled out by the Supreme Court for decades.⁷⁶ But in a Fishkin–Forbath world, that decision might be revisited.⁷⁷

The most important work that the constitution of opportunity might do in the agency fee context is to counter the challengers' hyperbolic and hyper-individualistic compelled speech claim. Half the current Court has averred that requiring a public employee to bear her fair share of the costs of an institution of collective representation chosen by a majority of her colleagues is a grave infringement of her freedom of expression.⁷⁸ The neo-libertarian recasting of regulatory requirements as "compelled speech," and of a refusal to submit to majoritarian decisions as protected dissent, is one of the more corrosive developments in contemporary constitutional law. It has made the First Amendment into a battering ram against a wide range of collective institutions and judgments made through majoritarian processes.⁷⁹ Individuals' freedom to oppose or criticize collective

72. Brief for Petitioners at 30–32, *Friedrichs v. Cal. Teachers Ass'n*, 135 S. Ct. 2933 (2015) (No. 14-915).

73. For a critique of this argument, see Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 *LOY. L.A. L. REV.* 439, 442 (2014).

74. The point is developed in Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *YALE L.J.* 148, 176–77 (2013).

75. See generally *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 797–819 (1961) (Frankfurter, J., dissenting); Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, *BERKELEY J. EMP. & LAB. L.* (forthcoming 2016).

76. *Street*, 367 U.S. at 774–75.

77. As Fishkin and Forbath themselves suggest. FISHKIN & FORBATH, *supra* note 1 (manuscript at 83–84).

78. *Harris v. Quinn*, 134 S. Ct. 2618, 2622–23 (2014).

79. See Robin West, *A Tale of Two Rights*, 94 *B.U. L. REV.* 893, 894 (2014) (arguing that individual rights harm rather than benefit civil society and do violence to our democratic aspirations). On the burgeoning deregulatory strand of First Amendment doctrine, see generally Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 *HARV. L. REV. F.* 165

judgments is not remotely threatened by the agency fee. Ironically, that freedom is threatened on a daily basis by public employers, who face limited First Amendment scrutiny (a balancing test at most, and often no scrutiny at all) when they discipline or discharge employees because of their speech.⁸⁰ To strike down agency fees, the Court would have to conclude that to require a public employee to bear her fair share of the costs of union representation is a *more* serious infringement of her freedom of expression than it is to fire her for expressing a political opinion at work or for blowing the whistle on official misconduct.

It seems clear how much labor and its allies need the sense of urgency and high purpose that the constitution of opportunity could bring to the union's side of the agency fee controversy and other cases. But let us step back and notice an inconvenient fact: What the constitutional assault on agency fees seeks to do through litigation is to nationalize a "right-to-work" regime that twenty-six states have adopted by one political avenue or another.⁸¹ Those laws make it unlawful for unions and employers to compel individuals as a condition of employment to pay money to a labor union that they oppose.⁸² State "right-to-work" laws typically ban mandatory union fees in both the public sector and the private sector.⁸³ The recent successes of the right-to-work movement in the political branches return us to the question of how far a progressive Fishkin–Forbath counter-narrative can go in the courts without winning the hearts and minds of the voters. That narrative might help to tilt the courts toward deference to the political branches when they act to advance the constitution of opportunity, but can it counter the political branches when they act to opposing ends? And can it do so without raising the objections to countermajoritarian

(2015); Amanda Shanor, *The New Lochner* (unpublished manuscript), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2652762 [<https://perma.cc/YLP5-4BZY>].

80. If public employee speech is work-related—roughly speaking, at work or about the work or the employer—and if it is on a "[m]atter[] of public concern," then the employee's free speech interest must be balanced against the employer's managerial concerns, including disruption of work relationships. *Connick v. Myers*, 461 U.S. 138, 149–52 (1983). If the speech is uttered as part of the employee's job performance, the Supreme Court prescribes no constitutional constraints on the employer at all, even for speech that discloses serious government misconduct. *Garcetti v. Ceballos*, 547 U.S. 410, 423–26 (2006). By contrast, the petitioners in *Friedrichs* argue for something like strict scrutiny of the agency fee mandate. See Brief for Petitioners, *supra* note 72, at 16 (arguing that compelled subsidization is subject to "exacting scrutiny").

81. See Johnathon Mattise, *Lawmakers Vote to Make W. Virginia Right-to-Work State*, WASHINGTON'S TOP NEWS (Feb. 12, 2016, 4:35 PM), <http://wtop.com/politics/2016/02/lawmakers-override-veto-will-make-w-va-right-to-work-state/> [<https://perma.cc/82R4-QAKD>].

82. For an excellent historical account of the right-to-work movement's very long litigation campaign against compulsory unionism and union fees, see generally LEE, *supra* note 70.

83. Private sector agency fees might withstand constitutional attack, even if public sector agency fees do not. The constitutional challenges to private sector agency fees, stemming as they do from agreements between nonstate actors, face a high "state action" hurdle. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 174 (2015).

judicial review that Fishkin and Forbath themselves take seriously? Perhaps this is one setting where it can.

State right-to-work laws prohibit what the NLRA permits; those laws thus escape federal preemption only to the degree that the NLRA expressly permits them. Section 14(b) of the NLRA, added by the Taft–Hartley Act, is generally understood to do just that—to allow states to prohibit mandatory union fees of all kinds.⁸⁴ On that view, Congress licensed the states to undermine the very system of collective representation that it had enacted nationwide. But a narrower reading of Section 14(b) is gaining some traction both in the academy and in the courts.⁸⁵ Section 14(b) on its face allows states to prohibit “agreements requiring membership” in a union.⁸⁶ The Supreme Court has construed it more broadly to allow states to bar agreements requiring union membership *or its full financial equivalent*; but the Court has not directly addressed the validity of state laws barring even the lesser “fair-share” agency fee.⁸⁷ The latter sort of agreement (the broadest kind of union-security agreement now permitted by the NLRA itself, after *Beck*) is not fairly construed as an “agreement requiring membership,” and thus is not among the agreements that states can prohibit. This narrower reading of Section 14(b) is both more faithful to the text of the NLRA and less destructive of the system of collective representation that it created. The result would be to preempt state right-to-work laws that purport to prohibit private-sector agency-fee agreements, and thus to permit such agreements across the country.

The arguments for this narrower interpretation of Section 14(b), and the preemption of existing state right-to-work laws, are highly technical, given the intricacy of the relevant statutory provisions and precedents.⁸⁸ But a basic substantive commitment to enabling workers to bargain through effective and financially sustainable collective institutions, as part of the constitution of opportunity, could bring some clarity of purpose to this technical exercise in statutory interpretation and weigh against an interpretation of the NLRA that would countenance its own corrosion at the hands of the states. While that would be countermajoritarian as against the

84. National Labor Relations Act, 29 U.S.C. § 164(b) (2012). The conventional view is reflected in a recent Seventh Circuit panel decision upholding Indiana’s right-to-work law. *See, e.g., Sweeney v. Pence*, 767 F.3d 654, 659–61 (7th Cir. 2014).

85. *See* Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 867–68 (2014); *Sweeney*, 767 F.3d at 677–81 (Wood, J., dissenting). Judge Wood’s dissent garnered support from half the Seventh Circuit in a petition for rehearing en banc.

86. 29 U.S.C. § 164(b).

87. *See* NLRB v. Gen. Motors Corp., 373 U.S. 734, 741–43 (1963); *Retail Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 751–52 (1963). The intricacies of these cases and the relevant statutory provisions are dissected in Fisk & Sachs, *supra* note 85, at 861–64.

88. Judge Wood’s lengthy dissent illustrates the point. *See generally Sweeney*, 767 F.3d at 671–85 (Wood, J., dissenting).

state legislatures or electorates that have adopted broader right-to-work laws, it would be no more so than any other decision giving preemptive effect to federal legislation, with its own democratic bona fides. Moreover, it would restore the ability of different majorities—majorities of workers who have chosen union representation—to distribute the costs of representation more equally if they so choose.

In short, there are several points at which the constitution of opportunity narrative could come to the aid of the existing statutory structure of collective labor relations, either by countering and defusing constitutional attacks on them or as a weighty reason to interpret ambiguous provisions of the relevant statutes to support rather than undermine those structures.

Unfortunately, that existing statutory structure is manifestly failing to serve workers' aspirations for a collective voice at work. The NLRA's enterprise-based bargaining structure encourages aggressive employer resistance to organizing and bargaining demands; that is a part of the story behind employer decline.⁸⁹ A more basic flaw of the enterprise-based bargaining model is that, in a world of increasingly fragmented or "fissured" work relations, it frequently fails to link workers and enable collective bargaining with the entities at the top of the "supply chain" that effectively set the price for their labor.⁹⁰ A major factor in growing economic inequality lies in the growing willingness and ability of well-capitalized firms to offload major (and especially labor-intensive) components of their operations and responsibility for the wages and working conditions therein to less visible, less capitalized firms that lack the capacity, the incentive, or both to treat workers decently.⁹¹ That is a large topic that I leave to another venue. Here, it will suffice to say that, unfortunately, nothing that the constitution of opportunity could do to fend off neo-libertarian threats to the existing model of collective bargaining will fix that model or make it functional for most workers today. None of these defensive uses of the constitution of opportunity will have anything like the impact that labor's constitutional narrative had in smoothing the way for the establishment of the existing model at its inception in the 1930s.

A more controversial use of the constitution of opportunity might be to attack some provisions of the NLRA that constrain workers' collective action and their ability to pressure employers, either within or outside of the existing statutory scheme. The constitution of opportunity narrative might fortify already strong constitutional arguments against statutory restrictions

89. See Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 526–31 (2001).

90. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 15–20 (2014).

91. *Id.*

on secondary boycotts and strikes, and the picketing that supports them.⁹² That might seem to be a countermajoritarian use of the constitution of opportunity narrative, foreclosed by the New Deal settlement; but of course that settlement contemplates stricter judicial scrutiny of laws that appear to offend specific provisions of the Bill of Rights, as the anti-picketing provisions of the NLRA do.⁹³ The layering of an economically egalitarian gloss atop existing First Amendment arguments illustrates another potential legal use of the constitution of opportunity.

To be more specific: One supposed justification for according First Amendment protection to “secondary” civil rights boycotts and picketing but not to analogous union picketing is that the latter does not involve expression on important public issues.⁹⁴ Contrast the view reflected in *Thornhill v. Alabama*,⁹⁵ which struck down a state anti-picketing law in 1940:

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region⁹⁶

The changing understanding of labor picketing from *Thornhill* to the present (by way of Taft–Hartley) is emblematic of organized labor’s fall from constitutional grace since the New Deal. A revival of the idea that growing economic insecurity and inequality threatens the health of our democratic polity (as well as “the health of the present generation and of those as yet unborn”) could help to elevate worker protests over wages and working conditions to the more exalted constitutional status of civil rights activism. The fact that workers use collective protest as a means of building and exercising economic power against well-organized and well-heeled business entities would count in favor of constitutional protection, not against it. Put to that use, the constitution of opportunity would not merely shore up the existing model of collective bargaining but would clear

92. See Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEXAS L. REV. 1623, 1635 & n.82 (2016) (citing Alan Hyde, *Exclusion Is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven to Be a Bad Deal for American Trade Unions and Constitutional Law*, 15 CANADIAN LAB. & EMP. L.J. 251 (2009) and James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEXAS L. REV. 889 (1991)).

93. Those constitutional arguments were given short shrift in *NLRB v. Retail Store Emps. Union*, 447 U.S. 607, 616 (1980).

94. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–13 (1982) (distinguishing *Retail Store Emps. Union*, 447 U.S. at 616).

95. 310 U.S. 88 (1940).

96. *Id.* at 102–03.

away some obstacles to unions' participation in collective protest and pressure tactics with a variety of aims—for example, seeking better conditions for low-wage workers by picketing the powerful and highly visible corporate entities up the supply chain.⁹⁷

We could multiply the items on this “wish list” of legal ramifications of the constitution of opportunity for labor law. (A girl can dream, can't she?). Unfortunately, all of these dreams do not add up to a genuine empowerment of workers, a reversal of trends toward greater inequality, or a major redistribution of wealth from the top to the middle and the bottom strata. Courts simply cannot do those things in our society. A meaningful re-engineering of social and economic structures in favor of greater equality and mobility will require a major political realignment along the lines that Fishkin and Forbath hope to inspire. And it might require a recognition on the part of those at the top—the “oligarchy,” if you will—that the world they would have to build inside their privileged gated communities, if current trends continue, is not the world they want to live in.

97. Those protest actions could run up against the NLRA's constraints on secondary boycotts, e.g., if the worker center is a “labor organization” (which it might be under some interpretations of the law), and if it targets an entity that is deemed separate from the immediate employer and thus “secondary” (e.g., McDonalds, Inc. may be deemed a separate employer from its franchisees).