

The Democracy of Opportunity and Constitutional Politics: A Response

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Introduction

When you are writing a book, the best thing you can hope for is to find thoughtful readers and interlocutors. We are enormously grateful to have the opportunity to be in conversation with the other participants in this Symposium—especially the ones responding to our book, and even more especially at this stage in the process, when we are still writing it. In this brief response, we will focus first on one issue that is central to many of the other contributions to the Symposium. Then we will briefly address a series of objections or concerns about our project that different contributors to this Symposium helpfully raise.

The contributions from Jed Purdy,¹ Cynthia Estlund,² and Jack Balkin³ responding to our manuscript, as well as contributions from Frank Michelman⁴ and Sabeel Rahman⁵ earlier in the Symposium, circle around a common question that is easily stated: In what sense, exactly, is our project about the Constitution?

We are all asking versions of this question for a straightforward reason. Contemporary constitutional argument is overwhelmingly focused on a particular, conventional view of the Constitution and its relationship to politics: the Constitution enforced by courts as a constraint on political action, often in the name of specific clauses of constitutional text.

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

2. Cynthia Estlund, *The “Constitution of Opportunity” in Politics and in the Courts*, 94 TEXAS L. REV. 1447 (2016).

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

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

5. 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).

In a number of the past constitutional struggles that we are writing about in *The Anti-Oligarchy Constitution*,⁶ one side saw things exactly that way. In the name of “limited government,” these forerunners of modern-day libertarians aimed to slow down or halt major social and economic projects chosen through the political process, on the grounds that these projects violated various constitutional constraints. On the other side of these struggles was what we call the “democracy of opportunity” tradition in American constitutional argument. In that tradition, the Constitution sometimes acts as a constraint, but more often the Constitution creates affirmative duties, which legislators and executives need to take the lead role in fulfilling, in order to build a more open and democratic political economy.

So how, exactly, is this way of thinking constitutional? As Michelman notes, it is not primarily through rights claims enforced by courts.⁷ Some rights claims, such as labor-rights claims, do play an important role in the democracy of opportunity tradition, but even there, these claims have not usually been addressed to courts.⁸ This tradition is not, in other words, of a piece with calls for the expanded judicial enforcement of social and economic rights. There is a reason for that. Rights are especially useful in formulating many types of claims: libertarian claims, for example, and also the claims of left liberals fighting for social minima to protect those at society’s margins. The democracy of opportunity tradition and its vision of constitutional political economy is not as easily framed in terms of rights. This vision is concerned with inequality—not only at the bottom but also at the middle and the top—and with the connections between economic power and political power.

One answer, captured well by Rahman’s argument,⁹ is that the democracy of opportunity tradition is concerned with the fundamental political and economic structures that literally constitute us as a society; that is the sense in which it is constitutional. This approach has much in common with talk of “small-c” constitutionalism—the “constitutive commitments,” as Cass Sunstein puts it, that are deep in American political

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

7. Michelman, *supra* note 4, at 1410–11, 1413–14.

8. Many of the rights claims of the labor movement have been framed in statutory terms rather than constitutional ones. But this is a matter of historical contingency. These claims could have been addressed to courts if the courts had been less vehemently opposed to labor’s constitutional vision. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); James Gray Pope, *Labor’s Constitution of Freedom*, 106 *YALE L.J.* 941 (1997); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 *COLUM. L. REV.* 1 (2002).

9. Rahman, *supra* note 5, at 1353–55.

culture, even if not in the “large-C” Constitution of lawyers and courts.¹⁰ However, we are skeptical of this distinction as a way of understanding the democracy of opportunity tradition—in part because the actors within this tradition did not look at things this way.

Balkin offers a somewhat different answer in his contribution to this Symposium, and it is one that deserves attention. He argues that *republicanism*—a set of ideas about constitutional political economy—plays the same role in the Constitution as separation of powers, checks and balances, and federalism. These are general principles that the Constitution depends on; Balkin calls them “underlying principles.”¹¹ We refer to them in the book as *structural* principles.¹² Such principles are not necessarily about interpreting a particular clause of text. Being ruled by an oligarchy is just flatly inconsistent with basic background assumptions that structure the Constitution itself.

Balkin, being a kind of originalist, is not willing to stop there. He draws the reader’s attention to the clause guaranteeing the states a republican form of government as a way of showing that a commitment to republicanism is manifestly in the text of the Constitution itself.¹³ We think that is true, and we also find it significant that the Reconstruction Republicans made such use of this clause in their own constitutional politics.¹⁴ But we also think the tradition of constitutional argument we are tracing in the book probably would have existed—and certainly would have been necessary—whether or not there were any specific clause in the Constitution invoking republican government.

Balkin refers to the democracy of opportunity tradition as a series of “constitutional constructions.”¹⁵ We think this is helpful. Typically when people hear the word “construction” in relation to the Constitution they think of “construe,” as in construing the meaning of text. But in the

10. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 61–62 (2004).

11. Balkin, *supra* note 3, at 1428.

12. See FISHKIN & FORBATH, *supra* note 6 (manuscript at 2).

13. Balkin, *supra* note 3, at 1429–30. For an example of an appeal to the Republican Form of Government Clause as a source of congressional power, see ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION* 106 (1990) (relating Charles Sumner’s argument that the Republican Form of Government Clause justified radical restructuring of the South after the Civil War and quoting his characterization of the clause: “a sleeping giant . . . never until this recent war awakened, but now it comes forward with a giant’s power”). For a primary source invoking this clause as a basis of congressional power, see Thaddeus Stevens’s speech—entitled “RECONSTRUCTION”—introducing the joint committee’s original draft of the Fourteenth Amendment. CONG. GLOBE, 39th Cong., 1st Sess. 72–75 (1865) (claiming that the Republican Form of Government Clause grants power to Congress in particular, not the President and not the Judiciary).

14. See Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEXAS L. REV. 1361, 1372–73 (2016) (highlighting the use of the clause by Reconstruction Republicans to support the Second Freedmen’s Bureau Bill).

15. Balkin, *supra* note 3, at 1427.

theoretical framework Balkin has built, the word construction is better understood in terms of building, as in constructing the laws and institutions necessary to effectuate a constitutional vision.¹⁶ In the democracy of opportunity tradition, the vision begins with the premise that economics and politics are not separable from each other or from the constitutional order. In our historical chapters, we bring this idea to life by showing how lawmakers themselves talked about legislation. Up until what we call the “great forgetting,” they spoke not only about being consistent with the Constitution, but about fulfilling its principles, and about being obligated to use their powers to advance its aims.¹⁷

Doing this requires relating old constitutional concerns to new circumstances in light of underlying reasons and purposes. And that brings us to the other piece of Balkin’s story that we think is important for ours: the notion of ideological drift.¹⁸ Vindicating the democracy of opportunity tradition has involved varied and often seemingly contradictory moves in economic policy. This is because the economy itself has changed. In order to maintain a democracy of opportunity—or even a republican form of government—against this backdrop, much adaptation is required. Even holding the goals constant, sometimes the solutions of the past become antithetical to the needs of the present.

This brings us to one thread in Purdy’s thoughtful response and reconstruction: his concern that framing our argument in terms of a constitutional tradition “will inevitably involve . . . motivated historical interpretation.”¹⁹ The idea here is that invoking a “constitutional tradition” means looking out across the room for people we can recast as friends.²⁰ And indeed, this book project makes for some uncomfortable “friends.” Andrew Jackson is, by any measure, a very strange friend for egalitarians to claim, even in a partial and limited way. We see the force of this point and are conscious of it all the time as we write.

At the same time, we think it is inevitable that we are all situated in relation to American constitutional and political traditions. It is impossible to stand outside those traditions and build something completely new with no antecedents; that is not how constitutional argument works. In constitutional argument, and indeed in politics, we all draw on a collective store of common memories and arguments—its examples remembered well and dimly—in making claims about what we should do or about what could be. Even people who understand themselves as standing in opposition to

16. JACK M. BALKIN, *LIVING ORIGINALISM* 130 (2011).

17. FISHKIN & FORBATH, *supra* note 6 (manuscript at 7–9).

18. Balkin, *supra* note 3, at 1444–46.

19. Purdy, *supra* note 1, at 1425–26.

20. *Id.*

our constitutional traditions almost always make use of those traditions at the same time.

What we can do as scholars is help flesh out and bring to life some of the materials that ought to be part of that common intellectual store of memories and arguments but may be sitting neglected, needing to be dusted off and readied for use. That is much of what we are up to in *The Anti-Oligarchy Constitution*.

It is not our work alone. Limiting our ambit to the participants in this very Symposium, Sabeel Rahman, Ganesh Sitaraman, and Bob Hockett are all at work on books with related themes. It is no accident that all this work is converging: It is because of the political economy of this new Gilded Age. That is what inspires the work. It is also what is beginning to inspire Americans to come to some sort of political reckoning with inequality and oligarchy.

We think this reckoning will inevitably be, in some significant measure, a constitutional reckoning as well. At the same time, we understand that there are plenty of reasons one might worry about viewing problems of inequality and unequal opportunity through a constitutional lens. In the remainder of this response, we begin to address a few of these concerns, as developed by our thoughtful interlocutors.

I. The “Undemocratic-Conversation-Stopper” Problem

Our polity is deeply divided over fundamental questions of economic policy. On the right, the air is thick with constitutional claims. Senator Ted Cruz,²¹ Governor Greg Abbott,²² and others²³ often declare that Social Security, the Americans with Disabilities Act, or the Affordable Care Act is unconstitutional, and by unconstitutional they mean that courts ought to strike them down.²⁴ Indeed, the Supreme Court’s failure to strike down the

21. See, e.g., Doyle McManus, *Ted Cruz’s Ride on the Obamacare Train Wreck*, L.A. TIMES (Mar. 28, 2015, 5:00 AM), <http://www.latimes.com/nation/la-oe-0329-mcmanus-cruz-20150329-column.html> [<https://perma.cc/H4DD-467H>].

22. See, e.g., Michael King, *Naked City: The ADA? Not in This State!*, AUSTIN CHRON. (Dec. 26, 2003), <http://www.austinchronicle.com/news/2003-12-26/191184/> [<https://perma.cc/HRP3-GCKB>] (reporting Governor Abbott arguing that the ADA is unconstitutional as applied to the states).

23. See, e.g., Louis Jacobson, *Mitt Romney Says Rick Perry Believes Social Security is Unconstitutional*, POLITIFACT (Sept. 12, 2011, 9:49 PM), <http://www.politifact.com/truth-o-meter/statements/2011/sep/12/mitt-romney/mitt-romney-says-rick-perry-believes-social-2/> [<https://perma.cc/4QMV-BZZM>] (discussing Perry’s view that Social Security is unconstitutional, along with much of the rest of the New Deal).

24. See RICK PERRY, FED UP! OUR FIGHT TO SAVE AMERICA FROM WASHINGTON 31, 58, 72, 79 (2010) (referring to Obamacare as an unconstitutional mandate, a New Deal-type program, and the “closest this country has come to outright socialism”); Adam Liptak & Matt Flegenheimer, *After a Rocky Start, Ted Cruz Had Success Before Supreme Court*, N.Y. TIMES (Feb. 16, 2016), <http://www.nytimes.com/2016/02/17/us/politics/after-a-rocky-start-ted-cruz-built-a-connection-to-the-supreme-court.html> [<https://perma.cc/N5N3-CRCY>] (stating that “Mr. Cruz routinely rails

ACA plays no small part in the current politics of judicial appointments on the right.²⁵

To these arguments, there is a standard liberal objection, which goes as follows: These are matters of economic and social policy about which we may debate and disagree. But do not drag the Constitution into the debate. Economic policy making in particular is a space for ordinary democratic give-and-take. It is about problem solving, trade-offs, and compromise. You cannot shove your opponents' ideas and proposals off the table by declaring them unconstitutional. That was the point of the "New Deal Settlement." It enacted as a matter of constitutional principle Justice Holmes's great insight: "[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views . . ."²⁶ Holmes's insight carried the day at the Court²⁷ and, to an extent, also in our public discourse²⁸—until recently. *Lochner* revivalists, libertarians, and others in our politics and on the bench are trying to rekindle the *laissez-faire* Constitution in various ways.²⁹ If, as Frank Michelman puts it, we on the left continue to have "pretensions to democracy,"³⁰ we should not follow suit.

To which we respond: we are not following suit. We understand that according to the conventions of our main current mode of constitutional discourse, to bring the Constitution into the democratic conversation is to put a stop to that conversation by saying to your adversaries, "Your ideas are off limits." We disagree with these conventions. A major part of the

against what he calls the lawless judicial activism of the Supreme Court led by Chief Justice John G. Roberts Jr., saving special scorn for its decisions upholding the Affordable Care Act"); Mimi Swartz, *Greg Abbott's Stern Commandments*, N.Y. TIMES (Dec. 4, 2015), <http://www.nytimes.com/2015/12/05/opinion/greg-abbotts-stern-commandments.html> [<https://perma.cc/YU3L-YNJB>] (noting that Abbott's targets as Texas Attorney General included the Environmental Protection Agency, the Department of Education, and the Affordable Care Act).

25. David Weigel & Katie Zezima, *Once a John Roberts Booster, Ted Cruz Continues to Turn Against Him*, WASH. POST (Sept. 12, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/09/12/once-a-john-roberts-booster-ted-cruz-continues-to-turn-against-him/> [<https://perma.cc/6AMK-3ZSM>].

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

27. *See, e.g., W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

28. *See* RICHARD A. POSNER, *OVERCOMING LAW* 179 (1995) (stating that both modern liberals and modern conservatives disapprove of substantive due process in part because of its association with *Lochner* and other freedom-of-contract cases); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 528 (2015) ("For a very long time, it has been an article of faith among those who pay attention to constitutional law that *Lochner v. New York* was obviously and irredeemably wrong.").

29. *See* Colby & Smith, *supra* note 28, at 531 (arguing that indications from opinion leaders, legal scholars, and prominent judges show that modern conservative thought appears ready to revive the *Lochner* principle of economic liberty).

30. Michelman, *supra* note 4, at 1407.

project of our book is to challenge them. We hope to help readers to see beyond them, and we hope to recover a different way of thinking about the project of 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 democratic constitutional politics. In this tradition, far from taking important issues off the table or out of the democratic arena, the classic type of constitutional claim announced a duty of the political branches to deliberate and act. For most of our history, a great many arguments about constitutional political economy took this same general form: they announced a duty to deliberate and act.³¹ You cannot keep your constitutional democracy, they argued, your republican form of government, unless you take steps to sustain or rebuild a broad middle class open to all. You must take steps as well to restrain the plutocrats—the moneyed aristocrats, the economic royalists—who dominate our politics and threaten our democracy.

This general sort of claim framed particular calls for legislative action. It might be a call for free common schools,³² public land distribution,³³ or a tariff to support an infant industry.³⁴ Decades later, it might be a call for antitrust legislation,³⁵ a minimum-wage law, or social insurance.³⁶ What stands out most, from a contemporary perspective, is that the constitutional

31. See FISHKIN & FORBATH, *supra* note 6 (manuscript at 3–4) (noting that in the history of debates over constitutional political economy, many within the democracy of opportunity tradition have held that Congress has both the constitutional power and the constitutional duty to respond with economic legislation).

32. *Id.* (manuscript at 50–51) (discussing Reconstruction Republicans and African-American leaders who argued that granting civil rights and suffrage to freedmen was not enough: free and equal citizenship would require material independence, which would in turn require initial endowments like public education).

33. *Id.* (highlighting the fact that some Reconstruction leaders, such as Thaddeus Stevens, thought that public education alone was insufficient to accomplish the material independence of freedmen and argued that Congress should confiscate southern plantations to distribute to the freedmen).

34. *Id.* (manuscript at 25) (recasting Jacksonian Era fights about tariffs and internal improvements as disputes about the nation's distribution of wealth and opportunity, not just states' rights and national power).

35. *Id.* (manuscript at 63) (“Maximum hours laws like that struck down in *Lochner*, legislation lifting the harsh, judge-made bans on unions and workers’ collective action, as well as railroad regulations, anti-trust and currency measures . . . were thought to flow from [constitutional] duties—all in the service of constitutional liberty and equal rights.”).

36. *Id.* (manuscript at 60) (recounting the calls of New Dealers for a Second Bill of Rights that included labor standards like the minimum wage and maximum hours provisions of the Fair Labor Standards Act and the system of social insurance established by the Social Security Act).

point took the shape of a duty—not a limitation on government nor (simply) a statement of a power that government properly enjoys, but a duty.³⁷

This kind of claim did not stop the democratic conversation. Of course, it is easy to imagine that, confronted with a proposed reform measure framed in this discourse of legislative duty, opponents could object that Congress or state lawmakers simply have no such duty. It is striking that in the past they rarely did so.³⁸ The general proposition that a republican form of government requires a republican social order—or, later, that a democratic constitution requires a democratic society—one with “a broad middle class flanked by neither an underclass nor an oligarchic overclass,” in Professor Estlund’s nice phrase³⁹—was not a proposition one wanted to contest in public.

Across a broad array of public policy questions, citizens and legislators could invoke, or be confronted by, an unduckable constitutional duty—what nineteenth-century lawmakers called an “imperative” duty⁴⁰—to address public-policy questions in light of the central objectives of the democracy of opportunity tradition, such as restraining oligarchy and preserving a broad, open middle class.⁴¹ These are the opposite of conversation-stopping arguments. But they do inflect and constrain debates and arguments in certain ways that, all things considered, we think might be helpful today.

Put simply, the democracy of opportunity tradition kept in plain view the idea that constitutional democracy has an economic dimension. It did so recurrently, on the retail level, by treating the distributional aims and consequences of many important kinds of economic policies as carrying constitutional weight. Arguments about constitutional political economy underscored and built on a basic insight: that how we run the economy has much to do with how well we sustain—or how badly we injure—our commitments to political equality and self-rule. We agree with Professor Purdy that “[i]n a time when economic argument gets relentlessly tugged in technocratic directions, . . . the importance of this move is hard to exaggerate.”⁴²

Nothing about the idea of rekindling constitutional political economy entails an insistence that the Constitution “embod[ies] a particular economic

37. *Id.* (manuscript at 63) (arguing that the Constitution “was understood by generations of political actors of quite different stripes to be a source of legislative and executive duties as well as judicially enforced constraints”).

38. *Id.* (manuscript at 3) (“All assumed that the principles at stake in these political-economic battles were constitutional principles; the difficult question was which way our constitutional commitments pointed.”).

39. Estlund, *supra* note 2, at 1447.

40. *See, e.g.*, FISHKIN & FORBATH, *supra* note 6 (manuscript at 42) (“[T]he new Republican Party’s Platform proclaimed it was the constitutional ‘right and imperative duty’ of Congress to prohibit slavery in the territories . . .”).

41. *See id.* (manuscript at 3).

42. Purdy, *supra* note 1, at 1423.

theory.”⁴³ Lawmakers, social reformers, and political economists of many different and rival schools of economic thought all made arguments and counterarguments within this framework.⁴⁴ Distributional consequences of certain kinds mattered, not how one achieved or averted them. The common ground was that a constitutionally sound political economy must produce not only goods but citizens, as Brandeis put it.⁴⁵ Ill-paid Americans battered by overwork and immiserated by unemployment could not constitute a democratic citizenry. Nor were economic overlords compatible with political democracy. But these ideas do not require organizing the economy in one particular way.

To be sure, some “economic theories” do fall outside this framework. The clearest cases within our discourse are those species of laissez faire that hold that law and policy can and should safeguard antiredistributive norms of economic liberty and private property—but cannot and should not try to secure democratic distributional outcomes, for reasons normative, prudential, or both. This was the thrust of late-nineteenth- and early-twentieth-century constitutional laissez-faire thinkers like Herbert Spencer⁴⁶ (whose memory Holmes’s famous dissent kept alive in constitutional discourse)⁴⁷ and Friedrich Hayek,⁴⁸ who laid the foundations of contemporary libertarian political economy.

This was decidedly not the thrust of Jacksonian laissez faire. The Jacksonians held that sharp limits on national government, strong norms against “class legislation,” and robust state and local authority over common law and police powers were constitutional essentials *precisely because* they would secure democratic distributional outcomes.⁴⁹

II. The Meaning of the New Deal Settlement

Even so, our critics might respond: Didn’t the New Deal settlement take concern for distributional outcomes off the table, separating this field from the domain of constitutional law?

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

44. *See, e.g.*, FISHKIN & FORBATH, *supra* note 6 (manuscript at 26, 29–30) (contrasting Jacksonian Democrats’ free-trade-based constitutional political economy with Whig Henry Clay’s tariff-based one); GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA, 1865–1896*, 73 (1997) (describing the argument between late-nineteenth-century political economists of rival schools who made competing claims about securing a constitutionally sound political economy through rival economic strategies regarding currency and finance).

45. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 56–57 (1999).

46. *See generally* HERBERT SPENCER, *SOCIAL STATICS* (1851).

47. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

48. *See generally* FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

49. FISHKIN & FORBATH, *supra* note 6 (manuscript at 25–27).

The New Dealers themselves did not think so. They did not understand the “settlement” in the way that our critics and most contemporary constitutional law scholars do. Contrary to today’s conventional wisdom, the New Dealers did not champion a separation of the domain of constitutional argument and claim making from the domain of political economy. Rather, they championed the removal of the judiciary as the nation’s authoritative exponent of constitutional political economy and its replacement by the democratic branches.⁵⁰

Well after the Court’s 1937 “switch in time” and its withdrawal from the battlefield of social and economic policy, New Dealers continued to frame social and economic legislation in terms of fulfilling Congress’s affirmative constitutional obligations. Thus, for example, New Dealers cast the Full Employment Act of 1945 in terms of a fundamental right to work—the “equal right . . . to a share of the Nation’s employment asset”⁵¹—that was one of many modern social and economic rights that the Constitution both authorized and obliged Congress to protect by enacting legislation and “determin[ing] for itself the meaning [of the Constitution’s general rights-bearing] provisions.”⁵²

It was clear to the New Dealers, as it had been to generations of Populists and Progressives, that the courts not only would not, but also could not and should not, translate the Constitution’s rights-bearing provisions or the Republican Form of Government, General Welfare, and Spending Clauses into specific guarantees of social and economic rights in industrial America. Partly, this was for functional reasons. Social and economic policy require legislation and administrative machinery. Moreover, such distributional measures were thought to require not only administrative expertise and legislative bargaining and trade-offs but also democratic assent and a broad national political will to support and sustain them. And in part, as Professor Estlund points out, their reasons were strategic: the courts were invested in their own constructions of workers’ rights and these were diametrically opposed to labor’s and progressives’ understandings.⁵³ At the time, it seemed clear that the only important contribution that courts could make to this essentially political and legislative task was to get out of the way and allow the process to go forward.⁵⁴

50. Forbath, *supra* note 45, at 57.

51. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 179 (2001).

52. *Id.* (second alteration in original).

53. See Estlund, *supra* note 2, at 1450 (stating that the *Lochner* era exposed to progressives the dangerous potential of constitutionalizing economic arguments: constitutional arguments tended to empower the judiciary, which was no friend to labor).

54. See *id.* (observing that, after the *Lochner* era, progressives thought that it was “[b]etter to adopt a more spare constitutional vision that leaves the great bulk of social and economic policy making to the political process”).

The New Dealers took a very different view of judicial enforcement of the provisions of the Bill of Rights protecting individual liberties. They also thought due process ought to remain in the courts' ambit as "a bulwark against the infringement of civil liberties by both Congress and the State legislatures."⁵⁵ Likewise, the Fourteenth Amendment in judicial hands had sometimes proved "useful in stemming the tides of prejudice manifested in [state] legislation."⁵⁶

This was not simply a legislative rehearsal and then an echo of Justice Stone's famous Footnote Four;⁵⁷ it was the "New Deal settlement" as New Dealers understood it.⁵⁸ Only later, during the broadly shared prosperity of the mid-twentieth century in the midst of what we call the great forgetting,⁵⁹ whose story Professor Purdy has gracefully distilled,⁶⁰ did the "settlement" come to signify the notion that not merely our judge-made constitutional law but our entire stock of constitutional norms includes no meaningful principles to underwrite the making of social and economic policy, which therefore can be left to the free play of competing interest group preferences.⁶¹

To us, of course, this bit of corrective history has a contemporary bearing. The New Deal marked the last time in our history when our politics were riveted on the problems of class inequality and the unequal distribution of wealth, power, and opportunity. The party and players that claimed the mantle of the democracy of opportunity tradition in this era saw these problems as constitutional problems.⁶² They did not think gaining judicial assent to their efforts to address them required forsaking their constitutional arguments, either in the public sphere or in the legislative arena. The problems, after all, extended well beyond debates about the commerce power's reach—and indeed, well beyond the ambit of judicial review.⁶³

55. Forbath, *supra* note 51, at 180 (quoting Jane Perry Clark, *Some Recent Proposals for Constitutional Amendments*, 12 WIS. L. REV. 313, 323 (1937)).

56. *Id.*

57. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

58. See FISHKIN & FORBATH, *supra* note 6 (manuscript at 9–10) (observing that, although New Dealers championed judicial restraint as a general matter, they were also attached to the ideal of "judicial constitutional safeguards" for the rights of individuals and politically unpopular minorities).

59. *Id.* (manuscript at 64–67).

60. Purdy, *supra* note 1, at 1417–19.

61. *Id.* at 1418 (articulating how "the Constitution" and constitutional law, the business of the courts, began to be viewed increasingly as one and the same).

62. FISHKIN & FORBATH, *supra* note 6 (manuscript at 1–2).

63. See *id.* (manuscript at 3–4).

Today our politics is once again riveted on class inequality and the unequal distribution of wealth, power, and opportunity.⁶⁴ We think we ought to revisit this original understanding of the New Deal settlement, not because we attach any great authority to its original-ness, but because it happens to be right. The proposition that the nation's present slide toward oligarchy and the erosion of its broad middle class endanger our constitutional order is one we think both professional and lay constitutional thinkers ought to be considering.

We think, in other words, that it is a useful imaginative spur, in the sense that Professor Purdy suggests at the beginning of his essay,⁶⁵ to recall that for most of our history, right through the resolution of the New Deal crises, the party of democratic reform—whatever and whoever that party and its constituents happened to be at the relevant time—would have loudly objected to the idea that our stock of constitutional norms has nothing to say about the shape of our political economy and the life chances of ordinary citizens. Instead, they insisted that lawmakers had a constitutional duty to deliberate and act with respect to structural reforms in that political economy. We think it worth pondering whether this is not a better understanding not only of our history but of our Constitution as a system of self-rule in the twenty-first century. If it is, then this understanding ought to play a greater role in both scholarly and public debate.

III. Constitutionalizing Anything Empowers the Courts—and the Courts Are Not Our Friends

Having gotten this far, we are met by the next item on our critics' list of warnings. Whatever was true in the past, they say, to invoke "constitutional rights," "constitutional law," or perhaps even simply "the Constitution" today is to bring on the courts. And when it comes to the kinds of social and economic reforms we advocate, the courts are not our friends. Judicial supremacy has never been more robust than it is today. That may not change. Moreover, our critics note, our own account of how the democracy of opportunity tradition could operate in the twenty-first century is *not* one that keeps all the action out of the courts.

Here, in contrast to our response to the democratic-conversation-stopper objection, we cop to the charge. We agree that, at least at the moment, the courts are not our friends when it comes to building a robust democracy of opportunity. Indeed, the courts have lately shown a disturbing degree of sympathy for the new *Lochnerism*—for reviving in

64. Jared Bernstein & Ben Spielberg, *Inequality Matters*, ATLANTIC (June 5, 2015), <http://www.theatlantic.com/business/archive/2015/06/what-matters-inequality-or-opportunity/393272/> [https://perma.cc/7893-CBFJ].

65. Purdy, *supra* note 1, at 1415 ("This kind of recovery project is also a certain form of imaginative literature.").

new doctrinal guises the basic building blocks of the antiredistributive constitution that was for so long the chief opponent of the democracy of opportunity tradition. And yet, at the same time, we think the democracy of opportunity tradition has something—perhaps a good deal—to contribute to battles *inside* the courts as well as outside. How can this be? Here, it is important to specify the roles we imagine the democracy of opportunity tradition playing in court. Once that is clear, we think most of the worries about involving the courts will prove far less worrisome.

Here are several different roles that constitutional political economy in the democracy of opportunity tradition might play in court.⁶⁶

(a) *As a sword. Courts use constitutional political economy as a sword, to help justify striking down legislation, on the ground that the legislation tends to move our political economy further from what the Constitution demands.*

This is the role that neo-*Lochnerite*, libertarian political economy plays at the Supreme Court now, in the most contested and controversial cases.⁶⁷ Sometimes the role is subtle rather than overt, as in the role of the broccoli argument in the Obamacare case.⁶⁸ Sometimes it is a supporting role, inflecting interpretations of specific constitutional provisions such as the First Amendment,⁶⁹ or of constitutional principles such as federalism;⁷⁰ those provisions play the starring role in the Court's analysis.

Our view is that this use of constitutional political economy is generally the least promising way to implement a democracy of opportunity today. Whatever may have been the case in the early nineteenth century, today it is abundantly clear that one cannot achieve the goals of the democracy of opportunity tradition simply by condemning legislation. Just the opposite is required.

66. These largely track the categories in Michelman's thoughtful essay, except that here we are limiting the story to the uses of constitutional political economy *in court* rather than in legislative or executive contexts. Michelman, *supra* note 4.

67. See, e.g., Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 694–95 (2014) (discussing the Court's recent campaign finance decisions).

68. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (arguing that the government's Commerce Clause argument in support of Obamacare's individual mandate would not distinguish between a mandate that individuals purchase health insurance and a mandate that individuals purchase broccoli and finding that result unacceptable because "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions").

69. See *Edwards v. District of Columbia*, 755 F.3d 996, 1007, 1009 (D.C. Cir. 2014) (striking down a tour guide licensing system because it burdened speech without an adequate justification and quoting Adam Smith to support the proposition that private market forces render public regulation of tour guides superfluous).

70. See *Sebelius*, 132 S. Ct. at 2578 ("Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed.").

Even so, we believe there probably remains a residual set of cases, not large, in which the democracy of opportunity tradition ought to function as a sword, in the mode Michelman calls “invalidation.”⁷¹ Here, we need an airtight case of a statute that does lasting damage to the democracy of opportunity, in a way that cannot readily be fixed except through judicial invalidation. We believe this is possible. We see glimmers of it, for instance, in state court decisions striking down school finance laws that perpetuate starkly unequal opportunity.⁷² But the more common and more important role for the democracy of opportunity tradition is just the reverse:

(b) As a shield. Courts invoke constitutional political economy as a shield, to help justify upholding legislation, on the ground that the legislation helps bring into being a democracy of opportunity.

This is where we think the democracy of opportunity tradition probably would make the most immediate difference today inside the courts. There are a wide variety of different statutory schemes that do some of the work in building a democracy of opportunity for our time—and many if not most of them are currently or potentially subject to challenges of various kinds because of the new *Lochnerism* afoot in the federal judiciary and in the world of conservative impact litigation.⁷³ In the book, we illustrate this problem with a series of recent, major, high-profile controversies—Obamacare, campaign-finance regulation, and labor law.⁷⁴ In all of these, legislation that helps promote a democracy of opportunity has been hobbled or weakened by the new/old idea that the Constitution embodies a distinctive kind of economic freedom: to opt out and refrain from contributing one’s share to democratically chosen collective obligations and to spend what one has without constraint or compulsion.⁷⁵

Missing from all these cases, from the dissents as well as the majority opinions, are the constitutional principles that *animate* and *support* the challenged laws. We think those principles ought to play a major role in the Court’s evaluation of the constitutionality of these laws. They are, in short, the principles of the democracy of opportunity tradition. We will not belabor the examples here. Purdy sketches several.⁷⁶ Estlund offers a particularly robust account of the role of the democracy of opportunity tradition in New Deal labor legislation,⁷⁷ and how recovering this tradition

71. Michelman, *supra* note 4, at 1409.

72. *See, e.g.,* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989).

73. *See* FISHKIN & FORBATH, *supra* note 6 (manuscript at 73) (describing the new *Lochnerism* in decisions of the Supreme Court and the D.C. Circuit, and the fuel it gives to libertarian litigation challenging the power and authority of the administrative state).

74. *Id.* (manuscript at 77–87).

75. *Id.*

76. Purdy, *supra* note 1, at 1416.

77. Estlund, *supra* note 2, at 1448–51.

brings to the surface the forgotten constitutional shape and purpose of the laws under fire today.⁷⁸

We think the democracy of opportunity tradition provides a firmer foundation for congressional (as well as state legislative) authority in many spheres than the old discourses of judicial restraint, institutional competence, and the political safeguards of federalism. We think it strengthens—and gives additional historical and economic substance to—arguments for congressional authority based on more general, post-1937 claims about the broad sweep of congressional power to tax, spend, regulate commerce, and enforce the Reconstruction Amendments. All of these, except perhaps the power to tax, have faced significant challenges in recent years from advocates of a particular vision of constitutional political economy—the new *Lochnerism*. This is not a coincidence. To respond to arguments squarely (if implicitly) grounded in a vision of constitutional political economy, it helps to make the case for an opposing vision.

In the long run, however, we hope that, more often than not, legislatures and courts will work in concert to build a democracy of opportunity. We hope this will happen because it is really the only way the democracy of opportunity tradition can be implemented. This work involves yet a third role for constitutional political economy in court:

(c) As a guide. Courts invoke constitutional political economy as an interpretive guide to the meaning of statutes whose aims include implementing a democratic vision of constitutional political economy—when interpreting statutes and when evaluating and interpreting regulations.

Here, the courts are not in the business of upholding or striking down statutes. Instead they are attempting to interpret them and effectuate their purposes. Statutes often have multiple purposes, but courts attuned to constitutional political economy would notice that many major pieces of legislation aim in part to build a democracy of opportunity. This purpose gives such statutes a special kind of significance because the statutes are doing constitutionally necessary work.⁷⁹ Construing the statute in light of the constitutionally necessary work it is doing can guide interpretation; it gives a particularly weighty reason to steer clear of interpretations that thwart the constitutionally necessary work. Given that many statutes, old and new, intervene in our political economy in profound ways—and indeed, are the primary means through which the government does the work of building a democracy of opportunity—this is likely the most important role for constitutional political economy to play in court. Depending on the

78. *Id.* at 1456–62.

79. See generally WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

politics of judicial appointments over the next several years, rekindling the democracy of opportunity tradition could have significant transformative effects across a broad range of statutory contexts, wholly apart from questions of constitutional invalidation.

Michelman understands these distinctions well. But he nonetheless worries that our appeal to courts to attend to constitutional political economy raises serious risks.⁸⁰ Once we reopen the door to *judicial* constitutional political economy, Michelman asks, what is to prevent a libertarian judge with a neo-Jacksonian cast of mind from concluding that the only sure way to make good on the anti-oligarchy principle and preserve a broad middle class is to strike down the ACA and a host of other statutes we think essential? What is to stop a runaway streak of invalidation of exactly the statutes that we think support the democracy of opportunity tradition in the twenty-first century?

Nothing in our theory prevents that outcome. But we think the danger is purely a theoretical one for two reasons. First, to a great extent, it seems the door is already open. We already *are* seeing a string of invalidations on grounds that, however they may be styled, amount to an endorsement of a laissez-faire, neo-*Lochnerite* vision of constitutional political economy.⁸¹ What prevents this trend from swallowing much of established constitutional law is not constitutional theory or the power of the New Deal settlement to keep the Court out of economic matters. It is politics. There are political limits to how far this line of cases is likely to reach, and that brings us to the second reason we think the worry is theoretical. In the real world of constitutional politics and constitutional law, the only context in which a runaway streak of invalidations seems plausible is one in which a particular neo-Jacksonian, laissez-faire constitutional outlook is powerfully afoot in the polity. That is not our current political reality. Neo-*Lochnerism* today is operating primarily on a plane of elite judicial action and activism, unmatched by widely shared commitments in American constitutional politics. To be sure, there is a political movement linked to this neo-*Lochnerism*, as we will discuss below. But it does not command anything like a majority of Americans. If that changes—if politics catches up with the neo-*Lochnerite* turn in the courts and a durable political majority favors this vision of the Constitution—then no theory will save the democracy of opportunity.

But this political defense brings up a deeper problem. Our argument in the book is about reviving a once-familiar, now-dormant form of constitutional politics. And within that renewed constitutional politics, our argument is for reviving and extending the democracy of opportunity tradition to help us see and address the problems of our own time. But why

80. Michelman, *supra* note 4, at 1413–14.

81. FISHKIN & FORBATH, *supra* note 6 (manuscript at 73, 77–87).

should we think this is even possible given the dispiriting landscape of American politics?

IV. The Democracy of Opportunity and Political Possibility

Professor Estlund offers a strong form of this critique, tied to the most fraught conflict within the democracy of opportunity tradition itself.⁸² The challenge, as she puts it, “lies in an American electorate that appears sharply divided”⁸³ about the desirability of redistributive economic reform and divided, as well—perhaps more deeply—about the virtue of a “thick” and generous conception of the principle of inclusion and racial and gender equality.⁸⁴ “The political majority of not-rich people that would need to come together in support of the opportunity agenda,” writes Estlund, “is fractured along both racial and cultural lines.”⁸⁵ Even progressives, she continues, seem divided between those “who harken mainly to the unfinished business of the Civil Rights Movement in dismantling racial and gender hierarchies” and “those who seek to build a wide coalition of the not-rich against growing economic inequality.”⁸⁶

Estlund cites our own chronicle of the democracy of opportunity tradition as a proof text for the proposition that “across the whole expanse of American history[,] . . . 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.”⁸⁷ She is right. But we do not think it necessarily follows that this history, combined with the fractured state of national politics, means the inclusive version of the democracy of opportunity tradition will never command a sturdy majority. There is reason to hope that the future may be different.

The politics of unequal opportunity is a powerful political force, but its direction is highly contingent. The last time our national politics wrestled seriously with structural reform to address class inequality was the last time class inequality was at levels comparable to today: the New Deal. Why did the New Deal reforms largely exclude African-Americans? The short answer is that the great majority of them were bluntly and officially disenfranchised.⁸⁸ White supremacy in that era was not a revanchist outsider politics of anger and resentment. It was the reactionary core at the

82. Estlund, *supra* note 2, at 1451–55.

83. *Id.* at 1451.

84. *Id.* at 1451, 1453–55.

85. *Id.* at 1454.

86. *Id.* at 1453.

87. *Id.*

88. See Forbath, *supra* note 51, at 208 (describing the Solid South as an anomaly at the heart of Roosevelt’s New Deal coalition and underscoring the fact that both parties and all three branches of the federal government condoned or supported Jim Crow and race-based disenfranchisement).

heart of the New Deal coalition. Roosevelt and the New Dealers in Congress made their peace with Jim Crow, for political reasons that are very straightforward. They could not get their reforms enacted without the support of Southern Dixiecrats.⁸⁹ The Dixiecrats would not support the reforms unless the reforms left undisturbed the entire system of Jim Crow, including super-exploitation of black labor and the general political and economic dispossession and disenfranchisement of African-Americans.⁹⁰ Black voters, confined largely to the South and overwhelmingly disenfranchised, lacked the power to play a significant role in any New Deal political coalition that would oppose the entrenched Southern Democrats in Congress. Thus, a racially inclusive New Deal was too utopian a prospect to enlist the support of critical New Deal lawmakers and powerbrokers.

The Civil Rights Revolution changed this, and opened the door to a different kind of politics. For all its massive unfinished business—including in the area of voting rights—the Civil Rights Revolution bequeathed us an America in which the obstacles to making common cause across ethno-racial lines are now substantially less daunting than they were in a world in which whites had an exclusive lock on national political power. Demographic trends today suggest that one of the two major political parties may soon be a coalition in which no one racial group constitutes a majority of voters⁹¹—just as the population of the state of California is already.⁹² Our constitutional politics is largely driven by parties, and we have never had a political system with a party like that before. The most we have had is the glimmers of the possibility of a multiracial party coalition, in support of a version of the democracy of opportunity, in the Reconstruction Republicans.⁹³

89. *Id.* at 209; see also William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 699–700 (2000) (detailing the concessions exacted by Southern Democrats in exchange for their support of New Deal legislation).

90. See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 156–94 (2013) (describing these political dynamics and their enormous effect on the New Deal).

91. In the United States as a whole, the year that a majority of children will be nonwhite is expected to be 2020; the year that a majority of the entire country will be nonwhite will be in the 2040s. Doug G. Ware, *Census: White Children to Become Minority by 2020*, UPI (Mar. 5, 2015, 11:57 PM), http://www.upi.com/Top_News/US/2015/03/05/Census-White-children-to-become-minority-by-2020/9751425612082/ [<https://perma.cc/93YX-6QQ7>].

92. Mark Hugo Lopez, *In 2014, Latinos Will Surpass Whites as Largest Racial/Ethnic Group in California*, PEW RES. CTR. (Jan. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/01/24/in-2014-latinos-will-surpass-whites-as-largest-raciaethnic-group-in-california/> [<https://perma.cc/ZM3G-A7DT>] (“Latinos are projected to become the largest single racial/ethnic group in the state by March of this year, making up 39% of the state’s population.”).

93. See generally FISHKIN & FORBATH, *supra* note 6 (manuscript at 46–54) (discussing the characterization of the Civil War and Reconstruction as a “Second Founding,” which promised economic and political enfranchisement to citizens of every race and color).

In American politics since the Civil Rights Revolution, we have never had a period of sustained attention to problems of class inequality and unequal opportunity—until now. We have no experience with the combination of an electorate that includes people of color and a polity riveted on the fact that those at the top are reaping all the gains of our no-longer-shared prosperity; and all the rest of us voters—say, the 90%, white, black, and brown, what can fairly be called “the American people”—are falling behind. This makes the future hard to predict. It makes the possibilities more open ended than history might suggest. We are on uncharted ground.

Of course it is still true, as Estlund observes, that “[m]any 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.”⁹⁴ This tends to cleave apart the politics of anti-oligarchy and economic opportunity from the politics of inclusion. We have no doubt that many opponents of the democracy of opportunity tradition will make use of this cleavage, as they have often before. It often works, and there’s a reason why. You will not find us succumbing to that old and deeply flawed impulse on the part of progressives to believe that all politics, all political aspirations and grievances, are “really” economic. People also vote their ethno-racial, cultural, and religious identities and grievances.

And in the United States, they also vote their constitutional identities, which are a kind of cultural and ideological identity. As our colleague Sandy Levinson pointed out long ago, they resemble a kind of secular faith; just as religious identities depend on narratives of belonging, restoration, and redemption, so do constitutional ones.⁹⁵ Virtually every movement for big changes in our politics has had such a narrative, one that recounts the founding and other crucial moments in the constitutional past and the fundamental commitments “we” made in those moments.⁹⁶ Such an account adds up to a vision of the kind of nation that the Constitution promises to promote, restore, or redeem. Insofar as such narratives succeed, they supply a common identity and a common project which help unify constituencies and bridge their differences.

94. Estlund, *supra* note 2, at 1452.

95. SANFORD LEVINSON, CONSTITUTIONAL FAITH 11 (2011) (first prtg., 1988); *see also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 7 (2011) (observing the similarities between constitutional traditions and religious traditions, especially those built around a central organizing text).

96. *See, e.g.*, Martin Luther King Jr., I Have a Dream, Address at the March on Washington, D.C. for Civil Rights (Aug. 28, 1963) (evoking the founding and scenes from American constitutional history to promote his cause).

Consider, for example, the contemporary libertarian constitutional narrative and its account of an America fundamentally committed to rugged individualism, limited government, personal responsibility, guns, and private property safe from state interference and redistribution.⁹⁷ This narrative has some real purchase on many judges, lawmakers, and ordinary citizens. It is intertwined imperfectly but serviceably with the other constitutional narratives that undergird the present conservative political coalition in this country, such as (among others) the constitutional narrative of a Christian America with a Christian constitution and national identity under threat from forces of secularism and pluralism.⁹⁸ These constitutional stories do cultural work, helping to bind together the famously disparate social and economic positions of the different constituencies within the conservative movement.

On the progressive side, the constitutional narrative is comparatively thin and impoverished. Some central, progressive political commitments seem to have obvious constitutional dimensions—think of sex equality, racial justice, and voting rights for all. Many of these speak to the principle of inclusion. But, because of the great forgetting, progressives have largely lost the ability to speak in constitutional terms about political economy. Progressive opposition to oligarchic concentrations of power and progressive efforts to restore the paths to a middle-class life read today as mere policy preferences. They seem largely unmoored from any larger constitutional narrative that could help bind together the disparate constituencies that make up this political coalition.

Work, livelihood, and opportunity; material security and insecurity; poverty and dependency: throughout the nineteenth and early twentieth century, these were at the center of American constitutional debate. Mounting class inequality—and the deprivations, unequal opportunities, and unequal political clout it bred—was not only a social or political problem, but a constitutional problem. There were constitutional stakes in attending seriously to the economic grievances, needs, and aspirations of ordinary Americans.

Because of the great forgetting, we no longer seem to appreciate the constitutional meaning and core insight of Reconstruction. Reconstruction marked a second Founding, whose core idea was to bring African-

97. See, e.g., Campaign for Liberty, *Statement of Principles*, <http://www.campaignforliberty.org/about/> [https://perma.cc/CTJ8-SPCM] (articulating general principles and observing that “Americans inherit from our ancestors a glorious tradition of freedom and resistance to oppression” and that “[t]he U.S. Constitution is at the heart of what the Campaign for Liberty stands for”).

98. See THEODORE J. LOWI, *THE END OF THE REPUBLICAN ERA* 160 (1995) (explaining how Ronald Reagan used religious language to fuse the traditional Republican Party, “a liberal, eastern, Wall Street party,” with the Christian Right, a group of “antielite, anti-eastern, anti-Wall Street, and antiliberal” voters).

Americans—and more broadly, “all persons born [or naturalized] in the United States . . . of every race and color”⁹⁹—into the democracy of opportunity. America’s constitutional commitments to equal citizenship thenceforth condemned *both* entrenched class inequality and caste-like subordination. The great moral and practical insight of Reconstruction and the party that led it (at their prophetic best) was that the nation cannot, over the long run, avert or overcome one without addressing the other. The party of Reconstruction and most of white America, by and large, abandoned that insight. But it has continued to illuminate our constitutional history.

Now, with a nation composed more than ever before “of every race and color,” and confronted by class inequality more starkly than at any time since the end of Jim Crow, there is a chance for the moral and practical truth of the old insight to gain a new purchase on Americans’ political imaginations. Would this make a difference in our politics? We think it could, although we make no promises. It is true, as Jed Purdy reminds us, that one could forget (or continue forgetting) all this history and still say that a political economy resolutely geared to producing this kind of America would be a fairer or more democratic one—for reasons unrelated to any constitutional narrative.¹⁰⁰ But we suspect that is not how Americans do large-scale political and constitutional change. We are a people with much faith in the Constitution and in the stories we tell about it. Therefore, we would do well to revisit the once highly salient, now largely forgotten narratives from our history that speak to common dilemmas of race and class, equal opportunity, oligarchy, and inclusion. We cannot predict the future trajectory of these ideas. But if historians are a society’s professional rememberers, we think it important to re-examine these constitutional commitments, as a way of providing materials that could be used in the future to construct a more revealing and resonant constitutional narrative for our time.

* * *

V. Postscript: Radicalism, Anticonstitutionalism, and the Democracy of Opportunity Tradition

Constitutional narratives like the one we are sketching raise one further set of concerns, which both Jed Purdy and Jeremy Kessler articulate well: By framing the hope for egalitarian economic reform in constitutional terms, do we risk crowding out more radical visions of change?

99. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

100. Purdy, *supra* note 1, at 1421–22.

From the late nineteenth century onward, Purdy and Kessler remind us, the United States saw socialist, communist, and anarchist movements challenging the liberal capitalist order. Such radical challenges at times helped inspire and legitimate the push for serious change in a more “reformist” vein. The radical movements enlarged the imaginations and ambitions of more moderate reformers. Thus, Purdy and Kessler argue, if we want to recover and reimagine forgotten traditions of thought and action around the tensions between democracy and capitalism in American life, we should not ourselves forget the radical traditions that held that there was no reconciling those tensions—and opted for democracy. These anticapitalist movements were part of the intellectual and political ferment of their day. Their history, Purdy and Kessler suggest, reveals a world of radical ideas about political-economic transformation that were frankly “anti-constitutionalist” and, hence, fell outside the democracy of opportunity tradition we are chronicling.

We agree about the importance of radical ideas, old and new. But Purdy and Kessler seem to equate social and economic radicalism with anticonstitutionalism. That is not true to the historical record, as we read it; nor do we think it theoretically sound. Kessler describes the opposing “socialist” and “reformist” “camps” of early-twentieth-century American political life as though only the reformist camp spoke in the key of constitutional political economy.¹⁰¹ Purdy too seems to assume that socialists, because they were anticapitalist, were also anticonstitutionalist.

In fact, most late-nineteenth- and early-twentieth-century radicals were steeped in the precepts and narratives of the democracy of opportunity tradition. Take Eugene Debs and the American Socialist Party he led for decades. They were the most formidable actors in the socialist camp during the Progressive Era, where Kessler and Purdy direct us for lessons in anticonstitutionalism, and indeed, the largest and most successful socialist movement in U.S. history.¹⁰² But Debs was not inclined to relinquish constitutional political economy to the antiredistributive crowd. He and his comrades consistently framed their party’s social democratic program in terms of regenerating, for an industrialized America, the republican commitments of the Founders.¹⁰³

Social democracy represented a rupture with the present political and economic order—but not, in Debs’s view, with the essentials of the

101. See generally Jeremy K. Kessler, *The Political Economy of “Constitutional Political Economy”*, 94 TEXAS L. REV. 1527 (2016).

102. See generally NICK SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* (1982).

103. *Id.* at 151–53, 229–30, 292–93, 374 n.28 (discussing Debs’s consistent invocations of Founding Fathers); see also EUGENE V. DEBS, *THE GROWTH OF SOCIALISM* (1902); Eugene V. Debs, Speech at Canton, Ohio (June 16, 1918) in *WORDS THAT CHANGED AMERICA: GREAT SPEECHES THAT INSPIRED, CHALLENGED, HEALED, AND ENLIGHTENED* 170, 170 (Alex Barnett ed., 2003); Eugene V. Debs, *In Prison*, RAILWAY TIMES, July 7, 1895.

American democratic constitutional tradition. He and other party leaders drew an egalitarian social vision out of the Declaration of Independence and the outlook of “the Fathers”—or, rather, their preferred Fathers, like Jefferson when he undertook his battle against the “moneyed aristocracy,” whom Debs analogized to the “plutocrats” of his own day.¹⁰⁴ As we do, Debs and his party drew a distinction between that egalitarian social vision and the “particular economic theor[ies]”¹⁰⁵ best suited to realizing it. The social vision remained durable across time—an anti-oligarchy principle and a principle of universal access to decent, secure livelihoods through meaningful work, what we describe as “an underlying constitutional commitment to a democratic political economy in which power and opportunity are dispersed among the people rather than concentrated in the hands of a few.”¹⁰⁶ The particular economic theories and programs best suited to realizing it necessarily changed dramatically in the course of economic development.

In comparison to mainstream Progressives, Debs and his party concluded that their economic circumstances required far more extensive public ownership of industry and more radical forms of economic democracy in the form of more support for unions and cooperatives.¹⁰⁷ But much like such “reformist” Progressives as Louis Brandeis¹⁰⁸ and Jane Addams,¹⁰⁹ the “radical” Debs defended his economic program in terms of recuperating the social underpinnings of democratic citizenship for the nation’s industrial workers.¹¹⁰

Debs and his comrades thought that achieving their kind of social democracy demanded extensive structural changes in the Constitution itself to make the American state more democratically accountable and unseat the plutocrats from the thrones of state power.¹¹¹ This vision of root-and-

104. See, e.g., Eugene V. Debs, *A Plutocratic Government*, 15 *LOCOMOTIVE FIREMEN’S MAG.*, June 1891, 492–93.

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

106. FISHKIN & FORBATH, *supra* note 6 (manuscript at 2).

107. See SALVATORE, *supra* note 102, at 189–90 (observing that the Socialist Party of America adopted a platform at its 1901 convention that contained immediate demands for municipal ownership of utilities and electoral reform and that “Debs did not attend the convention, [but] he applauded its actions and effusively shared its hopes”). See generally DAVID SHANNON, *THE SOCIALIST PARTY OF AMERICA: A HISTORY* (1955).

108. Forbath, *supra* note 45, at 56 (describing Brandeis’s views about constitutional political economy, particularly his belief that “[t]he Constitution must safeguard not only a framework of government, but also the project of fitting citizens for ‘their task’ of self-rule”).

109. See generally JANE ADDAMS, *DEMOCRACY AND SOCIAL ETHICS* (Anne Firor Scott ed., Harvard University Press 1964) (1902).

110. See SALVATORE, *supra* note 102, at 191 (“Through collective control of the means of production, Debs insisted, a democratic individualism might indeed be reborn.”).

111. See AZIZ RANA, *THE RISE OF THE CONSTITUTION* (forthcoming 2018) (manuscript at 48) (on file with authors) (describing how the Socialist Party “came to stand for the call for explicit constitutional re-founding grounded . . . in a class-based diagnosis of the 1787 text’s function in

branch constitutional renovation seems to be one reason our interlocutors consider the Socialists “anticonstitutionalists.” But if demanding structural changes to the present Constitution in the name of more fully realizing the ideals of the Declaration and the “true” commitments of the founders is anticonstitutional, then Lincoln and the Civil War and Reconstruction era Republicans were anticonstitutionalists. They cast their refounding as a way of redeeming first principles, just as the Socialists did.

And so too, for that matter, did many centrist and moderate Progressives, as various and mainstream as Woodrow Wilson and Theodore Roosevelt. Wilson (in his days as a political scientist) and Roosevelt (in his 1912 run as the Progressive Party candidate for the White House) called for many of the same constitutional changes as the Socialists: reforming or abolishing the Senate, curtailing separation of powers via a parliamentary system, popular recall of judicial opinions and other checks and restraints on judicial review, amending the obdurate rules of constitutional amendment, and so on.¹¹² Wilson and Roosevelt did so in the name of creating a more wieldy and accountable American state capable of taming corporate capitalism, wresting government from the grip of the money power and corporate malefactors, ending what Roosevelt, like Debs, dubbed “the tyranny of . . . plutocracy,”¹¹³ and enacting the democratic will of a reform-minded public. Debs articulated these goals in a more class-conscious way: he called the constitutional political-economic order he hoped to build “the workers’ republic.”¹¹⁴ But no less than the others, Debs framed the case for major structural changes in terms of what Jack Balkin would call a “redemptive” constitutional narrative,¹¹⁵ wherein deep changes are needed in order to restore government to its founding commitments. *Pace* Kessler, the discourse of constitutional political economy and the

collective life”); Aziz Rana, *Progressivism and the Disenchanted Constitution*, in *THE PROGRESSIVES’ CENTURY: DEMOCRATIC REFORM AND THE CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (Stephen Skowronek et al. eds.) (forthcoming 2016).

112. See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 110–54 (1994) (charting the judicial-recall movement, which sought to “make the courts more responsive to the popular will”); WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* v–vi, 5–6 (1885) (calling for structural constitutional changes, including a shift to a parliamentary system); Theodore Roosevelt, *The New Nationalism*, in 17 *THE WORKS OF THEODORE ROOSEVELT* 5, 5–22 (national ed. 1925) (1910); Platform of the Progressive Party (Aug. 7, 1912), <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/tr-progressive/> [<https://perma.cc/2Z6B-ELAD>] (calling for dramatic structural constitutional reform to make “the people . . . the masters of their Constitution” including direct election of Senators, primaries, including for President, and “a more easy and expeditious method of amending the Federal Constitution”).

113. THEODORE ROOSEVELT, *THEODORE ROOSEVELT: AN AUTOBIOGRAPHY* 464 (1913).

114. See SALVATORE, *supra* note 102, at 344.

115. See generally BALKIN, *supra* note 95.

democracy of opportunity tradition in particular were capacious enough to include both Roosevelt and Debs.

Socialists, along with other radicals and “advanced” Progressive reformers, brought something new to the tradition. In place of the old “producers” versus “money power” divisions of Jeffersonian and Jacksonian vintage, they offered a class analysis centered on the social relations of industrial capitalism. They saw how the legal and constitutional status quo—from the prevailing common law and constitutional conceptions of property and contract, and liberty and equality to the inherited structures of political representation like the Senate—were tilted wildly in favor of capital, against labor, and in particular, against redistribution. They were deeply critical of major aspects of the 1787 Constitution that they saw as stacking the deck in this way—a position famously embodied in Beard’s *Economic Interpretation of the Constitution*, the gist of which was that much of the original text and design was aimed at preventing redistribution. As Aziz Rana observes in his important forthcoming work,¹¹⁶ socialists and other radicals thus aimed at “disenthrall[ing]” working-class Americans from the kind of Constitution worship that inhibited support for fundamental change. But, as Rana also notes, radicals like the Debsian socialists nonetheless spoke and wrote in a “redemptive” constitutional register, casting radical changes in the constitutional and political-economic order as redeeming the revolutionary generation’s durable republican and democratic precepts.¹¹⁷

Most early-twentieth-century radicals were like Debs himself: They may have served serious jail time for defying antistrike injunctions and criminal sedition laws, and they certainly had nothing but scorn for the constitutional outlook of the courts and most of the legal elite. Yet, when it came to seeking radical structural transformations in state and society, they remained inside not only the democracy of opportunity tradition but also all the legal niceties of the existing Constitution. To the chagrin of critics on their left flank, they aimed to achieve their structural changes—

116. See Rana, *Progressivism and the Disenchanted Constitution*, *supra* note 111, at 49.

117. See RANA, *RISE OF THE CONSTITUTION*, *supra* note 111 (manuscript at 26–28). In contrast to the syndicalist and communist left, but in keeping with the Socialist International, Debs and his comrades held that the institutions of “bourgeois democracy”—parliamentary and electoral democracy, safeguards for political opposition, even the rule of law—were essentials for the long run, not destined to be supplanted when socialism supplanted capitalism. See G.D.H. COLE, 3 *A HISTORY OF SOCIALIST THOUGHT* 114 (1956) (describing how English Socialists envisioned not “a new kind of State embodying the class-power” of workers but “gradual and progressive modification of the system by democratic means”); GEORGE LICHTHEIM, *MARXISM: AN HISTORICAL AND CRITICAL STUDY* 264, 297, 403 (1964) (In contrast to Soviet Marxism’s “ideology of ‘total’ revolution” and “proletariat dictatorship,” “radicals” and “revisionists” alike in Socialist International took “for granted . . . the permanence” of constitutionalism and rule of law).

revolutionary reforms, if you will—through Article V amendments and conventions, not general strikes and insurrection.¹¹⁸

We are not experts in the constitutional and anticonstitutional thinking of every branch of twentieth-century radical thought. Some had visions of a more richly democratic form of government “beyond” the constraints of constitutionalism.¹¹⁹ But we find that even as these radical democrats talked about overcoming the elitism of the Founding Fathers and abolishing many of the elitist and antidemocratic institutions they had inscribed in the Constitution, they continued to hew to the Founders’ important republican constitutional linkages between the economic and the political dimensions of self-rule.

It is never a simple task to translate the ideals of the democracy of opportunity tradition into terms relevant to a contemporary political economy. This is especially true at times of major structural change in the economic order—which is also when such translation is at its most urgent. In the end, not every kind of radical political-economic imagination can find room within the democracy of opportunity tradition. But we think there is much to be learned from those that could and did a century ago, especially since today’s social and economic conditions are once again prompting us to revisit fundamental questions about the relationship between capitalism and democracy. The democracy of opportunity tradition does not provide clear answers for how to do this. But it provides resources worth drawing on as we begin the work.

118. See RANA, RISE OF THE CONSTITUTION, *supra* note 111 (manuscript at 100).

119. Others fell into the famous trap of much Marxist thought regarding the realm of politics—believing that the need for ongoing and organized political conflict and contestation was a function of liberal capitalism’s class divisions and its separation of economy and civil society from government and the state, and that overcoming these features of capitalism would make government a matter of administration rather than ongoing political strife. Put differently, our impression is that much anticonstitutionalism on the anticapitalist left in the twentieth century was technocratic in some of the same ways as much anticonstitutionalism within Progressive ranks. See William E. Forbath, *Courting the State: An Essay for Morton Horwitz*, in 2 TRANSFORMATION IN AMERICAN LEGAL HISTORY: LAW IDEOLOGY, AND METHODS—ESSAYS IN HONOR OF MORTON J. HORWITZ 70, 70–80 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).