Wealth, Commonwealth, & the Constitution of Opportunity

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Introduction

We live in a time of profound and justified anxiety about economic opportunity. Americans are deeply attached to an idea of America as a middle-class nation, with very few of us on the economic margins, abundant opportunities to reach the middle class, and a fair shot at wealth and distinction for all. Half a century ago, it was possible to believe that we were heading in that direction. Now, it is clear that we are becoming something very different. Inequality had been increasing quietly for decades, but the Great Recession laid bare just how much. With opportunities for a middle-class livelihood shrinking, a large part of the former middle class is edging downward toward a more precarious place, closer to that of the poor, while a smaller group is edging upward toward substantial wealth. The poor are becoming more geographically concentrated, separate from the rich and even from the middle. Meanwhile, wealth and economic clout is becoming concentrated at the top to a degree that recalls the last Gilded Age.[1] As structures of opportunity grow more narrow and brittle and class inequalities mount, our nation is beginning to look like what reformers throughout the nineteenth and early-twentieth century meant when they talked about a society with a "moneyed aristocracy" or a "ruling class"—an oligarchy, not a republic.

Such a claim seems to raise constitutional concerns. And we think it should. For earlier generations of reformers, economic circumstances like our own posed not just an economic, social or a political problem, but a *constitutional* one. That understanding was rooted in a constitutional discourse we have largely forgotten—one that this essay suggests we ought to reclaim. From the beginning of the Republic through roughly the New Deal, Americans vividly understood that the guarantees of the Constitution are intertwined with the structure of our economic life. This understanding was the foundation of a powerful constitutional discourse that today, with important but limited exceptions, lies dormant: a discourse of *constitutional political economy*.

Throughout the nineteenth and early twentieth centuries, waves of reformers of widely different stripes confronted crises in the nation's opportunity structure resembling the one we are

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[1] *See, e.g.*, Timothy Noah, *The Great Divergence: America's Growing Inequality Crisis and What We Can Do About It* (New York: Bloomsbury, 2012): 10-27; Thomas Piketty, *Capital in the Twenty-Frist Century* (Cambridge, MA: Harvard University Press, 2014); Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (New York: W.W. Norton, 2013).

experiencing today. They responded with constitutional claims. The content of these claims varied, but at the core of these reformers' arguments was the idea that we cannot keep our constitutional democracy—our "republican form of government"—without constitutional restraints against oligarchy and a political economy that sustains a broad middle class, wide open and broad enough to accommodate everyone.[2]

Such arguments are, at their heart, structural constitutional arguments. Unlike the structural mode of interpretation familiar to us today, which builds claims about topics like the separation of powers and federalism on institutional relationships within the political sphere, arguments about constitutional political economy begin from the premises that economics and politics are inextricable, and that our constitutional order rests on and presupposes a political-economic order.[3]

These arguments are attuned to the threat of oligarchy: the danger that concentrations of economic power and political power may be mutually reinforcing—and, if sufficiently extreme, may threaten the Constitution's democratic foundations. These arguments also generally hold that economic opportunities in our society must be structured in an open, democratic way. Avenues to wealth and distinction must to be open to ordinary Americans, not just the privileged few; the roads to a middle-class life must be broad enough to accommodate everyone, so that the economy reliably produces the mass middle class that is both the social base of republican government and a structural condition for fair equality of opportunity.

Finally, these arguments have sometimes been intertwined with one more principle, a principle of inclusion: the idea that the democracy of opportunity must extend to all the people across lines of race and other invidious group-based distinctions. This idea, as we discuss below, was embraced only fitfully by the reformers and advocates in the tradition we are sketching. But all three of these principles—anti-oligarchy, a broad and open middle class, and inclusion—play an intertwined role in its most coherent version, and the only version that remains compelling today. The reformers who advanced these ideas at different times offered diagnoses and prescriptions that differed in many respects. But together, they add up to a distinctive tradition of American constitutional argument, which we will call the *democracy of opportunity* tradition.

From our vantage point today, this tradition's arguments against oligarchy and in favor of broad, open middle class might seem to be drawing on what Cass Sunstein calls "constitutive commitments"—fundamental commitments of our society that are not necessarily found within the Constitution itself.[4] But this distinction is anachronistic, as applied to the constitutional

[2] Of course, the boundaries of who belonged in the category of "everyone" were fraught and always contested. These boundaries are the object of the third major principle in this tradition—a principle of inclusion—which we discuss below.

[3] This premise is the economic analogue of the modern premise that the Constitution is inevitably entwined with—and not neutral with respect to—the nation's *social* structure. *See* Jack M. Balkin, "The Constitution of Status," 106 Yale Law Journal 2313 (1997): 2313–14. That premise, in turn, also has genealogy that runs through the "social" – as opposed to "merely legal" or "formal" justice; "social economics"; and "social democracy." We will encounter these discourses as well.

[4] See Cass R. Sunstein, *The Second American Revolution: FDR's Unfinished Revolution and Why We Need It More than Ever* (New York: Basic Books, 2004), 62. Advocates of constitutional welfare rights have argued otherwise—

thinking of these nineteenth and early twentieth century reformers. These reformers were interpreting the Constitution as they understood it, and they said so. They offered arguments based on constitutional text and history, and arguments based on commitments embodied in the Declaration of Independence, as well as arguments in a straightforwardly structural mode. At the same time, their project was not exclusively interpretive. These reformers also offered constitutional amendments and reforms—many of them successful—at both the state and federal levels, aimed at protecting what they saw 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.

Arguments in the democracy of opportunity tradition animated a protracted series of hotly contested constitutional debates about class and opportunity. In general, *all* sides in each of these debates—both proponents and opponents of the democracy of opportunity tradition—made extensive arguments about constitutional political economy. Most often, one side invoked the distributive commitments of the democracy of opportunity tradition, while the other side called forth anti-redistributive constitutional precepts. Frequently, all sides claimed to be safeguarding or restoring fair equality of opportunity and a broad middle class. 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.

Today, there remains broad agreement that it is important to promote opportunity, avoid oligarchy, and build a robust middle class, open to all. These principles remain mainstays of our politics. However, we have lost the crucial idea that these are *constitutional* principles.

Take the problem of oligarchy—the problem of concentrated political and economic power. Today, particularly on the left, this problem remains a pressing concern, but its relationship to the Constitution has become surprisingly attenuated. The dominant contemporary story of that relationship goes something like this: Economic elites enjoy too much political sway. When our legislators attempt to do something about this—to blunt the conversion of economic power into political power—they hit a constitutional roadblock. The First Amendment, as interpreted by the current Court, has come to mean that making political influence less unequal is not even a permissible *goal* for campaign finance regulation. Notice that in this story, the Constitution appears only at the end. The problem of oligarchy is not itself a constitutional concern; the Constitution only constrains what legislators can do in response.

Or consider a different problem: the inability of tens of millions of Americans who comprise the so-called "working poor" to afford health insurance—and to pursue their lives and ambitions free from the enormous and avoidable peril of going without it. Here again, the Constitution enters the story very late, as a potential roadblock, in the form of a Spending Power question: does the Spending Power permit Congress to expand Medicaid?

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that in that area, at least, economic rights are part of the Constitution itself. For the canonical article see Frank I. Michelman, "The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment," *Harvard Law Review* 83 (1969): 7; for a critical historical and theoretical overview see William E. Forbath, "Constitutional Welfare Rights: A History, Critique and Reconstruction," 69 *Fordham Law Review* 69 (2001):1821.

The contemporary liberal response to such constitutional roadblocks is to argue that, no, the Constitution, when properly interpreted, presents no barrier: the First Amendment and the Spending Clause, rightly understood, do not condemn the statutes at hand. This is an inadequate response, and one that reflects a profoundly important twentieth century narrowing of our collective sense of what a constitutional argument is.

Understood in the light of the tradition we are reconstructing, in both of these examples the Constitution belongs at the beginning of the story, not the end. The first question is whether the Constitution requires lawmakers to enact measures like the ones the Court struck down. In past rounds of debate about constitutional political economy, arguments of this form were common. Proponents of the democracy of opportunity tradition in different eras responded to constitutional claims that Congress lacked the power to enact such laws with constitutional claims that Congress had not only the power to do so, but also the duty. Such arguments were directed primarily to the political branches, and only secondarily to the courts. They reflect a constitutional world that was once familiar but is now much less so, in which many of the central debates were clashes over the affirmative constitutional obligations of the political branches, especially the legislature. Such arguments are have consequences both outside and inside the courts. In court, they would mean that constitutional precepts are at stake on *both* sides of many important disputes, not only on the side asserting constitutional constraints on what Congress has done.

Today nobody is making these affirmative arguments. And yet it would be wrong to say that nobody is making arguments about constitutional political economy. This form of argument lives on today in a significant way—on the libertarian right. Libertarian advocates have a substantive vision of a political and economic order they believe the Constitution requires. They have long translated that vision into rights claims that can be enforced in court. And indeed, even where such claims cannot be enforced directly in court, they can nonetheless *inflect* court decisions, the way libertarian freedom of contract inflects both the majority's and joint dissent's reasoning in *NFIB v. Sebelius*.[5] This libertarian school draws on many past rounds of constitutional contestation; it shares some roots with the democracy of opportunity tradition, particularly in the Jacksonian era, although it developed in a very different and more reactionary direction. At many crucial moments in the late nineteenth and early twentieth centuries, advocates making claims within the democracy of opportunity tradition squared off against advocates of this libertarian tradition in high-stakes constitutional struggles over the most pivotal constitutional issues of the day.

Today, the contemporary libertarians who are the lineal descendants of early twentieth century freedom-of-contract and property-rights Lochnerism continue to make an array of constitutional claims that are recognizable as constitutional political economy. These arguments hang on many different doctrinal hooks. They inform interpretations of the Commerce Clause, the separation of powers, the First Amendment, even the Equal Protection Clause. Whatever the doctrinal setting, the underlying force of these claims comes from a particular vision of the relationship between the Constitution and our economic life that would be very familiar to veterans of many nineteenth and early twentieth century constitutional struggles over banking, currency, credit, labor, trusts, and federal power over economic matters. All that is missing is

[5] *See* Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. Rev. 669, 672 n.9.

the libertarians' traditional opponents: the advocates of the democracy of opportunity tradition. Their political descendants live on, but we have forgotten that their arguments, too, are constitutional arguments.

We think the libertarians get much wrong but one big thing right: The Constitution really can be understood to make substantive demands on our political economy. The question is how we should understand the content of those demands and their relationship to constitutional law.

Inclusion and the Democracy of Opportunity

So far, we may be heard to be singing the praises of the democracy of opportunity tradition that stretched from the founding through the New Deal. We have framed that tradition in terms of three principles—with a principle of inclusion working alongside the principles of anti-oligarchy and a broad, open middle class. But in fact the relationship of inclusion to the rest of this tradition has been far more uneven; often this third principle has been starkly absent or its reach severely limited. The problem is that through most of this tradition's twists and turns, there was a devastating moral blindness at the heart of its ideas and arguments about opportunity and the constitution. They were usually understood to protect the economic and political prospects of only one group: white men.

The boundaries of who is included in the democracy of opportunity have always been contested. There have always been arguments within the democracy of opportunity tradition for expanding these boundaries; over time, such arguments have had a profound impact on the course of American political and economic life. As a result, this set of arguments—what we are calling the principle of inclusion—have turned out to be central to the democracy of opportunity tradition. But its relationship with the broader tradition has been complex and fraught. Abolitionists, as we shall see, and later, Reconstruction Republicans understood the principle of inclusion on the basis of race as critical to the democracy of opportunity project. They viewed racial inclusion as deeply entwined with anti-oligarchy, both morally and in terms of political economy. It was through their work, embodied in the Reconstruction Amendments—as well as through the work of advocates for women's suffrage and the Nineteenth Amendment—that the inclusionary principle was permanently inscribed into the American constitutional order.

And yet, ironically, but not surprisingly, the first robust articulations of a principle of inclusion within the democracy of opportunity tradition came from white men—men who were excluded from both economic and political opportunities because of class, not race. In the 1820s, propertyless white men working as journeymen and tenant farmers began to link their subordinate, caste-like treatment at the hands of both judges and employers with their political disenfranchisement. Drawing together political and economic arguments, these men argued for the proposition that they ought to be full republican citizens—included in democratic politics and in the democracy of opportunity.

They won the ballot, in an early and dramatic expansion of the circle of suffrage, and soon became crucial to the election victory of President Andrew Jackson. But their arguments for expanding the democracy of opportunity, like Jackson's, in no way extended to black men or to women. Quite the opposite. In these early arguments and in many that followed, white workingmen with no property tended to articulate the case for their own inclusion in the circle of equal citizenship by explicitly contrasting their status with that of women and slaves. (As we shall see, this drive to discriminate was fueled partly by a dread sense of commonality as propertyless "dependents.") The dignity and citizenship of poor white workingmen in the North was bound up with their real and imagined autonomy as free white laborers—in contrast to the women and the slaves who worked merely as part of their "master's" household. Nor did the democracy of opportunity envisioned by these early reformers include Indians. It was in part through the appropriation of native lands by force that the Jacksonian Democrats aimed to build their nation of economically and politically enfranchised white men.

In the years following the Civil War, for a brief season, the Reconstruction Republicans attempted to build a multiracial democracy of opportunity. They recognized that a principle of racial inclusion was essential, both in moral terms and in political-economy terms, to the democracy of opportunity project. You could no more build a democracy that excluded black people than you could build a free society of slaveholders and slaves. These Republicans brought together in a robust way for the first time all three core principles of the democracy of opportunity tradition: anti-oligarchy, a broad and open middle class, and inclusion, at least in terms of race and class, in the mainstream of economic and political life. These linked ideas were central to the politics and ideology behind the Thirteenth, Fourteenth, and Fifteenth Amendments, which inscribed the principle of inclusion into the text of the Constitution. But as it turned out, this understanding of these three principles and their relationship to one another was tragically short-lived. They had been brought together at the point of the bayonet in the occupied South, and in the North, they had rested on an unstable compound of moral idealism and hard-nosed pragmatism, which fell apart under the combined pressures of class strife in the North and white supremacist terrorism in the South.

Thus, the story we tell in this article is the story of a democracy of opportunity tradition whose three central strands—anti-oligarchy, the mass middle class, and inclusion—have only briefly and fitfully been entwined together. We think it is profoundly important for understanding the American constitutional order that at the moment when inclusion gained its most vital foothold in our Constitution—Reconstruction—it did so as part of the democracy of opportunity tradition. However, more often, both before and since, the democracy of opportunity tradition and the idea of inclusion have been tragically at odds, to the great detriment of both.

Today, the principle of inclusion has a seemingly independent life in our constitutional order. Although linked at its inception with the democracy of opportunity tradition, today it lives on, seemingly unmoored from that tradition. And while the democracy of opportunity tradition itself is largely forgotten, this one important thread of that tradition, no longer readily identifiable as part of it, is familiar and celebrated.

Today, when we speak of "equal opportunity" in a constitutional register, we associate this phrase almost exclusively with antidiscrimination law and the project of racial and gender justice. When we think this way, we are calling on the principle of inclusion, with its roots in abolitionism, the Civil War, and Reconstruction. The greatest vindication of the inclusionary principle came in the mid-twentieth century with *Brown v. Board of Education* and the series of critical framework statutes of the civil rights revolution—the Civil Rights Act, the Voting Rights Act, the Fair Housing Act. At both of these crucial junctures, a century apart, the main focus was race. But the logic of inclusion has broadened over time and continues to do so today.[6]

We describe this principle as one of *inclusion* because that is its lodestar: the core idea is to include, on equal terms, those who would otherwise have been excluded from the full range of opportunities the nation offers—in education, employment, housing, public accommodations, voting and politics, and everywhere that opportunities shape our lives. At that level of abstraction, it is a principle embraced by all sides in modern debates about equal opportunity and constitutional law. Conservative advocates of a thin version of the principle frame it in terms of formal equality and nothing more. Thicker forms of the principle of inclusion have underwritten efforts by courts and lawmakers to restructure important features of our economic, educational, and political systems, with the aim of achieving what President Johnson called "equality as a fact and equality as a result" with regard to formerly excluded groups.[7]

These thicker versions of the principle of inclusion implicate, and are entwined with, the broader democracy of opportunity tradition—in ways we now tend to forget. They implicate questions far beyond formal equality: questions about education policy, the availability of job opportunities, and other questions whose answers determine whether or not members of formerly excluded groups, as well as others, have viable paths to the middle class. When the principle of inclusion is separated from the broader democracy of opportunity tradition, it risks being thinned out in ways that sharply limit its real-world reach.

This article sketches the story of the democracy of opportunity tradition in American constitutional politics—both when it has embraced the principle of inclusion, and when it has done the opposite. As we will discuss, generations of white male champions of the democracy of opportunity tradition not only refused to include women and racial others in their democratic vision, but actually made their subordination part of their outlook and program. Champions of racial and gender equality would strive to broaden and transform the democracy of opportunity tradition by recognizing a principle of inclusion at its foundation, no less central to the tradition than preventing oligarchy or preserving a broad middle class. 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 transcendently important exception of Reconstruction—these were dissenting views.

The Great Forgetting

The great triumphs of the principle of inclusion in the mid-twentieth century—the Civil Rights Revolution, the Great Society—were also largely disconnected from the broader

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[6] Today, for instance, the revolution that is now occurring in the law of sexual orientation fits well within this discourse of inclusion. As is so often the case when the principle of inclusion is invoked, analogies to race, which tie the principle back to its roots in American constitutional history, play an important role. See generally Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2011).

[7] Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965), in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, Book II—June 1 to December 31, 1965* (Washington, DC: Government Printing Office, 1966), 636.

democracy of opportunity tradition, but for a different reason. The Civil Rights Revolution and Great Society unfolded in an unprecedented moment of broadly shared prosperity. Thanks to the New Deal reforms and the post-World War II boom, America appeared to be becoming the kind of middle-class nation past generations of reformers dreamed about—or so liberals believed at the time. Thus, the moment that marked the rebirth and greatest triumphs of the inclusionary ideal also saw the eclipse of what had been the other core elements of the democracy of opportunity tradition: the anti-oligarchy principle and the related constitutional imperative to preserve and widen paths to the middle class. President Johnson and his allies in Congress insisted that the nation could pay for their War on Poverty out of the increased revenues that would flow from continued economic growth.[8] No tax hikes would be necessary, no controversial redistribution, no structural changes in the political economy. The Great Society did not aim, as nineteenth- and early-twentieth century reformers had aimed, to redistribute wealth and power between "capital" and "labor," the "few" and the "many," or private business elites and government.

These demands, in various forms, had been at the center of the political *and constitutional* claims of the Jacksonians, the Populists, the Progressives, and the New Dealers. They are at the heart of the democracy of opportunity tradition. But they were gone from the Great Society agenda. And no wonder. Fifty years ago, at the Great Society's greatest moment, broad-gauge class inequality was at or near historic lows. Increasing numbers of working-class Americans were enjoying a middle-class way of life, and also a measure of dignity and voice at work—underwritten by strong unions, high wages, and a generous meld of public and private-employment-based social insurance. What remained to be done, it seemed, was to open those opportunities to black America; to the overlapping category of the marginalized poor[9]; and, later, to women.

To be sure, this was not a universally held view. Many civil rights leaders and activists, many New Deal veterans in Congress and the Executive, along with left-leaning labor leaders, academics and intellectuals, and a small number of high officials in the Johnson administration, demurred from the notion that America's broad-gauge class problems were a thing of the past, and all that remained was the unfinished work of racial justice and the inclusion of the marginalized poor. They worried—rightly, as it turned out—that by assuming our class problems were solved, and forgetting the older elements of the democracy of opportunity tradition that addressed them, Great Society liberalism risked undermining its own ambitions. They championed, in vain, the idea of marrying the Great Society's renewed attention to racial

[8] *See*, among others, Alan Matusow, *The Unravelling of America: A History of Liberalism in the 1960s* (Athens, GA: University of Georgia Press, 2009), 42-59, 155-179; Irving Bernstein, *Guns or Butter: The Presidency of Lyndon Johnson* (New York: Oxford University Press, 1996), 36-42.

[9] That is, the project of inclusion was not limited to race, but also included an imperative to generate opportunities for the overlapping category of the marginalized poor—"poor" or "poverty-stricken" whites as well as blacks; "poor" whites being seen as predominantly rural and like African-Americans excluded from the prosperous industrial economy and the welfare state that had been built around it—excluded, often, because their geographic and economic circumstances were similar to those of African Americans, and fell outside the New Deal system by dint of the racialized lines its architects had drawn.

inequality to the old attention to broad-gauge class inequalities and pathways to the middle class—in short, constitutional political economy.[10]

Along with this complacent view of economic circumstances, the forgetting of constitutional political economy in liberal precincts was also the product of changes in what liberals and progressives, along with the rest of the nation, came to see as the natural shape and place of constitutional arguments. This new understanding of what a constitutional argument *is* remains with us today. It is more clause-bound, and more strictly tied to what courts enforce, than anything nineteenth-century or early twentieth-century Americans would recognize.

This shift began as an unintended upshot of the terms on which New Dealers fought and won their climactic battle with the "old Court" and its conservative constitutional political economy. In Congress and in public discourse, we will see, New Dealers championed their legislative agenda in terms of implementing a new "constitutional economic order," brimming with positive social and economic rights and affirmative governmental duties that they rooted in the Preamble, the general welfare clause, the guaranty clause and the Reconstruction Amendments. But they saw nothing to gain by trying to win judicial assent to this outlook, which flouted the Court's views at almost every turn. So, while New Dealers left no doubt about the essential constitutional work they believed the new statutes, agencies and social and economic rights were doing, they defended them before the Court on commerce and spending clause grounds.

And of course, after the "switch in time" in 1937, they prevailed. But what New Dealers sought and won from the Court was not a decision to make the New Deal constitutional political economy its own, but simply a decision to step aside and allow other constitutional actors—the ones New Dealers believed were best equipped to do the work—to carry out their duties. Not only labor legislation, we will see, but unions themselves had been born under clouds of judicial fear and loathing: until 1937, virtually every statute Congress or the states had ever enacted to protect and encourage unions had been struck down. Now was not the time to insist in Court that the rights to strike and organize were safeguarded, or the gross inequalities of bargaining power condemned, by a Constitution that the Court had long insisted meant just the opposite, forbidding democratic change in the harsh judge-made rules on all these matters. New Dealers believed that Congress had affirmative constitutional duties in this field, but they were content for the Court simply to acknowledge that Congress had the power to act. That was enough. Sufficient unto the day that the Court declare that Congress enjoyed well-nigh plenary authority in the realm of economic and social policy. By the 1940s, even the conservative factions of the nation's legal elite had assented to that proposition. The Constitution was no longer the ground on which to fight their anti-New Deal battles.

While the Court stepped away from guarding a conservative constitutional political economy, progressive reform efforts remained vibrant in Congress, animating work to "complete the New Deal" and enact its "Second Bill of Rights." Bills instituting the kinds of inclusive social provision and broad-gauged federal responsibility for employment opportunities that

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[10] See, William P. Jones, *The March on Washington: Jobs, Freedom and the Forgotten History of Civil Rights* (New York: W.W. Norton, 2013); William E. Forbath, "Constitutional Welfare Rights: A History, Critique and Reconstruction," *Fordham Law Review* 69 (2001): 1842–45.

earlier New Deal legislation lacked were afoot in Congress and enjoyed broad support in the polity. But unlike the earlier reforms, these would have unsettled the South's separate, racially segmented, caste-ridden labor market; and so, despite the plain but bootless support they enjoyed among disenfranchised blacks and poor whites throughout the South, these legislative efforts were thwarted by a coalition of Southern Dixiecrats and conservative Northern Republicans.

Thus, we suggest, white America's and the federal government's ongoing abandonment of Reconstruction did more than deprive black Americans of civil and political rights for another century. It also operated, at this crucial New Deal moment, to prevent all Americans from securing the full boon of the democracy opportunity tradition as New Dealers had begun to interpret it. Between the New Dealers' robust articulation of a modern account of that tradition and its enactment fell the shadow of Jim Crow.

By the 1940s, the new industrial unions had emerged as the only powerful, organized constituency behind the idea that Congress had further constitutional duties to fulfill, other social and economic rights to secure, in order to bring the democracy of opportunity and a political economy of equal citizenship down to earth for all Americans. Blocked at every legislative crossroads, the unions during the 1940s-60s instead fashioned a robust *private* welfare state by bargaining for private entitlements to job security, pensions and health insurance for their members. Beyond the unionized sectors of the economy, industrial prosperity, liberal tax incentives, and the hope of thwarting unionization prompted large firms to adopt the main features of this generous publicly subsidized, private welfare system.

And with that, the language of constitutional political economy fell into disuse, on the bench and in the political branches. Claims of constitutional duty to recast market and property relations—and rival claims of constitutional restraints against recasting them—fell silent for the first time in over a century.

The Court Ascendant

At that moment, one would not have predicted that the story of American constitutionalism across the second half of the twentieth century would be a story of the Court ascendant. The Court had stepped back from aggressive rights adjudication and the general office of constitutional guardianship; restraint was its new watchword. Indeed, some New Dealers were mooting schemes for shutting down judicial review entirely. Neither middle-of-the-road New Dealers in Congress nor the leading lights of the pro-New Deal liberal and progressive wings of the legal elite bought that idea. Attachment to the ideal of judicial constitutional safeguards for individual liberties and the rights of politically unpopular and vulnerable minorities was too deeply wrought into what it meant to be an enlightened liberal or progressive leader of the bar and bench. As liberal democracies fell across Europe, and the nation went to war against fascism, that ideal came to seem an essential element of the American experiment. So, the outlines of a new division of labor emerged: Congress and the Executive had constitutional responsibility to rebuild and maintain a democracy of opportunity in the economic order; there, judicial restraint was the rule. But the courts should continue and indeed expand their active watch, when it came to civil liberties and the rights of "religious, or national, or racial minorities," in the famous words of Justice Stone's prescient footnote, which echoed the prevailing sentiments of the liberal legal elite.

Of course, nothing in *Carolene Products*, footnote 4 preordained the rebirth of robust judicial activism. What mattered most was that as the NAACP and its allies found little welcome in their quest for citizenship rights for black America in Congress or the White House, in the late 1930s, they set their sights on a court-centered path to equal citizenship, just as the Court was beginning to etch out a new role for itself, in harmony with New Deal liberalism.

"[T]he paradoxical legacy of Warren Court activism," and of *Brown* itself, Bruce Ackerman recently observed, was that it established an idea of the Court as "the unique spokesman for We the People of the twentieth century"—an idea that it is the Court, and only the Court, that has the authority to enforce the Constitution.[11] But the idea that the courts were the locus of our most important constitutional conflicts and the most reliable allies of liberal and progressive reform was one that came naturally to a generation of reform-minded attorneys who came of age in a prosperous, post-War and cold war America, after the great battles of constitutional political economy had ended.

The first two principles of the democracy of opportunity tradition had faded, and with them the idea that structural reforms in our political economy were an affirmative constitutional duty that lawmakers, not judges, had to undertake. What was left was the inclusionary principle and the project of racial justice. Of course, in theory, Congress could have taken the lead. But Jim Crow had a hammerlock on Congress and the Democratic Party, and the courts made the first moves instead. By the time the civil rights movement reopened the doors of reform in the early 1960s, the NAACP and *Brown v. Board* had set the stage for a remarkable melding of social reform energies with a court-centered, counter-majoritarian constitutionalism in a new liberal mold.

In this context, "liberalism" and "progressivism" themselves changed shape. Social reformers and advocates for the racially excluded and downtrodden, along with women, the consumer and the environment all embraced individual rights claims made in courts; strong judicial oversight of administrative state institutions and private governance; and legalist, procedural conceptions of fairness and equality—all of which earlier generations of progressives had shunned. The rest of the democracy of opportunity tradition—the precepts of constitutional political economy that speak to the distribution of wealth and economic power—was forgotten.

This forgetting happened at an inopportune moment. Just as Congress, the Executive and the courts began to get behind the civil rights movement's demands for "Jobs and Freedom," just as Title VII made equal employment opportunity a norm that reached into the nation's factories and offices, union hiring halls and joint labor-management committees, the seeming abundance of decent jobs began to dwindle. The doors of middle-class opportunity in our industrial regions and workplaces began closing. By the 1970s, the political economy was on its way to becoming

[11] 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 105-06 (2014).

the one we know today—one where, as President Obama has observed, "opportunity comes to be seen as a zero sum game, in which your dreams come at my expense."[12]

A Twenty-First Century Democracy of Opportunity?

This brings us to the present: a moment of deepening inequality and profoundly unequal opportunity. We understand now, in a finer-grained way than ever before, that the two are related. New work in economics, by Thomas Piketty, Miles Corak, Joseph Stiglitz, and others, have shown how extreme inequality of wealth *makes* opportunities more unequal by hardening class lines, restricting access to networks, and giving elites both the means and the incentive to maintain and magnify their own advantages and keep others out.[13] Moreover, we know more clearly than ever how *economic* and *political* inequality (and inequality of opportunity) are intertwined. Social and political science and popular and highbrow public discourse alike are focusing attention on the permeability of the membrane between our economic order and our political one; we increasingly recognize the threat this poses to fundamental values of equal citizenship. As Bernie Sanders's primary campaign illustrates, some have begun to speak openly of "oligarchy" once again, in ways that our nineteenth- and early-twentieth century forbears would recognize.

But we have somehow lost the *constitutional* stakes—the sense that these threats to our democracy of opportunity are threats, as well, to our constitutional order. Those stakes are what we aim to recover in this article. To do this, we tell the story of the democracy of opportunity tradition, exploring how both its proponents and its opponents viewed those constitutional stakes at a series of critical moments of constitutional conflict, where the stakes were especially high and clear. We begin our story at the beginning, and then recount how the democracy of opportunity tradition evolved as both our economic life and our constitutional order evolved. We then tell a story of how the democracy of opportunity tradition was forgotten, and how that forgetting colored the revival of the constitutional principle of inclusion in the Civil Rights Revolution. We end by addressing why the democracy of opportunity tradition matters today, and what might be at stake in recovering it—why it might matter to view as constitutional principles not only the idea of inclusion but all three principles together, and their intersections: anti-oligarchy, inclusion, and the constitutional necessity of a broad and open middle class.

The current conventions of our constitutional discourse obscure these stakes. Those conventions hold, to oversimplify slightly, that the only *real* constitutional claims are ones enforceable, at least in principle, in courts. These conventions suggest that constitutional claims are political conversation-stoppers: they constrain the actions the democratic branches can take and thereby set boundaries on the scope of democratic policymaking. This is the way libertarian opponents of the New Deal once understood the constitutional arguments they were advancing.

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[12] Barack Obama, "A More Perfect Union" (March 18, 2008), in *The American Spirit: United States History as Seen by Contemporaries*, ed. David M. Kennedy and Thomas A. Bailey (Boston, MA: Wadsworth, 2010), 663.
[13] Thomas Piketty, *Capital in the Twenty-Frist Century* (Cambridge, MA: Harvard University Press, 2014); Miles Corak, "Income Inequality, Equality of Opportunity, and Intergenerational Mobility," *Journal of Economic Perspectives* 27 (2013). Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (New York: Norton, 2012). For a discussion of the mechanisms by which inequality exacerbates unequal opportunity, see Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* (New York: Oxford University Press, 2014): 199-219.

Though ultimately unsuccessful in their own time, such arguments are enjoying a substantial revival today, sometimes in new doctrinal guises, but still with the aim of using courts to build a more libertarian political economy than the democratic branches would produce. If this is what constitutional political economy is, then why on earth would proponents of the democracy of opportunity tradition want any part of it? Moreover, from the perspective of these current conventions it is obscure what it would even mean to call an argument that is *not* addressed to courts a "constitutional" argument. Within these conventions, calling the democracy of opportunity tradition a "constitutional" tradition seems essentially a rhetorical move, a way of putting an emphatic exclamation point on the importance of one's argument.

Part of the project of this essay is to help readers see beyond these current conventions and 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, through most of American history, arguments about constitutional political economy were not outside constraints on democratic politics. They were the substance of a democratic constitutional politics. Far from being conversation-stoppers, they were at the heart of one side of a series of great national debates over how to understand the relationship between our Constitution and our economic and political life.[14] The participants in these debates did not view arguments about the affirmative constitutional duties of legislatures and executives as "constitutional" in a merely rhetorical sense. Instead, the political branches were crucial fora in which most important constitutional conflicts and deliberations unfolded.

Of course, courts also played a crucial role in many of the rounds of constitutional conflict this article explores. The narrowest version of the project of this article, viewed entirely from within current conventions of constitutional discourse, speaks to courts: it suggests how courts ought to understand and take proper account of the constitutional character of statutes and regulations that aim to shape our political economy in a way that preserves and builds a democracy of opportunity. Courts ought to weigh these constitutional stakes when considering whether to uphold such statutes and regulations against constitutional challenges. And the scope of judicial engagement is not limited to the question of upholding or striking down. Equally important, in ways we will discuss, courts ought to make self-conscious decisions about how to interpret such statutes and regulations with their constitutional purposes firmly in view.

The broader project of this essay, and the book from which is drawn, is not primarily about courts. It is to help us recover the important idea that constitutionalism is not exclusively about what courts do—for this is a necessary precondition for recovering a robust discourse of constitutional political economy.[15] Ultimately, we think those who developed this important

[14] Constitutional politics of this kind—which is not limited to questions of constitutional political economy, but where those questions long played a central role—has been a constant in American political history, albeit punctuated with periods of particular intensity. It is a kind of politics that plays an important role in our political life because it helps to legitimate, as well as shape, the constitutional order. *See* Jack M. Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011): 69-73; Robert Post & Reva Siegel, "Democratic Constitutionalism," in *The Constitution in 2020* (Jack M. Balkin & Reva Siegel eds., Oxford University Press 2009).
[15] Robin West has argued in a related vein that only a "legislated" Constitution, rather than a judicially-enforced one, will do much for the substantive equality claims of the poor. Robin West, "The Missing Jurisprudence of the

tradition in American constitutional thought got quite a lot of the big things right. Our constitutional order does, in fact, rest and depend on a political-economic order. That political-economic order does not maintain itself. It requires action by all parts of government.[16] Although the content of what is required changes radically over time as our economy changes, we think the basic principles of the democracy of opportunity tradition remain affirmative constitutional obligations of government: to prevent an oligarchy from amassing too much power; to preserve a broad and open middle class as a counterweight against oligarchy and a bulwark of democratic life; and to include everyone, not just those privileged by race or sex or class, in a democracy of opportunity that is broad enough to unite us all.

By calling these constitutional obligations, we mean to elevate them in comparison to the other manifold responsibilities of government. Not every issue—not even every highly important issue—has the same relationship to the political-economic order that constitutes us as a democratic society. But we do not mean to suggest that constitutional political economy ought to be elevated above the plane of democratic debate. Quite the opposite. It has been the subject of intense democratic debate since the very inception of our constitutional tradition—debate that we once recognized, correctly, as a form of constitutional politics. Today, our politics is returning to questions of political economy; we have even begun to speak openly of "oligarchy," in ways that our nineteenth- and early-twentieth century forbears might understand. But we have somehow lost the *constitutional* stakes—the sense that these threats to our democracy of opportunity are threats, as well, to our constitutional order.

Those stakes are what we aim to recover in a larger book project, the gist of which we hope to convey in this essay.[17] Here, we haven't world enough or time to show you in detail each instantiation of the democracy of opportunity tradition, and the many, changing ways it melded constitutional and political economic ideas and arguments. Nor can we chronicle here the full tragic and tangled story of the role of the principle of inclusion in this tradition. Here we will sketch both in a few broad strokes, with snapshots of certain critical moments. We will tell the story of the original American democracy of opportunity tradition, beginning at the beginning. We will then briefly recount how it evolved through several key moments in our constitutional history, how it was then forgotten, and how that forgetting was linked to the ways that the Civil Rights Revolution and the Great Society rekindled the idea of inclusion that had been, at least briefly, at the moment of Reconstruction, inscribed into the core of the democracy of opportunity tradition and the Constitution itself. We will then consider how our constitutional order might look different if it were informed by this crucial piece of our constitutional legacy.

The "Pursuit of Happiness": Opportunity and Constitutionalism in the Early Republic

The democracy of opportunity tradition has its deepest roots in the anti-aristocratic, republican ideals of the revolutionary generation. They held it a constitutional essential for the

Legislated Constitution," in *The Constitution in 2020* (Jack M. Balkin & Reva Siegel eds., Oxford University Press 2009).

[16] It also requires, at times, *forebearance* from action by each part of the government.

[17] *See* Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution* (under contract, Harvard University Press). For a first installment, *see* Fishkin and Forbath, "The Anti-Oligarchy Constitution," 94 Boston University Law Review 671 (2014).

new United States to avoid reproducing the hierarchies, titles, and aristocratic forms of privilege and elitism that the colonists hoped to leave behind. Most deemed it no less essential to supplant that aristocratic order with a republic (or, more precisely, many new republics, joined in a larger union) of "middling sorts," without extremes of wealth or poverty—above all, without a permanent class of impoverished (but free and unbound) toilers or a permanent wealthy elite—amongst the citizenry.

Available, fertile land was the seedbed of American republicanism. A vast portion of white settlers came over from Europe as indentured servants; a good many, however, became freeholders. The key was what economic historians call the colonies' favorable land/person ratio. Cheap fertile land enabled poor settlers to exit the wage labor market; and labor scarcity assured relatively high wages, making it possible for hirelings to buy land. Given the broad suffrage rules of most of the colonies, becoming propertied stakeholders enabled a majority of white male settlers to become voters in elections for the colonial assemblies.[18]

These circumstances—the "poor [white] many" generally smallholders and enfranchised, and the "dangerous class" of property-less, super-exploited labor generally not freemen but enslaved for life—enabled patricians like Madison and Jefferson to imagine and embrace an unprecedented experiment in broad-based republicanism.[19]

Patrician and plebian revolutionaries alike agreed that they were embarked on a great experiment in republican self-rule. They agreed too on the proposition that "all men" were entitled to "equal rights" to "life, liberty, and the pursuit of happiness"—ringing phrases inscribed in many of the first state constitutions at the same time Jefferson enshrined them in the Declaration of Independence. Along with this revolutionary rights talk, the state constitutions of the 1770s and '80s brimmed with provisions expressing both sides of this founding republican impulse: to dismantle the aristocratic elements of the colonial social order,[20] and to broaden the distribution of wealth, power and opportunity, along republican lines. Some provisions, like the abolition of primogeniture and entail or the allocation of public lands to smallholders, directly implemented distributional goals; others empowered and enjoined government to maintain a

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[18] See Joshua Rosenbloom, "Indentured Servitude in the Colonial U.S.," in *EH.net Encyclopedia,* ed. Robert Whaples. Available at http://eh.net/encyclopedia/indentured-servitude-in-the-colonial-u-s/ ; Robert C. Allen, et al., "Colonial Origins of the Divergence in the Americas: A Labor Market Approach," *Journal of Economic History*, 72 (2002), 880; James T. Lemon, *The Best Poor Man's Country: A Geographical Study of Early Southeastern Pennsylvania* (Baltimore, Johns Hopkins Press, 1972); Stanley Engerman and Kenneth Sokoloff, "The Evolution of Suffrage Institutions in the New World," *Journal of Economic History* 65 (2005); Alexander Keyssar, The Right to Vote: The Contested History of Democracy in America (New York: Basic Books, 2000), 6-7.

[19] See, Edmund S. Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia (New York: Norton, 1975).

[20] All of the new constitutions rehearsed the federal titles of nobility clause, often in passionate language revealing something of the drafters' resentments toward the upper ranks of the old imperial order. Thus, New Hampshire's constitution provided that "no office or place whatsoever in government, shall be hereditary – the abilities and integrity requisite in all, not being transmissible to posterity or relations." And Virginia's that "no Man or Set of Men are entitled to exclusive or separate Emoluments or Privileges from the Comunity, but in Consideration of public Services; which not being descendible, or hereditary, the Ideal of Man born a Magistrate, a Legislator, or a Judge is unnatural and absurd." Gordon Wood, *The Radicalism of the American Revolution* (New York: A.A. Knopf, 1991), 181.

wide distribution of property and a broad middle class.[21] The revolutionary elites who designed the new constitutions were encouraging and responding to the expectations of plebian patriots that the new constitutions would ensure, in the words of their leading historian, "not only that everyone enjoy equality before the law or have an equal voice in government, but also that everyone have an equal share in the fruits of the common enterprise"[22]—an "equality" that, another historian of revolutionary era law has observed, was "to be achieved if necessary through government acting as a distributive mechanism under the guidance of a people whose inalienable right to political participation was the Revolution's signal domestic achievement."[23]

Many revolutionary leaders like the starchy John Adams and his erudite friend, Noah Webster were confident that the abolition of aristocratic laws and privileges, by themselves, would go a substantial way toward closing the gulf between rich and poor—a gulf, which, already, was not nearly so great as in the old world. An end to primogeniture and entail, Webster argued, would produce, over time, that "equality of property" that is "the very soul of a republic."[24] Every state abolished these devices for holding together the landed wealth and social and political power of "great families," either by statute or by writing the abolition into their constitutions.[25] Nor was Webster wrong in believing that the abolition of these reviled aristocratic institutions would, over a generation or two, have fairly large distributional consequences. At least where economic historians have carefully examined the question, as with Virginia, they conclude it did.[26]

Where the revolutionaries of the 1770s and early '80s differed was not about the need for a broad distribution of property, wealth and opportunity, but about how much and what kinds of ongoing shaping and reshaping of the rules and policies that governed the distributional outcomes of economic life were necessary or desirable to achieve that result, or how urgent (or foolhardy) it was to direct policy toward making the poor independent. Many agreed with

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[21] Thus, for example, the penultimate draft of the Declaration of Rights that began Pennsylvania's constitution sternly warned that excessive accumulation of land or wealth is "dangerous to the Rights, and destructive of the Common Happiness" of the community. See Eric Foner, *Tom Paine and Revolutionary America* (New York: Oxford University Press, 1976), 133. Frontier delegates at Kentucky's first convention declared "that to grant any Person a larger quantity of land than he designs Bona Fide to seat himself…[is] subversive of the fundamental principles of a free republican Government [and] to allow any such individual or Company or body of Men to possess such large tracts of Country [will give them] undue influence over laws and police…and therefore ought not to be done." See Thomas P. Abernethy, "The Journal of the First Kentucky Convention, Dec. 27, 1784—Jan. 5, 1785," *The Journal of Southern History*, 1 (1935): 75-75.
[22] Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1980), 188
[23] Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 81.
[24] Noah Webster, "An Examination into the Leading Principles of the Federal Constitution, Oct. 10, 1787," in *Pamphlets on the Constitution of the United States Published During its Discussion by the People, 1787-1788*, ed. Paul L. Ford (Brooklyn, NY: 1888), 59.
[25] Claire Priest, "Creating an American Property Law: Alienability and its Limits in American History," *Harvard Law Review* 120, no. 2 (2006).
[26] Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform," *William and Mary Quarterly*, 3d Series, 52, No. 2 (Apr. 1997); Lee Soltow, *Distribution of Wealth and Income in the United States in 1789* (Pittsburgh, PA: University of Pittsburgh Press, 1989), 144-47 (considering especially New Jersey).

Thomas Jefferson, who led the campaign against primogeniture and entail in Virginia but insisted that maintaining a republican constitution over time demanded much more. "[L]egislators," he declared, "cannot invent too many devices for subdividing property."[27] Steep taxes on large landholdings, public land policies, even "agrarian laws": all were apt tools for sustaining a republican citizenry and upholding the equal right of every "poor man" to the pursuit of happiness.[28]

Libertarians imagine Jefferson as a foe of "energetic" government. He was that—but only with respect to a distant, central government, which he feared "always" would use its power in "oppressive" ways. He was not skeptical about governmental power as such. Quite the contrary. As intellectual historian of the early republic Joyce Appleby observes, Jefferson was "never loathe" to use both "constitutional and statutory measures to make the poor independent" and achieve and sustain "the institutional framework for a free society." "What today would appear as social engineering," Appleby notes, "presented itself to Jefferson as liberation of [the potential of ordinary men] long held in check by the Old World artifices of monarchy, nobility and established religion."[29]

Another part of Jefferson's "system [of what we might call framework statutes] by which every fibre would be eradicated of antient and future aristocracies" from Virginia's constitutional "fabric" was his famous "systematical plan of general education."[30] We haven't space to explore it in depth; but we note it as a classical statement of two other durable precepts of the democracy of opportunity tradition:

(i) the idea that some social goods are so important to building and maintaining a democracy of opportunity that government must treat such goods as *initial endowments*; and

(ii) the idea that *elites* must be open to and drawn from all classes, on the basis of *talent or merit,* not birth or blood.

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[27] Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in *The Papers of Thomas Jefferson,* eds. Julian P. Boyd *et al*. (Princeton: Princeton University Press, 1953), VIII:682.

[28] Ibid. (Jefferson's idea "to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise"); Tomlins, *Law, Labor, and Ideology*, 81-82; Richard K. Matthews, *The Radical Politics of Thomas Jefferson: A Revisionist View* (Lawrence: University Press of Kansas, 1984), 19-29, 40-42, 50. On such subjects as high taxes on large holdings and total exemptions for the smallholder, Madison consistently seconded Jefferson's views. In implementing the new constitutions, Madison held that state legislatures ought to craft laws and policies whose "silent operation" would "reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort." See, Madison, "For the *National Gazette*, [ca. Jan. 23] 1792," in *The Papers of James Madison*, ed. Robert A Rutland and Thomas A. Mason (Charlottesville: University Press of Virginia, 1983), XIV:197

[29] Joyce Appleby, "What is Still American in the Political Philosophy of Thomas Jefferson?" *William and Mary Quarterly*, 3d Series, 39, no.2 (1982): 295; Appleby, "The Radical *Double-Entendre* in the Right to Self-Government," in *The Origins of Anglo-American Radicalism*, eds. Margaret Jacob and James Jacob (London: George Allen and Unwin, 1984), 281.

[30] Thomas Jefferson, *Autobiography* (1821) in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1904), I:75, 77.

From the Revolution onward, in the annals of the democracy of opportunity tradition, education was a social good second only to free or cheap land in undergirding the constitutional order of the new republics. These were the original "essentially necessary" initial endowments. Thus, just as Jefferson called for a right to fifty acres of land for each and every free man, so, as governor, Jefferson demanded and got an "amendment of our constitution…in aid of the public education."[31]

As with other states, Virginia's constitutional commitment to something like Jefferson's conception of universal public education evolved over the next several decades.[32] The idea proved unduckable, however, that basic education was, in Jefferson's words, "not all that is necessary, though it be essentially necessary" for the "whole mass" of "the people themselves" to participate in government and be the ultimate "judges" and "guardians" of their "liberty" and "happiness." Without this initial endowment—without "mass" education, "government degenerates" into oligarchy, no matter its republican forms. Basic education also is "essentially necessary" to enable the "great mass" of the citizenry "to work out their own greatest happiness," which must "not depend on the condition of life in which chance has placed them," but instead must flow from "occupation and freedom in all just pursuits."[33]

No theme loomed larger in the orations marking the new republics' first Independence Day celebrations than the ideal of a "natural aristocracy" of "talent and merit." A farmer or mechanic hearing a notable patriot deliver a Fourth of July oration in any medium-sized town from 1778 onward was as likely as not to be told that the struggle for independence was ushering in a brave new world in which "all offices lie open to men of merit, of whatever rank or condition." "[E]ven the reins of state may be held by the son of the poorest men, if possessed of abilities equal to the important station."[34]

Notice, the notables were not forecasting a republican society in which poor, humble men—farmers, artisans, tradesmen—would themselves hold "the reins of state," although soon enough, that would befall these enlightened republican gentlemen. Rather, they were exhorting such ordinary, humble men to educate their "own children for these exalted purposes." The new republics would afford their offspring the means to gain a common education; then if they had abilities, they should be encouraged to seize any chance to attend a college like one of their own alma maters and qualify themselves "for the bench, the army, the navy, the learned professions, and all the departments of civil government." Independence would fan sparks of genius in the farmers' and mechanics' most gifted and ambitious sons, men "drawn from obscurity" but now certain to "dazzle the world" by dint of the new opportunities republican equality held in store.[35]

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[31] Jefferson, *Notes on the State of Virginia* in *Works of Jefferson,* ed. Ford, IV:12, 64.

[32] Paul Tractenberg, "Education" in G. Alan Tarr and Robert F. Williams, eds., *State Constitutions for the Twenty-First Century* Vol. 3 (Albany, NY: SUNY Press, 2006), 241-306; Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton, NJ: Princeton University Press, 2013), 67-84.

[33] Jefferson, *Notes on the State of Virginia,* in *Works of Jefferson,* ed. Ford, IV:62-65.

[34] David Ramsay, *An Oration on the Advantages of American Independence, July 4, 1778* (Charleston, 1778) quoted in Wood, *Radicalism of the American Revolution*, 180.

[35] Ibid.; See also Letter from Jefferson to John Adams (Oct. 28, 1813), in *The Papers of Thomas Jefferson*, Retirement Series, ed. J. Jefferson Looney (Princeton: Princeton University Press, 2009), 6:562-68; John Carson,

Jefferson's system of general education translated these exhortations about an open opportunity structure and careers open to talent into a blueprint, which resembled a pyramid of public/private education. At its base were elementary schools everywhere throughout the state, laid out in "small districts of five or six miles square," paid for chiefly by local taxes, where "every person [in the district was] entitled to send their children three years, gratis" to receive a basic education. Above these were "grammar schools, of which twenty are proposed to be erected in different parts of the country." There, tuition-paying students who could attend because of the "wealth of their parents" would learn alongside "geniuses" "from among the classes of the poor," chosen each year from every elementary school in the area. After two years of grammar school, a "rake" of students "whose parents are too poor to give them further education" would select "the best genius" to "be instructed, at the public expence, so far as the grammar schools go," for a total of nine years of schooling, and half of these would be selected to be sent "at the public expence" to the College of William & Mary.[36]

The idea was that "nature has sown" talents "as liberally among the poor as the rich"; yet the talents "perish without use, if not sought for and cultivated,"[37] to the detriment of both the individual and the state. Thus, the "general system" was an educational charter for the idea of natural equality[38] and the ideal of an opportunity structure with broad avenues to the top. Gradually, something like Jefferson's blueprint was inscribed in state constitutions and federal statutes.

Jefferson's friend and fellow Virginian George Mason drafted their state constitution's Declaration of Rights in early 1776. Jefferson had Mason's language in his hands that June when he set about drafting the Declaration of Independence. Like Jefferson's, Mason's Declaration commenced with the "inalienable rights" enjoyed equally by all men. Mason already had altered the familiar Lockean trinity of life, liberty and property to include "pursuing and obtaining happiness," a change Jefferson took a step further in the Declaration by altogether dropping "property" in favor of "the Pursuit of Happiness."[39] The substitution, which recurred in several of the new state constitutions, was about substance, not just stylistic felicity.[40] Many of these new constitutions made more explicit the right of the people and the duty of the state to promote the public happiness with language securing to "the people of this State… the sole

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The Measure of Merit: Talents, Intelligence, and Inequality in the French and American Republics, 1750-1940 (Princeton: Princeton University Press, 2007), 10-13, 36.

[36] Jefferson, *Notes on the State of Virginia,* in *Works of Jefferson,* ed. Ford, IV:60-61, 64.

[37] Jefferson, *Notes on the State of Virginia,* in *Works of Jefferson,* ed. Ford, IV:64.

[38] An idea that Jefferson and many of his fellow republican gentlemen found easy enough to extend to the white "poor" but impossible or agonizing to ponder regarding African Americans. Paul Finkelman, "Jefferson and Slavery: 'Treason Against the Hopes of the World'" in Peter Onuf, *Jeffersonian Legacies* (Charlottesville: University Press of Virginia, 1993), 184-186. Jefferson made his "suspicion" that "blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments of both body and mind" plain in his *Notes on the State of Virginia,* (*Works of Jefferson,* ed. Ford, IV:58).

[39] Virginia Declaration of Rights, Art. 1, (June 1776), in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, Francis Newton Thorpe, comp. and ed. (Washington, D.C., 1909), VII:3813.

[40] Appleby, "What is Still American in the Political Philosophy of Thomas Jefferson?" 297.

exclusive and inherent Right of governing and regulating the internal Police of the same."[41] We can get a deeper purchase on the distributive and regulatory dimensions of the constitutional discourse of the early republic by pausing over these two words, "Police" and "Happiness," whose eighteenth-century meanings we have quite forgotten.

"Police" had nothing to do with uniformed officers of the law, which, apart from militia or regular military troops, simply did not exist in North America until the middle of the nineteenth century. "Police" instead was the eighteenth-century ancestor of what today we call the "police power" of the states. As eighteenth-century lawyers understood the term, it harked back to Aristotle, or, more precisely, to English translations of Aristotle explaining that the term derived from "polis" and "polity" and "can signify the constitution in general, or the constitution under which the many rule with a view to the common good," or "[w]hen the masses govern the state for the common interest or public happiness." "Police" named both the source and exercise of governmental power whose key object was securing the common "weal" and "happiness."[42]

For a contemporary definition of the "happiness" whose pursuit the new republics were vouchsafed to secure in equal measure for all, we can turn to a humbler source. William Manning was a farmer and tavern-keeper in Billerica, Massachusetts, and a self-taught commentator on constitutional and political-economic matters. The views expressed in his pamphlets roughly tracked figures like Jefferson and the more plainspoken Thomas Paine. They provide as good a single snapshot as any of the widely shared public meaning of key words like these. Manning defined that "Happiness" enshrined in the Declaration and state constitutions as "a person… enjoying the goods of his own labors, and feeling that his life and liberties (both civil and religious) and his property are all safe and secure; and not in the abundance he possesseth, nor in expensive…grandeur, which have the tendency to make other men miserable."[43] Government had the duty, Manning held, following Jefferson and Paine—and Locke, as the latter two read Locke (more literally than Locke may have intended)—to prevent the wealthy from accumulating property to a degree that deprived the "poor" of their "natural inheritance" in available land and resources.[44]

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[41] Constitution of Pennsylvania, Art. III (Sept. 1776), in *Federal and State Constitutions*, Thorpe, ed., 5:3082. Nearly identical language exists in the constitutions of Delaware (Sept. 1776), Maryland (Nov. 1776), North Carolina (Dec. 1776), and Georgia (Feb. 1777). See, Adams, *The First American Constitutions*, 287; Tomlins, *Law, Labor, and Ideology*, 57.

[42] Nicolai Rubinstein, "The History of the Word *Politicus* in Early-Modern Europe," in Anthony Pagden, ed., *The Languages of Political Theory in Early Modern Europe* (New York: Cambridge University Press, 1987), 42-3; Christopher L. Tomlins, *Law, Labor and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 44, 55-59, 81-88.

[43] Michael Merrill and Sean Wilentz, eds., *The Key of Liberty: The Life and Democratic Writings of William Manning, "A Laborer," 1747-1814* (Cambridge, MA: Harvard University Press, 1993), xi-xii, 131.

[44] "The earth," Jefferson famously and frequently wrote, "is given as a common stock for man to labour and live on." All persons had a natural right to enough land to produce their subsistence, as well as a right to the property produced by mixing their labor with the land. This theory sanctified private property for most free inhabitants of the early republic and its cheap, fertile land. Jefferson recognized that the country was not ready "yet" to let the landless appropriate enough uncultivated land to meet their needs. But "it is not too soon," he insisted, "to provide by every possible means that as few as possible shall be without a little portion of land." Letter from Jefferson to Madison (Oct. 28, 1785), *Papers of Thomas Jefferson*, ed. Boyd, 681; Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991), 36; Matthews, *The Radical Politics of Thomas Jefferson*, 28.

So, as revolutionary lawyer-leaders like Mason and Jefferson pushed aside the inherited "mixed" constitution of king, nobility and commons, and began in earnest to imagine government under "purely republican constitutions" in which "the many rule with a view to the common good," their understandings of "Police" was inflected by the natural rights discourse of the Revolution and the radical notion of "the people" possessing the "sole and inherent right to govern and regulate."[45] "Police" came to mean regulating (and also deregulating) the social and economic activities and relations of the new republics with an eye to the "Safety and Happiness" of the "whole mass" of "the people." A regard for the "Happiness" of "Every Man" meant that the aim was assuring conditions of ownership, production and exchange that enabled all to achieve a "competency" or "a degree of comfortable independence."[46] The right to the pursuit of happiness took the shape of what we might call a substantive and positive right of economic opportunity. It signified genuine access to the means of a decent livelihood.

How did this square with their thinking about property rights? A rough answer emerges if we return to the replacement of property with the pursuit of happiness. Jefferson was at pains to distinguish between the two. The pursuit of happiness was a natural right; the right of property was emphatically not. Property was essential to individual and collective well-being. However, it was not a natural right at all, "but one which is established by and subject to the civil power," and as such, decidedly subordinate to the inalienable right to the pursuit of happiness.[47] Republican legislation and "police" could touch the vested interests of large property holders in order to maintain this inalienable right for the "poor many." There should be no mistaken claims that such incidental injuries were violations of higher law.[48]

Thus did Jefferson explain the phrasing of the Declaration; and a dozen years later, when Jefferson was the United States' envoy in France and his friend Lafayette, the liberal French aristocrat and hero of the American Revolution, sent Jefferson his working draft of what would become France's 1789 Declaration of the Rights of Man and of the Citizen, the American envoy returned the draft with the words "Life, Liberty and Property" edited to omit "Property" and substitute "the Pursuit of Happiness," with just this explanation.[49]

We must pause here in our snapshot chronicle of the adventures of the democracy of opportunity tradition and jump ahead to the Jacksonian era, skipping over the intervening decades. In sum, what unfolded was this. By the mid-1780s, a significant portion of the national

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[45] See, Tomlins, *Law, Labor and Ideology*, 44. The people's "sole and inherent right to govern and regulate" is from the Pennsylvania constitution (1776), with similar language in the constitutions of Delaware, Vermont, New York, and North Carolina. See Adams, *The First American Constitutions*, 287.

[46] Daniel Vickers, "Competency and Competition: Economic Culture in Early America," *William and Mary Quarterly* 47, no. 1 (1990): 3.

[47] See, Tomlins, *Law, Labor and Ideology*, 84.

[48] Rather, by Jeffersonian lights, higher law constrained the accumulation of property to the extent it clashed with the natural right of the poor to a sufficient share of land and resources to make a livelihood. Christopher Tomlins, "Law, Police and the Pursuit of Happiness in the New American Republic," *Studies in American Political Development,* 4 (1990), 28-31; David M. Post, "Jeffersonian Revisions of Locke: Education, Property-Rights, and Liberty," *Journal of the History of Ideas* 47, no. 1 (1986): 152-153; Matthews, *Radical Politics of Thomas Jefferson*, 40-42, 50, 122.

[49] Appleby, "What is Still American in the Political Philosophy of Thomas Jefferson?" 297.

revolutionary leadership had had their fill of the capacious authority these first republican constitutions imparted to the new states' lawmakers—or at least with some of the uses to which they were putting their authority. The deliberations of the men who gathered in Philadelphia in 1787 reflected this elite desire to circumscribe state lawmakers' power over political economy (although they rejected the strongest proposals to do so, such as Madison's Virginia Plan with its federal veto over state laws). The Anti-Federalists' Bill of Rights aimed for greater protections for individual liberties and greater protections for the states. The States, on this reckoning, remained essential guardians of both individual rights and "Public Happiness" and "distributive Justice."[50]

Many in the front ranks of national leadership, like Jefferson and Mason, worried from the start that the new national framework might provide the machinery by which the privileged classes would climb to new oligarchic powers. As he watched Alexander Hamilton pursue policies that seemed to justify Jefferson's and Mason's fears—policies aimed at creating a strong central, fiscal-military state, with a national bank, a national debt, and a national patronage-based moneyed elite, openly modeled on Britain's—Madison reversed ground.[51] During the 1790s, he joined Jefferson in creating a national opposition, based on the very values and institutions he had gone to Philadelphia to subdue. The pair coordinated newspaper campaigns against the Bank and Hamilton's other policies. As leaders of the burgeoning Democratic-Republican opposition movement, they forged an enduring outlook on federalism and republican self-rule and political economy under the new Constitution: an outlook rooted in states' rights and the democracy of opportunity tradition, which the revolutionary contest had bred. Tightly linking text, structure and political economy in one discourse, it made the distributional purposes and effects of national policies matters of great constitutional moment. According to this outlook, the Bank and other Federalist policies not only breached constitutional limits and usurped powers that the Constitution assigned to the states, but also imperiled the constitutional order by promising to concentrate wealth and power in a moneyed aristocracy with control over the levers of public policy and private finance. Hamilton's Reports on the Public Credit and on Manufactures openly laid out the scheme, while his arguments for the Bank's legality revealed some of the ways that the would-be Federalist oligarchy meant to torture the Constitution's text in pursuit of it. Only by restoring the constitutional balance between national and state power would lawmakers accountable to the humbler classes of citizens retain essential powers over economic life and development; only then would the safeguards for sustaining a broad middle class and fair equality of opportunity be assured. And only then, with its social basis intact, would the Constitution—conceived as a grand experiment in republican self-rule—survive.[52]

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[50] Jack Rakove, "Confederation and Constitution," in *The Cambridge History of Law in America: Volume 1, Early America* ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 497, 499-502, 503-04, 510; Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 177-224; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990), 144-48.

[51] See, Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005), 43-49.

[52] Gerald Leonard, "Jefferson's Constitutions" (October 31, 2014), 21. Forthcoming in Constitutions and the Classics: Patterns of Constitutional Thought From John Fortescue to Jeremy Bentham, ed. D.J. Galligan (New York: Oxford University Press, 2015); Wilentz, Rise of American Democracy, 41, 53-68; Saul Cornell, The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828 (Chapel Hill: University of North

It is no wonder that the Democratic-Republicans insisted on the constitutional stakes of their opposition to Hamilton's policies. Although their work in the 1790s seems plainly partisan, neither Madison nor Jefferson saw party-building as constitutionally legitimate. Party-building was still, by definition, faction-building; and factions were what the new Constitution or any good republican constitution was designed to overcome, and what virtuous citizens scorned. But traditional anti-partyism did make room for an exception. "Just as the people might organize to effect their right of revolution (as they did in 1776), they might organize a temporary party of the Constitution to attempt salvation by peaceful, political means when the Constitution was in danger of usurpation."[53]

So, the Democratic Party came into being as a "party of Principle," its very warrant for existence the *constitutional* stakes of defeating the "moneyed Oligarchy" in power. Americans would later grow accustomed to the idea of permanent political parties. But for decades, the Democrats—or "the democracy," as the party called itself—would continue to proclaim the constitutional necessity for a mass party of "the people" or "the producing classes" to counter the inevitable tendency of "wealth" to convert economic into political domination. "To be allied to power, permanent, if possible…is one of the strongest passions which wealth inspires," Martin Van Buren, the great architect and theorist of Jacksonian Democracy, observed in his remarkable *Inquiry into the Origin and Course of Political Parties.* "Here [in the U.S.], where [wealth] is deprived of [aristocratic privileges], it maintains a constant struggle for the establishment of a moneyed oligarchy, the most selfish and monopolizing of all depositories of political power, and is only prevented from realizing its complete designs by the democratic spirit of the country"—a spirit, Van Buren argued, which could only find effective political expression via a permanent party organization.[54]

Looking back from mid-century on "the democracy's" origins in the decades we have just canvassed, Van Buren set out a canonical rendering of the Jeffersonian narrative of constitutional redemption. Hamilton's policies in the 1790s, Van Buren declared, were noble but knowingly unconstitutional. Convinced that the best interests of the nation demanded flouting the Constitution that "the people recently had ratified," Hamilton aimed to "sap and mine" and ultimately supplant the Constitution with what he believed was "a superior Monarchical form of Government." If the Party's founding father had not thwarted him, "this glorious old Constitution of ours…would long since have sunk beneath the waters of time…Our system might then have dissolved in anarchy, or crouched under despotism or some older type of aristocratic government—a monarchy, an aristocracy, or, most ignoble of all, a moneyed oligarchy—but as a Republic it would have endured no longer."[55]

Carolina Press, 1999), 174-187; Saul Cornell and Gerald Leonard, "The Consolidation of the Early Federal System, 1791-1812," in *Cambridge History of Law in America,* ed. Grossberg and Tomlins, 525-27.

[53] Leonard, "Jefferson's Constitutions," 21, 25.; Ralph Ketcham, *Presidents Above Party: The First American Presidency 1789-1829* (Chapel Hill: University of North Carolina Press, 1984), 100-113; Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley: University of California Press, 1969), 123-128.

[54] Martin Van Buren, *An Inquiry Into the Origin and Course of Political Parties in the United States* (New York: Hurd and Houghton, 1867), 166; Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (Chapel Hill: University of North Carolina Press, 2002).

[55] Van Buren, *Inquiry Into the Origin and Course of Political Parties,* 214-15.

Together, during the 1790s, Jefferson and Madison honed an account of the constitutional order and the roles it assigned to national, state and local government in support of a more democratic and decentralized political economy: one dedicated to a democracy of opportunity, one where, as Hamilton ruefully observed, people would expect "distributive justice" from the "hands" of state government, where great fortunes at the top would diminish, the share of those at the bottom would rise, and the middling classes would predominate in both state and civil society. The "Revolution of 1800," Jefferson would proclaim, signified an enduring national decision in favor of this view of the principles enshrined in the national Constitution.

The new Democratic Republican Party toppled Hamilton and the Federalist grandees, gathered into its ranks the nation's enfranchised majority of small farmers and artisans and incorporated them into a new, broad-based elite alliance with rising enterprisers and Southern planters. Over the next two decades, a new generation of state-based entrepreneurial Republican leaders took on board much of Hamilton's program and built up *at the state level* much the same kind of monetary, corporate and transportation infrastructure Hamilton had hoped to create from the center on a national scale. On the national plane, Republicans aimed to stabilize money and credit and subsidize manufactures.[56]

This new Republicanism embodied a stunning shift in direction, as the Party's founding father saw it. Yet, the younger politicos who engineered the departures from tradition had the wit—or the fraudulence and temerity, as Jefferson saw it—to defend their reversal of Jeffersonian tradition in the name of that tradition. The new entrepreneurial wing of the Republican elite acknowledged, as one of them put it: Yes, they had "grown reconciled to…measures and arrangements which may be as proper now as they were premature or suspicious when urged by champions of Federalism." On the other hand, they proclaimed undying fealty to the Jeffersonian vision of government acting to protect Every Man's equal rights and opportunities. Every new bank, canal and railroad, every glittering investment opportunity, they chartered and underwrote with unsecured loans or bonds backed by local taxpayers' dollars was to promote the ordinary mechanics' and farmers' opportunities.[57]

The delusion that "legerdemain tricks upon paper can produce as solid wealth as hard labor in the earth," complained Jefferson from Monticello, made it impossible to "reason Bedlam to rights." Early in 1819, with the bust almost at hand, Jefferson wrote that the speculative frenzy had produced "a filching from industry its honest earnings, wherewith to build up palaces, and raise gambling stock for swindlers and shavers."[58]

When the bust came, it brought the nation's first "traumatic awakening to the capitalist reality of boom and bust." As the Republican's second national Bank set about saving its own skin by calling in loans and demanding settlement of its heavy balances against state banks, the brutal deflation brought down most of the nation's new market economy. "Export prices collapsed; businesses failed; settlers lost their allotments of public lands for inability to complete

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[56] Sellers, *Market Revolution,* 36-69; Wilentz, *Rise of American Democracy*, 203-05.
[57] Letter from Madison to William Eustis (May 22, 1823), quoted in Sellers, *Market Revolution*, 101.
[58] Letter from Jefferson to Colonel Yancey (Jan. 6, 1816), quoted in Sellers, *Market Revolution*, 133.

payments; the remorseless process of debt liquidation brought down modest enterprisers and large ones; distress was greatest in the cities where roughly a million, perhaps three out of four, of the growing new class of wage earners, were out of work . . . . the destitute fled back to kin in the countryside for subsistence."[59]

The so-called "Workey" or urban working-class press saw the emergence of a new, more radical and class-conscious brand of popular constitutionalism. Jefferson saluted it, and was gladdened by the growing sway of "Old School" Republican leaders like William Duane of Philadelphia, whose son would serve a dozen years later as Jackson's radical Secretary of the Treasury during the Bank War of the 1830s. These new "Old School" Republicans and the older purists alike assailed *McCulloch*'s grandiloquent vision of national authority and national development.[60] The Bank that Marshall vindicated, in the Old School view that Jackson would make his own, was a "great monopoly…concentrat[ing] the whole moneyed power of the Union." With its vast power to corrupt and its "numerous dependents," it was engendering a new oligarchy with a sway sufficient "to defeat any measure" in Congress. But even at the state level the "paper system" enabled "one class in society" to corrupt the polity and exploit and rule over the rest.[61]

Thus was a pattern—we might say, a dialectic—of constitutional political-economic discourse and debate formed, which would endure for well over a century to come. After the Federalists' demise, no mainstream party ever again openly proclaimed itself the party of elite rule. All sides appropriated the language of democracy of opportunity—and made their rival constitutional political economic claims and defenses at least partly in its terms. They might accuse their foes of "despoiling the rights of property" or of being the "ruination of enterprise," they might defend the wealthy, but not the wealthy's right to rule; always they proclaimed fealty to "equal rights" and broad distribution of prosperity for the producing classes. When such claims grew strained and thin, when the enfranchised "mass" of the citizenry, or some significant portion of it, was pressed too far, thicker distributional claims emerged; and innovative policies and restraints were defended in the name of constitutional restoration. So it was when Jackson and Van Buren set out to save the democracy of opportunity once more.

Jacksonian Equal Protection

It was the Jacksonians who first brought the democracy of opportunity tradition into militant democratic ascendancy. One can't understand the central elements of Jacksonian constitutionalism—its conceptions of equal protection and class legislation, strict construction and states' rights—without understanding the contest over constitutional political economy that Jackson and his new Democratic Party believed they were waging.

Jackson's war on the Bank was the centerpiece of a broader questioning of how American capitalism was taking shape. With the Panic of 1819 and the economic pain that followed, a breach had opened between the party elites and ordinary farmer- and worker-voters

[59] Sellers, *Market Revolution*, 137
[60] Wilentz, *Rise of American Democracy*, 210-16.
[61] Andrew Jackson, Farewell Address (March 4, 1837), in *A Compilation of the Messages and Papers of the Presidents 1789-1897*, ed. James D. Richardson (Washington, D.C., U.S. Gov't Printing Office, 1896), 3: 303, 305.

over the paths of national and regional development the elites were blazing. Into the breach stepped a popular non-politician. A farmer-worker populace, voting directly, in mass numbers, in a presidential election for the first time, found in General Jackson more than military charisma. Ordinary Americans were mustering democracy against "the paper system" and its "new aristocracy" of enterprise. To the astonishment of old party leaders like Calhoun and Clay, the voters rallied to Old Hickory's cry: the Constitution was imperiled "and the people alone by their Virtue and independent exercise of their free suffrage" could rescue and redeem it. Not until FDR would a presidential candidate again speak so plainly about the realities of class divisions and the incompatibility of political democracy and economic oligarchy. Voters who readily accepted that they were the "poor Many" fighting off the "wealthy Few" exercised their suffrage for what the new Democratic Party press heralded as a "Constitutional Millennium."

The idea of equal protection of the laws is central to our modern understanding of the Constitution. Today we generally think of equal protection as the wellspring of the inclusionary principle, with roots in Reconstruction: a constitutional provision aimed against laws that injure groups defined by race and sex and other "discrete and insular minorities," as elaborated in *Carolene Products'* famous footnote.[62] But there was also another equal protection, *before* the Equal Protection Clause. For Andrew Jackson and his followers, equal protection was already a touchstone of the democracy of opportunity tradition. It was a constitutional principle about protecting the "many" against class legislation that privileged the "few."[63]

Today, when they read and write about Jackson's war on the Bank and the fights from that era about tariffs and internal improvements, constitutional scholars—especially our fellow liberals and progressives—think they see a story about states' rights and the limits of national power. They understand it largely in terms of a Southern elite determined to keep Congress's hands off slavery. But that is only half of the story. Entwined with those battles was a different strand of constitutional debate about the nation's distribution of opportunity, wealth and power.

The mass of ordinary white farmers and workers, "the laboring classes of society" who formed the social base of Jacksonianism, were fearful of the new "paper-money system"; the new boom and bust business cycle; and the growing inequalities of wealth, opportunity, and political power between the poor many and the rich few. The new "paper-money system," Jackson told the nation in his Farewell, threatened "to undermine . . . your free institutions" and place "all power in the hands of the few . . . to govern by corruption or force."[64]

The Bank controversy perfectly distilled the Jacksonians' fears, which found expression in the constitutional discourse inherited from their party's founders. As one leading Jacksonian put it, although the Bank is "maintained out of the hard earnings of the poor," "it is essentially an aristocratic institution" that "bands the wealthy together" and tends "to give exclusive political, as well as exclusive money privileges to the rich." The Bank, he argued, "falsifies our grand boast

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[62] See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).
[63] Andrew Jackson, Veto Message (July 10, 1832), in *Compilation of the Messages and Papers,* ed. Richardson,, 2:576, 590.
[64] Jackson, Farewell Address (Mar. 4, 1837), in *Compilation of the Messages and Papers,* ed. Richardson, 3:292, 302.

of political equality; it is building up a privileged order, who, at no distant day, unless the whole system be changed, will rise in triumph on the ruins of democracy."[65]

Jacksonians responded to these fears with a welter of sustained constitutional arguments —in the courts, in Congress and state legislatures, and in critical presidential vetoes. These arguments sounded in the key of constitutional political economy. They condemned an array of corporate and bank charters, tax exemptions, subsidies, and protectionist tariffs as unequal laws: "invasion[s] of the grand republican principle of Equal Rights—a principle which lies at the bottom of our constitution."[66] Such laws created "inequalities of wealth and influence" that would lead "inevitably" to the invasion of the rights of the "weak" by the "strong." Specifically, such laws would enable an emerging oligarchy—the "moneyed aristocracy"—to amass economic and political power over the "middling and lower classes."[67] In vetoing the Bank, President Jackson urged the government to "confine itself to *equal protection*, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor" rather than "grant[ing] titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful."[68]

The Jacksonians viewed the direction of economic development that this emerging oligarchy was charting with a distinct sense of *constitutional* crisis: they argued that it subverted the nation's republican Constitution (or, more precisely, republican constitutions). In great part, this was a story of the corrosive effects of inequalities of wealth. An American political economy built upon true constitutional principles, argued Jacksonian Congressman John Bell of Tennessee, would not aim for the "European" goal of maximizing national wealth "without regard to the manner of its distribution": "the accumulation of great wealth in the hands of individual citizens" subverts the natural "equality of rank and influence" that is "the fundamental principle upon which [our Government] is erected."[69]

Mainstream Jacksonians laid down strong distributional constraints on government policy —ones that ran not only to formal equal opportunity but also to "equality in the actual condition" of the citizenry. As Bell's speeches illustrate, these constraints were at once precepts of their political economy and—equally, inseparably—of their constitutional outlook. "I deny," Bell proclaimed, "that it is either necessary or proper, or consistent with the constitutional objects of our Government, to promote the growth of the country in wealth, without regard to the manner of its distribution." He viewed "the accumulation of overgrown individual fortunes" as "a positive national evil," and argued that governments are "free, just, and equal in proportion to the degree of equality in the actual condition of their members or citizens."[70]

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[65] William Leggett, "The Monopoly Banking System," *Evening Post*, Dec. 1834, in *A Collection of the Political Writings of William Leggett*, ed. Theodore Sedgwick, Jr. (New York: Taylor & Dodd, 1840), 1:103.
[66] Ibid., 97.
[67] William Leggett, "The Reserved Rights of the People," *Evening Post*, Dec. 13, 1834, in *Democratick Editorials: Essays in Jacksonian Political Economy,* ed. Lawrence H. White (Indianapolis, Ind.: Liberty Press, 1984), 7, 8; Leggett, "Despotism of Andrew Jackson," *Evening Post*, May 23, 1834, in *A Collection of the Political Writings*, 1:, ed. Sedgwick, Jr., 1:290; Leggett, "The Division of Parties," *Evening Post*, Nov. 4, 1834,in Ibid., 1:64, 66.
[68] Jackson, Veto Message, in *Compilation of the Messages and Papers*, ed. Richardson, 2:590 (emphasis added).
[69] Statement of John Bell, June 8, 1832, 22nd Cong., 1st sess., *Register of Debates in Congress*, 8, pt.3: 3357.
[70] Ibid., 3357–3358.

The central problem was that economic inequality inevitably has corrosive effects on political equality. In Jackson's words, an economic system divorced from "the great principle of equality" threatened to create "a dangerous connection between a moneyed and political power." The "moneyed interest" would become a political aristocracy, he warned, as "a control would be exercised by the few over the political conduct of the many by first acquiring that control over the labor and earnings of the great body of the people."[71] This is, in short, the problem of oligarchy.

These concerns became the mainspring of a distinctive Jacksonian constitutionalism. They inflected many modalities of Jacksonian constitutional argument, such as textual arguments about federal power—for instance, President Jackson's argument that Congress's textual authority to mint currency should *not* be read to permit Congress to delegate this power to a private bank (by chartering and authorizing the Bank to issue notes that, foreseeably, had become the nation's paper currency). Jacksonian equal protection and equal rights meant that stern constitutional scrutiny was required any time the government granted exclusive privileges, exemptions, immunities, or monopoly powers to determine whether these were truly "necessary" or whether they instead embodied an unjustifiable "bend[ing of] the acts of government" by "the rich and powerful . . . to their selfish purposes." But Jacksonian equal protection was not *laissez faire* for its own sake. It had two overriding purposes: to prevent the capture of the government by the rich and to safeguard broad opportunities for all.[72]

Of course, "all" did not mean all. Jacksonians wedded white farmers' and workers' democratic aspirations to the racist causes of southern slavery and Indian Removal, a tragedy of American political and constitutional development from which we are still disentangling ourselves. Slaves' and women's productive work was not merely excluded from the Jacksonians' generous conception of equality for the nation's producers; racial and gender subordination were among the bases on which they rested their vision of the white man's republican liberty and citizenly independence.[73] It was not the Jacksonians but instead their Whig foes and abolitionist critics who first probed the contradictions between championing an egalitarian political economy for the white "laboring classes" and perpetuating black bondage; it was nineteenth-century women's rights advocates who made the case that the Constitution's promise of equal rights meant equal rights for women.[74] Jacksonians championed a democracy of opportunity with a relatively broad base—but one consisting exclusively of white men.

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[71] Andrew Jackson, Seventh Annual Message (Dec. 7, 1835), in *Compilation of the Messages and Papers*, ed. Richardson, 3:164, 165, 167; Jackson, "Farewell Address," in Ibid., 3:305 ("moneyed interest")..

[72] Jackson, Veto Message, in Ibid., 2:582-85, 590.

[73] For this critical perspective on Jacksonian democracy, see Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 347-49, 352-65; Alexander Saxton, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America* (New York: Verso, 1990), 148-54, 247; Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country*, (New York, Oxford University Press,1995)..

[74] One such Whig foe was the young Illinois politician, Abraham Lincoln, who probed those contradictions as an Anti-Slavery friend of corporations and spokesman for the Whig vision of capitalist development, which, as we'll see, he outfitted in a vocabulary of equal opportunity largely borrowed from his Democratic adversaries.

What the Jacksonians understood, vividly, and articulated in constitutional terms, was that in their time, a nexus of elite wealth and political power threatened the political and economic equality of white male farmers and "mechanics." In Jacksonian constitutional political economy, this was the fundamental threat to the constitutional order.[75]

To respond to this threat, the Jacksonians created the first modern mass political party. Such a creature seemed to its conservative foes a constitutional nightmare: a permanently organized faction. But, as we have noted, the Jacksonians defended the new creature as just the opposite: not a nightmare, but actually a constitutional necessity, to mobilize the nation's dispersed "producing classes" as a new "[d]emocracy of numbers" to defeat oligarchy and save the republic from the "[a]ristocracy of wealth."[76]

The Second Founding: An Inclusive, But Fleeting, Democracy of Opportunity

For roughly the first century of its history, the democracy of opportunity tradition's ideal of a middle-class nation called for well-nigh universal white male property holding. Madison, Jefferson, Jackson and Lincoln had vastly different views about banking, corporations, internal improvements, land policy, and the proper overall shape of capitalist development, but they began from this shared premise: As a matter of constitutional principle, the political economy had to deliver a distribution of wealth and opportunity sufficiently broad and generous that "everyone" could enjoy the independence that flowed from secure possession of productive property. The political economy had to be set up and governed in ways that enabled, in Lincoln's words, "every penniless beginner in the world" to "labor for wages [only] awhile" and end up owning his own land or shop.[77]

The inclusionary principle entered the constitutional mainstream when Lincoln and the Republican Party that led the North through Civil War redefined "everyone," and set about extending the democracy of opportunity, as they understood it, to the black man. The main prompting for the Thirteenth and Fourteenth Amendments was to usher African-American men into the "free labor system," equipping them with the same equal rights of contract and property

[75] "States' Rights" and "Strict Construction" likewise were bound up in Antebellum constitutional discourse with democracy of opportunity for the "humbler [white male] members of society." As Tony Freyer has shown, the constant Antebellum battles between state and federal courts and federal courts and state lawmakers frequently pitted small and middling producers against larger, regional and national players: the mercantile, corporate and financial elites and their allies on the federal bench. State judges and attorneys championed a broad state police power and broad readings of state versus federal jurisdiction; they tethered "strict construction" and "states' rights" to safeguarding broad structures of opportunity and a fair chance for "humbler members of society" and to averting oligarchy. See Tony Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America* (Charlottesville: University Press of Virginia, 1994).
[76] Leonard, *The Invention of Party Politics*, 43, 162, 173 (quoting delegates at an 1837 Illinois Democratic congressional convention).
[77] Abraham Lincoln, Annual Address Before the Wisconsin State Agricultural Society (Sept. 30, 1859), in *The Collected Works of Abraham Lincoln, 1809-1865*, ed. Roy P. Basler (Springfield, Ill.: Abraham Lincoln Associoation, 1953), 3:471.

that were thought to ensure white men the opportunity to pursue a calling and earn a decent livelihood.[78]

The Civil Rights Act of 1866 gave canonical expression to this idea. Take a glance at the language of Senator Charles Sumner's proposed draft, which captures how Republican leaders at what Garrett Epps calls the Second Founding folded their vision of racial equality and inclusion into the older Antebellum discourse of democratic opportunity: "There shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the US…"

The Anti-Slavery crusade transformed Abraham Lincoln into an eloquent exponent of the equality of rights and opportunity enjoyed by Northern free labor, which he was bound and determined to extend to the black "bondsmen" of the South. "Equal privileges… an open field and a fair chance," said Lincoln, were together the "jewel" of the system of "free government" for which the North fought.[79] Lincoln's account of the North's "free labor system" and its broad opportunities for upward mobility and ownership of productive property was already a nostalgic fiction for the industrial working class that Lincoln's own war-time policies were helping to create.[80] But it was a fiction with constitutional legs: Along with Jacksonian laissez-faire, Lincoln's accounts of the "free labor system" became source material for the fiercely individualistic, thin and formal guarantees of legal equality among increasingly unequal economic actors that animated constitutional laissez-faire in the Gilded Age and Progressive Era. By then, Jackson's and Lincoln's constitutional ideologies were being repurposed to do anti-redistributive work.[81]

In its own day, however, the constitutional revolution Lincoln helped launch brought forward radical new and inclusive ideas of equality—and of government's duty to secure a broad distribution of opportunity and decent livelihoods—for black "freedmen and poor whites alike," as one leading Reconstruction Congressman would put it.[82]

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[78] William E. Forbath, "Caste, Class, and Equal Citizenship," *Michigan Law Review,* 98 (1999): 26; Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History*, 75 (1988): 474-75. On the Antebellum concept of the "free labor system," see Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York: Oxford University Press, 1970), 11-40.

[79] Abraham Lincoln, Speech to the One Hundred Sixty-Sixth Ohio Regiment (Aug. 22, 1864), in *Collected Works of Lincoln*, ed. Basler, 7:512

[80] The classic rendering of Lincoln's position is this: "The prudent, penniless beginner in the world labors for wages awhile, saves a surplus with which to buy tools or land for himself; then labors on his own account another while, and at length hires another beginner to help him. This, say its advocates, is free labor- the just and generous, and prosperous system, which opens the way for all – gives hope to all, and energy, and progress, and improvement of condition to all. If any continue through life in the condition of the hired laborer, it is not the fault of the system, but because of either a dependent nature which prefers it, or improvidence, folly, or singular misfortune." Abraham Lincoln, Address Before the Wisconsin State Agricultural Society, in *Collected Works of Lincoln*, ed. Basler, 3:471.

[81] On the Jacksonian inheritance, see Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993), 19-75. On the use of Lincoln's constitutional ideas, see William E. Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review*1985 (1985):798-99.

[82] William D. Kelley, *The Causes and Authors of the Financial Depression* (Philadelphia, Henry Carey Baird & Co., 1877), 5.

The many elements of the Republican coalition that brought about that revolution were hardly of one mind about exactly what kinds of new rights, structural reforms, or initial endowments the new constitutional promise demanded. Their reform outlooks ranged broadly. And no wonder: they hailed from across the spectrum of economic and social class positions. Both within the Republican Party elite and outside it, from mobilized ex-slaves, women's advocates, industrial workers and hardscrabble tenant farmers and agricultural laborers, there arose a ferment of new constitutional political-economic ideas and claims, spurred by the astonishing proposition that the new constitutional order of "universal freedom" condemned caste-like relationships of legalized social and economic subordination.

Even the most conservative Republican lawmakers and voters agreed on the core rights of contract, property and personal liberty; now these rights were "universal." All agreed, too, that the new amendments empowered Congress to enact enforcement machinery to secure the new constitutional vision of black free laborers owning land, making contracts and meeting white employers, merchants and landlords on a plane of legal equality. This meant new federal enforcement statutes, new federal administrative actors, and new routes to federal courts.

But Radical Republicans succeeded in pushing further. The freedmen's new status as citizens demanded suffrage; and the independence of their ballots required material foundations. That entailed not only equal rights to contract and own property, but also initial endowments of public education and training. Many agreed with Thaddeus Stevens that equal citizenship for the freedmen also demanded land redistribution—"forty acres and a mule," in Stevens's famous phrase. The idea of expanding the federal commitment to initial endowments was not limited to former slaves. Stevens and other Republicans pressed for generous homestead laws and land grant colleges for white hirelings in the North.[83]

For their part, freedmen and women also hewed to the old-fashioned republican view that freedom entailed ownership of productive property; self-ownership alone was not freedom. Many apparently agreed with Stevens on the necessity of confiscating the largest plantations of the South and redistributing them to ex-slaves to secure the African Americans' liberty. "Only land," said former Mississippi slave Merrimon Howard, would enable "the poor class to enjoy the sweet boon of freedom."[84] In an 1865 "colloquy" with General Sherman and Secretary of War Stanton, twenty "Colored Ministers" concurred. Asked "what you understand by slavery, and the freedom that was to be given by the President's Proclamation," ex-slave Garrison Frazier, the group's spokesman, replied: "The freedom, as I understand it, promised by the proclamation, is taking us from under the yoke of bondage and placing us where we could reap the fruit of our own labor, and take care of ourselves." "Freedom," he went on, meant that ex-slaves were entitled "to have land, and turn and till it by our labor…and we can soon maintain

[83] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988), 235-36; Akhil Reed Amar, "Forty Acres and a Mule: A Republican Theory of Minimal Entitlements," *Harvard Journal of Law and Public Policy* 13 (1990): 37.
[84] Quoted in Eric Foner, "The Meaning of Freedom in the Age of Emancipation," Presidential Address of the Organization of American Historians (Apr. 15, 1994), *Journal of American History* 81 (1994):458.

ourselves." The land, after all, was not only the property of traitors; it had been bought with the fruits of the bondsmen's "unrequited" toil.[85]

Most national African American leaders during Reconstruction took a more moderate stand on the land question. They heartily agreed that freedom demanded material independence, but, like most other prominent Republicans, the nation's most prominent African Americans claimed that as long as they had suffrage, equal civil rights fairly administered combined with a right to "common school" education would suffice for hard-working freedmen and women to become freeholders and free-standing citizens. They urged ex-slaves to labor hard, save their earnings, and buy land on their own.[86]

When Congress made plain its refusal to redistribute the estates of the South, the key sites of argument and struggle shifted. State and local black Republican leaders formed coalitions with representatives of white yeomen and tenant farmers to build up a Southern base for the "party of Free Labor," the "Black Republicans" or a "poor man's Party," as planters scornfully called it. "Black Republican" judges and justices of the peace, along with Freedmen's Bureau administrators, adjudicated contract disputes between freedmen and former masters in a fashion that confirmed the planters' worst fears about "Negro rule" and confirmed as well the mutability and distributional consequences of common law doctrine. "Equal rights under law" was anything but self-defining; as always with contract and property relations, the devil was in the details. Called on to apply the principles of free contract and property to the emergent relations between landlord and sharecropper, "Black Republican" judges did so in ways that gave the latter a substantial measure of bargaining power and control over work and crop.[87]

As the judges plumbed the meaning of the individual's "right to the fruits of his labor" and Republican lawmakers enacted redistributive taxes, lien laws and land-lease measures, the planter class and the Democratic Party turned to terror to quell black voting and political associations. The Democrats and the Klan also meted out violence against black property holders and skilled craftsmen, aiming in one freedman's words, to "[keep us] as the hewers of wood and drawers of water to as mean a class of white men…as live in any one of these reconstructed states."[88]

Meanwhile, in the rapidly industrializing North, as the Labor Question began to eclipse the Slavery Question, it too had a constitutional cast. Many abolitionist-bred Republican

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[85] "Colloquy with Colored Ministers," *Journal of Negro History* 16 (1931):90-1; Foner, *Reconstruction*, 235-37; Leon F. Litwack, *Been in the Story so Long: The Aftermath of Slavery* (New York: Knopf, 1971), 401-04.
[86] Foner, *Reconstruction*, 54-54; Leon F. Litwack, *Been in the Story so Long*, 399-408.
[87] Foner, *Reconstruction*, 281-411; Thomas Holt, *Black over White: Negro Political Leadership in South Carolina During Reconstruction* (Urbana: University of Illinois Press, 1977); Edward Magdol, *A Right to the Land: Essays on the Freedmen's Community* (Westport, Conn.: Greenwood Press, 1977); Donald Nieman, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865-1868* (Millwood, N.Y.: KTO Press, 1979); Nieman, "African Americans and the Meanings of Freedom: Washington County, Texas as a Case Study, 1865-1890," *Chicago-Kent Law Review* 70 (1994); Nieman, "Black Political Power and Criminal Justice: Washington County, Texas, 1868-1884, *Journal of Southern History* 55 (1989).
[88] Peter J. Rachleff, *Black Labor in the South: Richmond, Virginia, 1865-1890* (Philadelphia: Temple University Press, 1984), 65.

lawmakers joined labor's tribunes in weighing the common law of labor and the wage contract against the strictures of the new Reconstruction Constitution. "Equality of rights" between labor and capital demanded an end to "wage slavery" via repeal of many "caste-ridden" common law rules and statutory reconstruction of the labor market, including legal limits to the working day, which Congress enacted for federal workers, in 1868, intoning the new constitutional dispensation of universal freedom. President Grant's 1869 National Eight Hour Law Proclamation did the same. Such invocations of constitutional precepts aimed at protecting black ex-slaves to support new rights for white workers in the North were not as farfetched as they may sound. Defending white "Free Labor" had been at the heart of the Republicans' anti-slavery outlook, and leading framers repeatedly declared that the Reconstruction amendments embodied promises, limited to "neither black nor white."[89]

Beyond the unique harshness of the South's post-bellum Black Codes, law and state power could be used to hem white working people into dependent and degraded, caste-like conditions. They could be used to invest groups and classes of the propertied with "peculiar privileges and powers," and enshrine in Representative Thaddeus Stevens' words, "the recognized degradation of the poor, and the superior caste of the rich." This too the new Amendments forbade. Republicans celebrated their constitutional handiwork as a charter of Free Labor aimed at "subduing that spirit" which "makes the laborer the mere tool of the capitalist."[90] Like the language of Sumner's draft of the 1866 Civil Rights Act, these readings of the new Amendments' bearing on labor and capital echoed the old Jacksonian meanings of "equal protection." Like Sumner's draft, they provided a bridge between new understandings of the constitutional condemnation of "caste" and of "class legislation" (as bearing on racial equality) and old ones (as bearing on economic equality)—knitting together the new inclusionary principle with the older strands of the democracy of opportunity tradition.[91]

Some of the main architects of the laissez-faire, "liberty of contract" reading of the 14th Amendment were deeply attuned to both the old and the new elements of the democracy of opportunity tradition, their constitutional commitments a meld of classical (political-economic) and racial liberalism. Michigan state Supreme Court chief justice Thomas Cooley, for example, authored the late 19th century's leading constitutional treatise, *The Constitutional Limitations Which Rest Upon the Legislative Power of the States of the Union*, the year the Amendment was ratified and saw it through a dozen editions and voluminous citations over the next decades. Cooley's political odyssey was richly typical of these "new liberal" jurists: a radical Jacksonian

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[89] Forbath, "Caste, Class, and Equal Citizenship," 30; Remarks of Sen. Wilson, Jan. 22, 1866, 39th Cong., 1st Sess., *Congressional Globe*, 343, quoted in Lea VanderVelde, "The Labor Vision of the Thirteenth Amendment," *University of Pennsylvania Law Review* 138 (1989) 446; Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* (New York: Norton, 1978), 108-40.
[90] Proposal by Sen. Sumner, Feb. 6, 1866, 39th Cong., 1st Sess., *Congressional Globe*, 674, quoted in Andrew Kull, *The Color-Blind Constitution* (Cambridge, MA: Harvard University Press, 1992), 252 n.27; Remarks of Rep. Stevens, June 13, 1866, 39th Cong., 1st Sess., *Congressional Globe*, 3148, quoted in Foner, *Reconstruction*, 254; Statement of Rep. Shannon, June 14, 1864, 38th Cong. 1st Sess., *Congressional Globe*, 2948, quoted in VanderVelde, "The Labor Vision of the Thirteenth Amendment," 471.
[91] Steven G Calabresi and Larissa C. Leibowitz, "Monopolies and the Constitution: A History of Crony Capitalism," *Harvard Journal of Law and Public Policy* 34 (2013): 1038-40; Steven G. Calabresi and Julia T. Rickert, "Originalism and Sex Discrimination," *Texas Law Review* 90 (2011): 37.

reformer in his youth; an abolitionist; a Free Soil Party organizer and a founder of the Republican Party, who broke with the Republicans during Grant's administration; and finally an independent "Mugwump" or new liberal reformer and jurist. Cooley's judicial opinions during Reconstruction exemplified the highly abstract yet deeply felt fusion of abolitionist and laissez-faire constitutional meanings of "discrimination by the State," striking down as "class legislation" such measures as Detroit's school segregation ordinance, along with another township's use of the tax power to float bonds subsidizing private enterprise. At the same time, Cooley's 1868 treatise began laying foundations for *Lochner*, characterizing eight- and ten-hour day laws on behalf of various categories of workers as another species of "discriminatory class legislation"—a proposition seized on by employers' attorneys and state high courts, where *Lochner*ism first took root in the 1880s.[92]

Thus, just as Congress and the White House declared the constitutional *imperative* of hours laws, Cooley argued for their constitutional infirmity. From the start, the laissez-faire reading of the new "right of free labor" enshrined in the Reconstruction amendments was contested by another opposing one—holding that, in the words of one prominent labor leader, "legislative bodies [were] bound to interfere" in the name of "equal rights between labor and capital."[93]

Congress and the White House were channeling an emergent constitutional political-economic outlook anchored in the Reconstruction era's burgeoning labor movement. Here too one found prominent leaders embracing a new racial liberalism. But in contrast to the new liberal jurists' backward-looking revival of classical/Jacksonian laissez-faire, which was spurred by fears of working-class political activism and the specter of an American replay of the Paris Commune, labor's tribunes instead linked racial inclusion with a new and more modern take on the democracy of opportunity and the political economy of citizenship.

Industrialization, so spokesmen of the massive Eight Hour Day movement contended, was changing the social meaning of constitutional equality. For Lincoln, the hireling's lot was almost as unfree as the slave's, but it was a brief way-station on the road to owning productive property. With the rise of large-scale production, however, and the increasing concentration of ownership of resources and capital, today's hireling was no longer tomorrow's proprietor. Artisans and skilled workers found themselves competing against new machines and new unskilled and underpaid workers.

The industrial capitalists seemed a new aristocracy, whose wealth and power were built on oppression.[94] Just as the capitalist strove to grind down wages, so he abused the new technologies and "labor-saving devices" by "cheapening labor" and demanding longer and longer hours of "mindless toil" that deprived workingmen of the time to educate themselves and

[92] Forbath, "Caste, Class, and Equal Citizenship," 39 n.169.
[93] George E. McNeill, "The Problem of Today*,"* in *The Labor Movement: The Problem of Today*, ed. George E. McNeill (New York: M.W. Hazen, 1886), 462.
[94] Generations of social historians have reconstructed this process in great detail. A distillation of their work is Forbath, "Ambiguities of Free Labor." See also, David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865-1925* (New York: Cambridge University Press, 1987).

participate in public affairs. Under the "wages system," "progress" seemed to have the ironic consequence of producing more "dependence," more "ignorance," and more "grinding poverty" among succeeding generations of workers. The capitalists' wealth was being purchased at the price of making the new industrial working class unfit for citizenship.[95]

This irony animated George McNeill as he wrote on behalf of the International Labor Union, "There is an inevitable and irresistible conflict between the wage-system of labor and the republican system of government." A similar declaration would appear in the preamble to the constitution of Gilded Age's largest and most prominent, and boldly biracial labor organization, the Knights of Labor.[96] Thus, just as the courts began to enshrine as a constitutional right the worker's liberty to sell his labor, the labor movement was forging an opposing outlook, which held that being forced to sell his labor contradicted the worker's status as a citizen. By the 1880s, virtually every labor leader, from the most stolid iron puddler to the more radical miner, agreed that the "present industrial order" or the "wages system" had to give way, or the republic would perish. Like their agrarian counterparts, they would invoke the ideal of a "Co-operative Commonwealth" in which "producers" would "eventually be the only capitalists" and ownership and control of industry would be broadly shared, while transportation, communication and banking would go public.[97]

Modernity and Loss – the Democracy of Opportunity in the Gilded Age & Progressive Era

As we've already glimpsed, the late 19th and early 20th century—the Gilded Age and Progressive era—brought an important turn in the democracy of opportunity tradition, one that in many ways recalled Jacksonian constitutional struggles. Decades earlier, at the beginning of the 19th century, the birth of the capitalist market economy had brought forth a crisis of mounting inequality and hardening class lines; Jacksonian Democracy was the polity's dramatic response. The advent of corporate capitalism at the end of the 19th century produced another such crisis—one that prompted another constitutional reckoning, and ultimately, a reinvention of the ideal of the mass middle class. In the age of Jackson, powerful corporations had taken control of the nation's banking and finance. Now big firms and nation-spanning corporations had come to dominate the entire economy.

This was the moment when the nation haltingly confronted the fact that the United States, like Europe, was destined to have a vast, permanent class of propertyless wage earners. It was no longer possible to contend that the industrial hireling was on a path to owning his own workshop, the agricultural tenant or laborer his own farm. Indeed, the mass of farmers found themselves sinking into debt and tenancy, and a mass migration of young people from the countryside to the industrial centers was underway.[98]

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[95] Daniel T. Rogers, *The Work Ethic in Industrial America, 1850-1920* (Chicago: University of Chicago Press, 1978), 153-60; McNeill, "The Problem of Today," 462; Ira Steward, "The Power of the Cheaper over the Dearer," in *A Documentary History of American Industrial Society*, ed. John R. Commons, et al. (Cleveland, OH: A.H. Clark, 1910).
[96] McNeill, "The Problem of Today," 459; McNeill, "Declaration of Principles of the Knights of Labor," in *The Labor Movement,* ed. McNeill, 483-86.
[97] Forbath, "Ambiguities of Free Labor," 808-09.
[98] Forbath, "Caste, Class, and Equal Citizenship," 28-9.

From the perspective of the democracy of opportunity tradition, then, the dilemma was this: If the promise of equal opportunity meant universal access to middle-class status—and if only a mass middle class could protect the republican Constitution from decaying into oligarchy—then either the vanishing world of small producers and proprietary capitalism would somehow have to be restored, or the mass middle-class would have to be reinvented.

Agrarian Populists, labor advocates, and middle-class reformers, as well as elite attorneys, lawmakers, jurists and political economists were riveted by this problem. Reformers of all stripes—elite and plebian, pro- and anti-corporate, those who were reconciled to the "inevitability of bigness," and those who deemed it a "curse"—plunged into constitutional political economy. The ideas and arguments differed greatly from earlier battles, but basic elements remained: the concern that economic oligarchy breeds political oligarchy; the idea that political equality and republican self-rule hinge on economic arrangements that sustain a broad middle class; and crucially, the fear that an impoverished and dependent mass of industrial workers and farm laborers or tenants and a moneyed aristocracy spelled *constitutional*, as well as social and political, trouble.[99]

But some important things had changed with the rise of national markets and nation-spanning industrial corporations. There was a new sense that some of the constitutionally essential state police power functions had to shift upward to the national plane, or be permanently outmatched by the new scale of concentrated private economic power. Now that the political economy was so thoroughly nationalized, the broad authority and duties of what the framers had called "Police" in the service of "Public Happiness" could no longer rest solely on the states' shoulders. They had to be shared by Congress.

Substantively, the Currency Question, the Banking Question, the Trust Question, and the Labor Question were the central issues of the day. All had profound constitutional dimensions, as reformers made claims on the Constitution that we have quite forgotten. That forgetting is unfortunate, because these constitutional debates are surprisingly relevant today. Now that class inequalities have returned to Gilded Age levels, our political system is beginning to refight a number of the great political-economic battles of the late 19th and early 20th centuries—over the regulation of banking and credit, labor standards, unions and employment relations, the political power of corporations, and more generally, conflicts over the proper responses to growing concentrations of wealth and narrowing access to opportunity. A century ago, all sides of these debates were clear that these questions had constitutional stakes. Not so today. Today, some conservatives and libertarians see constitutional stakes in these questions, but most of their opponents do not.

In forthcoming work, we survey the first Gilded Age's constitutional battles in each of these domains. Here we glance only at the Gilded Age questions of labor and work. Gilded Age and Progressive Era labor politics were shot through with constitutional claims and counter-claims—in popular and highbrow public discourse and in the courts and the halls of Congress. Here again, we are familiar today with the laissez-faire arguments mounted *against* labor laws. Just last term, the Supreme Court took a critical step toward reviving such arguments.[100]

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[99] See, e.g., Louis D. Brandeis, *The Curse of Bigness,* ed. Osmond K. Fraenkel (New York: Viking, 1934), 72-74.
[100] *See* Cynthia Estlund and William E. Forbath, "The War on Workers," *New York Times*, July 3, 2014.

We have forgotten, however, the arguments of labor's advocates and their allies that the Constitution's promise of equal citizenship *demanded* the laws that the courts struck down, demanded safeguards for the rights to strike and organize, demanded hours and wages legislation and demanded social insurance. That is unfortunate; for this was among the most important sites where modern middle-class-ness—and what FDR would come to call the new "economic constitutional" meaning of equal rights, equal opportunity and equal citizenship—were forged.[101]

The *old idea* had been that ownership of productive property—whether in the form of land or the tools of a trade and a place to ply it—was the material basis of middle-class-ness and of full membership in the political community. Only someone who owned such property, and enjoyed the economic independence that was thought to accompany it, had the minimum social measure of dignity and freedom from domination, as well as the material circumstances and sheer time to develop his capacities for judgment and deliberation sufficiently to participate in civic life.

The *new insight* generated by labor advocates and social reformers of many stripes in this period was this: These citizenly goods do demand an economic base, but that need not mean owning productive property. It all depends on how we order social and economic life and whether our laws and political economy provide for such goods for all.

The rise of large-scale industry and employment relations had upended the old propertied, self-employed household farm or workshop. And good riddance, perhaps, from the point of view of the women and poor laborers, disproportionately poor laborers of color, who had never enjoyed full civic membership in that world of the small producer's household and the old middle class. A decent livelihood, some leisure for self-improvement, civic life, some control over one's work life—all these were social resources. None was naturally restricted to any single class. To be a wage earner, these reformers insisted, was not necessarily a life of dependency or servitude. It all depended on whether our laws and political economy provided for such goods for all: "employees" as well as "employers," women as well as men (although the real change in women's economic opportunities, and social position, did not occur until the 1970s).

Ironically, it was the readiness of the nation's courts to enjoin strikes and union organizing, imprison trade unionists, and nullify labor and social insurance legislation—all in the name of employers' constitutionalized property rights and freedom of contract—that provoked the labor movement and social reformers to delve so deeply into text, history, treatises and precedents to produce a new constitutional narrative of economic and social development, and a new constitutional political economy of equal rights, opportunity and citizenship.[102]

[101] Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), in *The Public Papers and Addresses of Franklin D. Roosevelt* (New York, Random House, 1938),1: 752.
[102] *See* Forbath, "Caste, Class, and Equal Citizenship," 43-49, 51-7.

By overcoming grave inequalities of bargaining power and providing the individual worker with real opportunities for "actual liberty of contract,"[103] so trade unionists and champions of labor law reform boasted, unions and collective bargaining could (and did) overcome the contradiction between "political democracy" and "industrial tyranny," bringing all the expectations of living under the Constitution—the freedom to associate and voice grievances, deliberate over common concerns, share authority, choose representatives, and be heard before suffering loss—into industrial life.[104] By combining labor law reform—repealing the old judge-made law of industrial and employment relations—with minimum wages and maximum hours laws, safety standards, and social insurance, the unionists and reformers aimed to transform industrial workers into middle-class citizens. There is some historical truth, in other words, to the bumper sticker slogan that unions brought you the modern middle class, although this achievement had to await the New Deal and World War II.

In the complex trajectory of movements and ideas between Gilded Age radicalism and the New Deal, much was gained and much lost. The racially inclusive Populists and Knights of Labor with their ambitious affirmative constitutional claims for "Reconstruction of the whole social structure" collapsed under the combined weight of terror and mass disenfranchisement in the South, violent state repression of broad strikes and boycotts and broad-based unionism in the North, and race-baiting and racial divisions throughout.

The campaign to "redeem" the South for white supremacy was an elite-led affair, prompted by the threat of a poor people's party that joined tenants, sharecroppers, and mine and mill workers on both sides of the color line. The Redeemers did not disenfranchise poor blacks alone. To defuse Populism, they also aimed to strip the vote from lower class whites, and they succeeded. The poll tax proved a defining feature of the Jim Crow order, and in many southern states far more whites than blacks—a majority of white voters—were effectively barred from the ballot box. Combined with the all-white primary and racial intimidation, which took precedence in blocking black voter participation, the poll tax would operate during the New Deal era to deprive liberal Democrats of their natural constituency among hard-hit Southerners of both races.

The Supreme Court played an important part in the process, almost strangling the Equal Protection Clause in its infancy, striking down or narrowly reading civil rights statutes, and confirming that the constitutional guarantees of black citizenship would not impede Jim Crow, Klan violence and mass disenfranchisement. The Court thus lent its sanction to the reconstituted caste system of the South; the New South thereby secured a special status as a distinct society within the Union's new constitutional order. The Court's bad faith, shared by the other branches, led to a strange anomaly: a reactionary core, the Solid South, at the heart of the New Deal liberal coalition.

And yet for all their genuine efforts at cross-racial solidarity, the kind of decentralized, democratic "producers'" political economy—the "Co-operative Commonwealth" that the Knights and Populists envisioned—never really had much place for the landless agricultural

[103] That phrase would find a home in the preamble to the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).
[104] *See* Louis Brandeis, Testimony before Comm. on Industrial Relations (1915), in Brandeis, *The Curse of Bigness,* ed. Fraenkel, 72-74.

laborer or the new immigrant factory proletariat. The more statist-leaning Progressives had more to offer. Their translations of the democracy of opportunity were various, but in general, they pushed the tradition toward a greater reliance on welfare-and-regulatory state-building, administration, and social insurance, while still holding out the prospect of a more democratic civil society.

What most separated Progressives from Gilded Age radicals, however, was the death of racial liberalism among white reformers. As the Populist moment passed, the movement's commitment to multi-racial democracy—always fragile and ambivalent on the part of white Populists—became a dissenting tradition within the tradition of dissent, shunted out of the mainstream of reform ideals by the increasingly virulent racism of white America in the first decades of the twentieth century. When the New Deal brought a thick modern rendering of the democracy of opportunity into the corridors of national power, the inclusionary principle was barely heard.

The New Deal: Forging a Mass Middle-Class

The New Deal brought to a head many of the constitutional and political-economic clashes left simmering from the Progressive Era. Because the Supreme Court's opposition to the New Deal lent moral and political armor to the "economic royalists," Roosevelt made his showdown with conservatism on the field of constitutional political economy. Not since Jackson had any President spoken so candidly and starkly about the nation's class divisions and inequalities. The "economic royalists," whom Roosevelt likened to "the eighteenth century royalists who held special privileges from the crown," stood accused of building a "dynastic scheme" that threatened to subvert our constitutional democracy and replace it with a "new despotism"—"a new industrial dictatorship."[105]

Here was the original democracy of opportunity tradition—and in particular its anti-oligarchic strand—in its purest modern form. Roosevelt's repeated invocations of the "economic royalists" and their "[n]ew kingdoms" were a story of both economic and political "despotism." In his speech at the 1936 Democratic Convention, Roosevelt argued that "[f]or too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives." He framed the result in terms of the Declaration of Independence: "[L]ife was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness."[106] Roosevelt credited the Populist and Progressive antimonopoly movements for understanding the constitutional stakes. These movements understood that "the inevitable consequence" of placing "economic and financial control in the hands of the few" was "the destruction of the base of our form of government" and its replacement with "an autocratic form of government."[107]

[105] Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), in *The Public Papers and Addresses of Franklin D. Roosevelt* (New York, Random House, 1938), 5: 230, 231-34.
[106] Ibid., 232-33.
[107] Roosevelt, Address at the Texas Centennial Exposition (June 12, 1936), in *ibid.*, 5: 209, 212 (1938).

A democratic government, on FDR's and the New Dealers' account, had not only the constitutional power but the duty to enact a "Second Bill of Rights." FDR's Second Bill embraced a host of broad new social and economic rights: to decent work and livelihoods, to education and training and retraining, to housing, healthcare, and social insurance. These rights, Roosevelt argued, were imperative to restore the "forgotten[] ideals and values," once secured by the "old and sacred possessive [common law contract and property] rights."[108] Such enabling social and economic rights, FDR explained, amounted to an "economic constitutional order,"[109] essential "to protect majorities against the enthronement of minorities" and secure a "democracy of opportunity."[110]

The New Dealers proved unable to enact all these rights. Notably, they failed to enact universal health insurance. Still, the Fair Labor Standards Act (FLSA), brought an array of national labor standards like maximum hours and minimum wage laws; the National Labor Relations Act (NLRA) brought statutory and then judicial recognition of new national safeguards for what the New Deal Court now dubbed workers' "fundamental rights" to organize, build unions, and bargain collectively. Rounding out these measures in the transformation of countless working-class Americans' lives, from precariousness and near poverty toward a real measure of material security, and dignity and voice at work, was the Social Security Act (SSA). Its nationally administered system of social insurance provided a baseline of material well-being when the (white male) breadwinner was unable to work because of unemployment or old age.

These and other New Deal measures would underwrite the emergence of a new mass middle class. They profoundly changed class relations for the Americans who benefited from them. But they were bought at a high price. They were crafted to exclude African-Americans. At the heart of the New Deal liberal coalition in Congress was the reactionary core of Southern Democrats. Representing an impoverished region, these "Dixiecrats" were staunch supporters of the New Deal until the late '30s. They insisted that the key pieces of New Deal legislation we have mentioned—the FLSA, the NLRA along with the SSA's old age and unemployment insurance—all exclude the main categories of black labor, agricultural and domestic workers. By allying with northern Republicans, or by threatening to do so, the "Dixiecrats" stripped all the main pieces of 1930s New Deal legislation of any design or provision that threatened the separate southern labor market, its racial segmentation, or its low wages.[111]

Keeping African-Americans dependent on local labor markets and local poor relief was the principal reason for the distinctly segmented and caste-ridden system of social insurance and

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108 Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), in *ibid.,* 3:287, 288, 292.

109 Franklin D. Roosevelt, Campaign Address on Progressive Government (Sept. 23, 1932), in *ibid*, 1: 752.

110 Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), in *ibid.*, 6: 366.

111 See, Forbath, "Constitutional Welfare Rights," 1835–36; James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939*, (Lexington: University of Kentucky Press, 1967), 40–76; Arthur Altmeyer, *The Formative Years of Social Security* (Madison: University of Wisconsin Press, 1966), 15; Kenneth Finegold, "Agriculture and the Politics of U.S. Social Provision: Social Insurance and Food Stamps," in *The Politics of Social Policy in the United States*, ed. Margaret Weir et al. (Princeton N.J.: Princeton University Press, 1988), 199–234; Ira Katznelson et al., "Limiting Liberalism: The Southern Veto in Congress, 1933–1950," *Political Science Quarterly* 108 (1993): 283–302; Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W.W. Norton, 2005).

labor rights bequeathed by the New Deal. This also explains why what would come to be known and reviled as the "welfare" portions of the SSA—chiefly the Aid to Dependent Children (ADC, later AFDC, later TANF) program, which provided assistance to single mothers—was designed for local and state authorities to administer, in sharp contrast to the old-age and unemployment programs, which had national administrators (but also excluded blacks). Local southern authorities simply refused ADC assistance to black mothers, keeping them dependent on labor in the cotton fields and white households, on whatever terms the local labor markets would bear. Three decades later, the Great Society's Medicare and Medicaid programs would be based on just this segmentation of federal support into a contributory centralized, national program, which would come to be called "social security," and a decentralized one administered by state and local officials in the discretionary fashion of ages-old poor relief, which came to be known and reviled as "welfare." Medicare would be built on the centralized, national framework of "social security"; and Medicaid on the decentralized, state-administered and stigmatized framework of "welfare."

During the '40s, liberal New Dealers set out to "complete the New Deal" with bills to remedy the (racialized) gaps in the Social Security Act, to enact national health insurance, alongside old age and unemployment insurance, and to commit the federal government to achieve full employment. These were all features of Roosevelt's 1944 Second Bill of Rights, and they enjoyed broad support. But the measures expired in Congress, as the Dixiecrats joined with conservative Republicans to block them.

Thus, the New Deal constitutional political economy would be built around elevating the white, male workingman or office worker into a middle-class breadwinner. Deeply gendered as well as racially exclusive, FDR's "democracy of opportunity" proved a kind of affirmative action for white men.[112]

Civil Rights and the Democracy of Opportunity in the Great Society

Beginning with the Montgomery bus boycott in '56 and culminating in the epic confrontation in Birmingham, the wave of sit-ins, demonstrations, and riots that swept the South and the nation in spring and summer '63 pushed open the door to reform for the first time since the '30s. Through this door, responding warmly, shrewdly, and sometimes boldly to the civil rights movement, stepped LBJ and the liberals of both parties in Congress, the Executive and the courts. The Great Society witnessed transformations of both American constitutional law and American democracy, forging our modern inclusionary understanding of equal rights and "equal protection of the laws"—an understanding firmly rooted in the Fourteenth Amendment, Congressional power to enforce the Fourteenth Amendment, and a conception of equal opportunity in employment and in other spheres that is focused squarely on combating group-based exclusion and hierarchy through antidiscrimination law. This modern understanding has been so important—and also so generative, from the women's movement to the disability rights

[112] See, Marion Clawson, *New Deal Planning: The National Resources Planning Board,* (Baltimore, MD: Johns Hopkins University Press, 1981), 225–36; Stephen Kemp Bailey, *Congress Makes a Law: The Story Behind the Employment Act of 1946*, (New York: Columbia University Press, 1950), 165–67; Richard Bensel, *Sectionalism and American Political Development, 1880-1980* (Madison: University of Wisconsin Press, 1984), 152–68; Katznelson et al., "Limiting Liberalism," 283–302; Katznelson, *When Affirmative Action Was White.*

movement to the gay rights movement—that it is easy to lose sight of how we ever understood the Constitution to speak to questions of inequality and unequal opportunity in any other way.

In some important ways, the Great Society carried forward the conceptual architecture of the democracy of opportunity tradition; but in one crucial respect, as we noted at the outset, it was laid aside and forgotten. Laid aside was the old idea that equal rights demanded a constitutional political economy that paid careful attention to the distribution of wealth and opportunity among economic classes. The political-economic reforms of the New Deal had attended to that, so LBJ and most Great Society liberals assumed. Thanks to the New Deal reforms and the post-World War II boom, more and more working-class white Americans were enjoying a middle-class way of life. They enjoyed a measure of security, dignity and voice at work, underwritten by strong unions, high wages, and a generous meld of public and private-employment-based social insurance. Thus, as far as economic life was concerned, the constitutional work that remained was not addressing class problems but enabling Black Americans to enter these abundant middle-class opportunities, from which they had been shut out. At the top, in elite higher education and jobs, the idea was similar: these opportunities were no longer the exclusive preserve of the well-born; the barriers that remained were lines of exclusion that reserved the top jobs for white men. The constitutional work to be done was to remove those racial—and later gender—barriers.[113]

We will return to the blind spots of this outlook, but first, let's underscore some more of the Great Society's continuities with key strands of the democracy of opportunity tradition. Like the old class-based vision of "equal rights," Great Society liberalism embraced FDR's insight that "freedom is no half and half affair"; "equal opportunity in the polling place" and "equal opportunity in the marketplace" are entwined.[114] Neither one alone is sufficient. The civil rights movement demanded both political and economic enfranchisement; like the older class-based vision of equal rights, it recognized that political power and economic power were intertwined and potentially mutually reinforcing—and that the same is true on the flip side for political and economic exclusion. Thus, the landmark legislation of the Great Society included both voting rights laws and laws aimed at economic exclusion: the civil rights canon of antidiscrimination laws about employment, housing, and education.

Another continuity between old and new lay in the ways that the social and political movements of the 1960s—those that pushed for the era's civil rights reforms and those that opposed them—reproduced many of the conceptual tensions of the long arc of the democracy of opportunity tradition as applied to white male producers, pitting thinner, more formal conceptions of equal treatment against thicker and more substantive forms of inclusion and integration, which began to take the form of industrial quotas and affirmative action.

We have noted the thick distributive claims of some of the democracy of opportunity's most influential early expositors: how President Jackson and his fellows in Congress and on the

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[113] Moves to address the gender dimension of this constitutional problem were only nascent in 1964. They gained force with the growth of the women's movement later in the decade. See Nancy MacLean, *Freedom is Not Enough, The Opening of the American Workplace* (Cambridge, MA: Harvard University Press, 2008), 117-155.
[114] Roosevelt, Acceptance of the Renomination for the Presidency, in *Public Papers and Addresses of Roosevelt*, 230, 234.

bench held that equal protection of the laws condemned "class legislation" favoring the wealthy few; and how they viewed this as one pillar of a constitutional political economy aimed against oligarchy and aimed at securing what Jacksonians saw as the essential political-economic meaning of equal rights: a broad "actual" distribution of wealth and opportunity amongst "all" the nation's white male "laboring classes." Reform movements wielded this early nineteenth-century constitutional vocabulary in support of broad distributional goals for over a century. But, as we have seen, by the 1870s and '80s, conservative elites and jurists with an anti-redistributivist outlook were drawing on this same vocabulary to make a more formalist set of arguments, invoking the bar on "class legislation" to condemn labor law reforms.

The concepts of equality and equal protection at the heart of the civil rights movement and Great Society had a similar trajectory. Both the movement and Great Society liberals had thicker, social accounts of equal protection, aimed at ending group subordination. But these accounts soon had to contend with thinner, more formal, more individualistic accounts of racial equality, constructed by conservatives to condemn as unconstitutional many egalitarian measures that Great Society liberals had deemed essential.

Almost from the start, Great Society liberalism's many-sided initiatives in the service of a thick, substantive vision of racial equality "in fact and in result" met with white resentment, which politicians like George Wallace were swift to exploit, in the key of populist opposition to elite national actors'—liberal federal judges', lawmakers' and attorneys'—"arrogant" interventions in local, white middle- and working-class spheres of governance. These foes of civil rights enforcement drew on some of the legacies of the democracy of opportunity tradition itself—especially its commitment to a broadly accessible, open middle class—to depict integration and affirmative action as threats to white children's basic initial endowments of opportunity.

This move made political sense because of profoundly important economic changes in post-Great-Society America. By the end of the 1970s, it was becoming painfully clear that employment was not expanding but contracting in the very private sector industries, like auto and steel, which were the base of decently-paid blue-collar work. Great Society liberals had believed that no further rounds of New Deal-style political-economic intervention were needed in the American economy; what was needed was to make a prosperous working-class America racially inclusive. But in fact, by the end of the 1970s, instead of an economy of expanding middle-class opportunities, what emerged was a world in which race-conscious measures like hiring quotas and affirmative action in employment appeared to be at the center of an increasingly bitter game of redistribution between white and black workers—a world, in President Obama's words, in which "opportunity comes to be seen as a zero sum game, in which your dreams come at my expense."[115]

This was nothing LBJ or the Great Society liberals in Congress intended. But many civil rights leaders could see it coming. Even before the ink was dry on the Civil Rights Act of 1964, figures like Martin Luther King, Bayard Rustin, and A. Philip Randolph warned Congress that

[115] Barack Obama, "A More Perfect Union," March 18, 2008, in *The American Spirit*, ed. Kennedy and Bailey, 663.

achieving “our full citizenship” demanded economic reform as well as civil rights.[116] A thin inclusionary principle by itself could not do the work: it needed to be threaded together with the rest of the democracy of opportunity tradition. It was essential, but insufficient, to “outlaw discrimination in employment when there are not enough jobs to go around.” Decently-paid industrial jobs, they pointed out, already were dwindling – above all in the nation’s “relatively high-wage heavy industries into which Negroes have moved since World War I.” And nothing was taking their place. “[G]reat city minorities” were feeling “the pressures of increasing poverty and unemployment.” Forcing white workers to make room for blacks in every tier of industrial employment was essential. But, again, leaders like King and Rustin predicted it would not be enough. "[I]t would be dangerous and misleading to call for [enforcement of antidiscrimination norms],” Rustin argued, “without at the same time calling attention to the declining number of employment opportunities in many fields." “We cannot have fair employment,” he insisted, “until we have full employment.”[117]

The “full emancipation and equality of Negroes and the poor,” Dr. King told rallies and demonstrations, Congress and the White House, demanded a “contemporary social and economic Bill of Rights.”[118] Like FDR’s Second Bill of Rights, which King was evoking, King's “Bill of Rights” emphasized decent incomes, education, housing, and full employment for all.[119] By contrast, King and the others argued at Johnson’s 1965 White House Civil Rights Conference, LBJ’s War on Poverty not only fostered the “mischievous” notion that “the War on Poverty is solely to aid the colored poor”—it also provided “job counseling but no jobs.”[120] A credible War on Poverty would involve large scale “social investments” to “destroy the racial ghettoes and decently house and employ the white and Negro poor.”[121] How otherwise could the President hope to achieve something like “equality as a fact and equality as a result”?[122]

King’s entwining of civil rights with New Deal-style demands for social and economic enfranchisement and reconstruction found support in LBJ’s Department of Labor. The Secretary of Labor waged a sustained battle against the “partial and piecemeal” social services/job counseling approach being adopted by the War on Poverty. Offering carefully documented accounts of the “human slag heap” emerging in the nation's industrial regions, including central cities where black unemployment already had begun to “explode,” the Secretary of Labor, like King and the organizers of the March on Washington, urged a War on Poverty that included regional and sectoral public investment, incentives for job creation, and coordinated employment services and training.[123] But this structural approach to the problems of the millions of black and white poor and working-class Americans, this “New Deal thirty years late,”[124] and the public

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[116] Bayard Rustin, Address to Democratic National Convention, Atlantic City, N.J. (Aug. 1964), in *Bayard Rustin Papers* (Frederick, Md.: University Publications of America, Inc. 1988), Reel 3, 27.
[117] Bayard Rustin, Draft for Testimony on FEP, in *Rustin Papers*, Reel 4, 4-5, 7.
[118] Martin Luther King, Jr., *Where Do We Go From Here: Chaos or Community* (New York: Harper & Row, 1967), 193, 199-200.
[119] Forbath, “Caste, Class, and Equal Citizenship,” 87.
[120] Rustin, Address to Democratic National Convention, in *Rustin Papers*, Reel 3, 27.
[121] Bayard Rustin, Untitled Article on the Freedom Budget, in *Rustin Papers*, Reel 13, 1.
[122] Lyndon B. Johnson, Commencement Address at Howard University, in *Public Papers of the Presidents, Book II, 1965*, 636.
[123] Memo, Willard Wirtz to Walter Heller, Nov., 19, 1963, Administrative History of the Department of Labor, Vol. III, Documentary Supplement, Sec. III-B, Box 5, LBJ Library, Austin, TX
[124] Rustin, Untitled Article on the Freedom Budget, in *Rustin Papers*, Reel 13, 9.

spending and redistributive measures it demanded, were not in the cards. So, while anti-discrimination law would gain a place in the industrial and public sector workforce for a great many African Americans, a great many were still left out, and poverty in our inner cities only deepened.

Meanwhile, disillusionment with Great Society liberalism did more damage to the fortunes of liberal Democrats than LBJ imagined in his famous prediction that enacting civil rights would cost his party the loyalty of the white South. The conservative appeal of Ronald Reagan completed the unraveling of the old base of solid Democratic support among middle- and working-class whites throughout the nation, who felt that the pro-business, pro-civil rights, pro-"welfare state" liberalism of latter-day Great Society Democrats had too little to offer them—and too much to offer others—during the economic stresses of the late '70s and early '80s.

And small wonder: the legacy of the open opportunity structure, for white men, and the institutions that had sustained a broadly accessible middle class at mid-century, were coming undone. Deindustrialization and deregulation were setting the stage for a new Gilded Age of global finance. With Reagan's blessings, business leaders and lawmakers chipped away at the public and private social benefits forged during the New Deal and expansive postwar decades. By century's end, ordinary Americans' opportunities for material security and a decent livelihood were a shadow of what they had been. An ascendant conservative movement in these decades cut progressive taxes, dismantled initial endowments in public schooling and mass higher education, and executed a devastating attack on unions' economic and political power and on many of the cornerstones of middle-class economic security, such as private-sector pension plans, that unions had safeguarded. At the same time, this movement unraveled much of the structure of New Deal-era financial regulation, enabling the financial sector's meteoric rise. In this narrower and more brittle opportunity structure, and through conservative change in the courts, a thinner, more individualistic, and formalist conception of equal opportunity has taken center stage, harking back to the old liberalism of the *Lochner* Era and its colorblind constitution. The ascendant individualistic, formalistic conception of equality and equal protection condemns racial preferences aimed at undoing the legacies of group exclusion and subordination—just as the individualistic, formalistic conception of equality and equal protection in the *Lochner* Era condemned "redistribution" among economic classes.

Assuming that the nation's class problems were solved, the Great Society's constitutional vision of inclusion left behind the older traditions of constitutional political economy that addressed them—with thicker conceptions of equal rights and equal opportunity and distributive commitments across class lines. As a result, it was ill-equipped to cope with the tangled knot of race and class that lay beneath the main problems it aimed to address.

Conclusion: A Democracy of Opportunity Today

Today, the principle of inclusion, whose greatest triumphs were secured as part of the Great Society, seems an indelible fixture of the constitutional firmament. Martin Luther King has become a kind of secular saint, claimed by all sides of continuing debates about many questions of race and affirmative action. Enormous contestation continues about how best to interpret our constitutional commitment to an inclusionary vision of equal protection anchored in

Brown v. Board, King, and the Civil Rights Act of 1964 and related statutes. But no one doubts the existence of such a commitment—or its constitutional character. We argue today about how far this commitment extends, whether its core is a principle of colorblindness or one of antisubordination, whether other groups such as gays and lesbians have a claim on this inclusionary principle that is parallel to the claims of racial minorities, and so on. The shared premise of all sides in these debates is that an inclusionary conception of equal protection and equal opportunity is a core American constitutional commitment, and that questions about the inclusion or exclusion of a set of groups, including but not limited to racial minorities, are questions of fundamental constitutional concern.

To an enormous extent, our current ideas about the relationship between the constitution and equal opportunity still follow the tracks laid down during the Civil Rights Revolution. Because of this, the older strands of the democracy of opportunity tradition that have been the main focus of this essay—the principles condemning oligarchy and demanding a broad, open middle class—remain largely latent. This is unfortunate, because the democracy of opportunity tradition can fulfill its fundamental promise only when its three main strands are woven tightly together.

The idea that the democracy of opportunity tradition can only work when inclusion is linked with preserving a broad, open middle class and avoiding the dangers of oligarchy is not a new idea. It has been forcefully articulated at several critical junctures in the tradition's long trajectory. In Reconstruction itself, some of the earliest advocates of black equality argued that only with the redistribution of land and capital to the landless, poor freedmen would it be possible to fulfill the guarantees of the Fourteenth Amendment; this led them into nascent "free labor" political alliances with poor white tenant farmers and laborers—alliances that the resurgent white, wealthy "redeemers" in the South crushed as Reconstruction receded.[125] The great labor and agrarian reform organizations of the Gilded Age—the Knights of Labor and the Populists—both stood for a union of the inclusionary principle and with rest of the democracy of opportunity tradition, outfitted for an industrial America. And finally, in the Civil Rights Revolution, as we have seen, some (including King) argued for broad redistributions of opportunity that would have threaded the inclusionary principle together once again with the remaining principles that constitute the democracy of opportunity tradition.

That is not what we got. There are many reasons why. One piece of the story is this: while the Constitution of the Populists and the New Dealers was largely a charter to be fulfilled with legislation and executive action, which courts needed to approve but not initiate, the past half-century has been dominated by a much more court-centered constitutionalism. We live in an age in which constitutional interpretation tends much more exclusively to mean clause-bound, highly doctrinal constitutional decision-making by courts, especially the Supreme Court. This approach places the burden of constitutional decision-making entirely in the hands of the branch least equipped to consider systemic questions of the shape of the political-economic order. Moreover it is a branch whose past forays into constitutional political economy—especially in the *Lochner* era—have come to stand as anti-precedent. Thus, a turn toward complete judicial dominance over the field of constitutional interpretation and construction is almost certain to

[125] Forbath, "Caste, Class, and Equal Citizenship," 32-34, 49-50.

mean an eclipse of the democracy of opportunity tradition—with the possible exception of the principle of inclusion.

To be sure, even the inclusionary principle has never been exclusively court-centered. Framework statutes such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 stand as perhaps the paradigmatic modern examples of legislation that does constitutional work—in the sense that they do not simply enforce the judiciary's judgments about constitutional meaning, but make constitutional meaning themselves.[126] Still, to a substantial extent, our implementation of the inclusionary principle does run through courts, as current court fights by same-sex couples for inclusion in the institution of marriage attest.

The other strands of the democracy of opportunity tradition have a more limited judicial footprint—by necessity. It is no coincidence that the Populist anti-monopolists called for an end to the judiciary's "monopoly" over constitutional interpretation as part of their constitutional program. In general, most interventions in our political economy require action by the political branches, not (only) the courts. This is true of the changes to currency, banking, tax policy and antitrust law that the Populists saw as key restraints on oligarchy. It is equally true of the state action required to create pathways to middle-class livelihoods, for instance in the educational sphere. These crucial elements of the democracy of opportunity tradition are not, in the first instance, projects for the judiciary. But the judiciary often must play some supporting role—at a minimum, through its judgments about Congressional authority to intervene in our political and economic order. For this reason, losing sight of the democracy of opportunity tradition, or writing it out of our understanding of American constitutionalism, would have profound consequences *in court* as well as elsewhere.

The work of entwining the strands of the democracy of opportunity tradition, and recovering our understanding of it as a *constitutional* tradition, is more urgent now than it has been for generations. The reasons are ones the Populists and other Gilded Age reformers would have found familiar. Our present economic and political moment is marked by deep anxiety about economic opportunity. It is far from clear that the broad middle class that has been the backbone of our democratic political-economic order will survive another half-century. It is likewise far from clear that in our politics we will avoid the gradual slide toward oligarchy. These central elements of a democracy of opportunity are no longer things we can take for granted, as many of the architects of the Great Society more plausibly could and did half a century ago.

Rebuilding the democracy of opportunity, and entwining the older strands of that tradition with the more familiar constitutional project of inclusion, is a multifaceted project. It entails building and rebuilding paths from poverty to the middle class, and even to the height of "wealth and distinction," compatible with our contemporary economic order. It means undoing old decisions, many of them dating back to the New Deal, that concentrate the supports for a middle-class life, especially health care and social security, in occupational categories that are disproportionately white and male. Entwining all three strands of the democracy of opportunity

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[126] William Eskridge and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven, CT: Yale University Press, 2010); Bruce Ackerman, *We the People, Volume III: The Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2014).

tradition means identifying and ameliorating the barriers that prevent people from pursuing these paths, *especially but not only* those barriers that have group-based exclusionary effects. It also involves reversing the processes of concentration of economic and political power in few hands. The core idea of the democracy of opportunity tradition is to alter the *tilt* of our political economy: from a political economy that tends to concentrate economic and political power to one that tends to disperse it.

Rising levels of inequality bring many old problems to the surface in new forms that require novel responses. Consider the problem of initial endowments. Most forms of economic independence two centuries ago required land and tools—which some could not afford except by credit on onerous terms. From the early republic through Reconstruction, states and federal government attempted to regulate the availability of these basic building blocks of economic independence through both constitutional and statutory means. Over time, secondary education came to play the same role—leading to a successful effort to spread free, public secondary education, as a basic endowment for all citizens, across the nation, in part through state constitutionalism. Today, higher education plays the same role. It is the starting point for so much of the spectrum of productive work that it is becoming a kind of gateway to a middle-class life. But the expense of higher education means that many people's economic prospects once again turn heavily on the terms of credit, in the form of student loans. Some recent salutary changes to the federal student loan program have attempted to ameliorate this problem, with income-based repayment and loan forgiveness for students who work in public service jobs. Such efforts are important; and indeed they do work that has constitutional significance. But to make these fundamental building blocks of access to a middle-class life universal, we need to revise our system of financing higher education in more fundamental ways. It is likely that we will need taxation to play a greater role, and tuition a smaller role—a direction of change that reflects and echoes the common school movement.

A democracy of opportunity would entail a fundamental shift in the distribution of the tax burden. Today we tax labor—especially middle-class labor—far more heavily than we tax wealth. Indeed, we essentially do not tax wealth at all: states and localities tax some specific forms of property, primarily real estate; and both states and the federal government attempt to tax the *return* on capital in the form of interest, dividends, and capital gains. But no one taxes capital itself. A century ago, the increasing concentration of wealth in a few hands spurred Progressive reformers to enact what was initially simple legislation, but eventually became an Article Five Amendment in response to an intransigent Court, to tax income from any source.[127] Today we need a parallel legislative regime to begin the process of taxing capital wealth. There are many ways to do this, the simplest of which is probably a less loophole-ridden estate and gift tax. Rather than attempting to account for and tax wealth every year, such an approach taxes it once a generation. If such a tax had a high enough top rate, and could not be evaded through trusts and other devices, over time it could meaningfully mitigate both oligarchy and unequal opportunity. It could shift the tax burden from the workers of the present toward the accumulated concentrations of capital of the past.

As our political economy shifts, many sets of questions once old—questions of banking, currency, and credit, of labor and the suppression or protection of unionism—are new again. For

[127] *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895); U.S. Const. Amend. XVI.

instance, the democracy of opportunity tradition should prompt us to revisit the constitutional foundations of antitrust, which began not as a technocratic regime focused on consumer surplus, but as a bulwark against firms so large they tend to find it too easy to crush competitors and capture governments. A democracy of opportunity today would revitalize and deepen legislative and regulatory commitments such as the Community Reinvestment Act, which distribute access to credit on good terms more evenly throughout society. This was an Act born to expiate the sins of racial discrimination in lending—that is, it began with close ties to the inclusionary principle. But it is at the intersection of all three principles that it makes the most difference: modestly restraining the potentially oligarchic concentrations of wealth and power in the banks, by requiring banks to deploy their resources in ways that spread opportunities to start and expand businesses and create pathways to the middle class, and doing all this in a racially and class-inclusive way.

In these examples—and many others—rebuilding a democracy of opportunity today depends on using federal Congressional power to solve national political-economic problems. That much has been clear since the New Deal. And that is why we must return, finally to courts. Today, courts are the arbiters of the scope of Congressional and executive power over domestic policy. And so, paradoxically, the courts may be where that it makes the most difference that the democracy of opportunity tradition is a *constitutional* tradition.

So, let us conclude by considering the court cases with which we began, *Citizens United* and its offspring, and the Obamacare case, *NFIB v. Sebelius.* The thrust of recent Supreme Court decisions in cases such as *Citizens United* and *Arizona Free Enterprise* and *McCutcheon v. FEC* has been the wholesale rejection of statutory efforts to in any way equalize political influence—among donors, among candidates, among citizens.[128] In a variety of contexts, the Court has analyzed these efforts similarly. The Court reasons that government has a legitimate policy goal of preventing corruption, although it defines corruption in an exceedingly narrow way. However, the Court holds that this effort to prevent corruption must come to terms with a powerful force: the Constitution. The sole constitutional value in play in this story is First Amendment protections for free speech.

The democracy of opportunity tradition we have been chronicling can help us understand the distinctive constitutional principles on the other side of these cases. It is not a coincidence that the Montana campaign finance law the Court struck down in 2012 in *American Tradition Partnership v. Bullock*,[129] was enacted 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.[130] The statute was an urgent response to the fact that one company "clearly dominated the Montana economy and political order" —owning or

[128] *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (deeming it unconstitutional for the government to suppress corporate political speech); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett* 131 S. Ct. 2806, 2818 (2011) (declaring state campaign finance rules burdensome to candidates who spent large amounts of personal money to finance their campaigns).
[129] *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (applying *Citizens United* and striking down the Montana law).
[130] Larry Howell, "Once upon a Time in the West: *Citizens United*, *Caperton*, and the War of the Copper Kings," *Montana Law Review* 73 (2012): 27-28.

controlling "90% of the press in the state and a majority of the legislature." [131] Bribery and campaign contributions by large corporations had "convert[ed] the state government into a political instrument" serving the interests of absentee stockholders rather than the people of Montana.[132] Restoring popular sovereignty in Montana required circumventing the legislature, using the Progressives' new invention, the initiative process, through which Montana passed a number of reforms including primary elections; the direct election of Senators; and the Montana Corrupt Practices Act, the campaign finance law in question. The Corrupt Practices Act had a constitutional aim—not only in the sense of being constitutionally permissible, but in a more demanding sense: this statute actually implemented the Constitution as a reform-minded public then understood it, informed by the anti-oligarchy constitutional precepts of the day. In other words, it was an Act that did constitutional work, protecting the political economy on which the Constitution rests.

To a majority of the current Supreme Court, *American Tradition Partnership* was simply a case that followed from Citizens United; there was nothing new to see, and the Montana Supreme Court's decision upholding the law was summarily reversed.[133] That is because the current Court's campaign finance jurisprudence sees only one aspect of the Constitution in play: the First Amendment liberty to speak and spend.[134] How different this jurisprudence would look if the Court could see the real constitutional stakes on *both* sides by considering not only individual First Amendment liberty, but also the constitutional problem that aroused the voters of Montana in the first place. Like the Jacksonians before them, and like the New Dealers later on, the Montana reformers who created the initiative process and used it to enact the Corrupt Practices Act were attempting, in an innovative way, to rebuild the democratic political economy the constitution requires, in response to new economic and political conditions that threatened it.

A Supreme Court that took seriously this important piece of the American constitutional tradition would not necessarily develop an elaborate doctrine of anti-oligarchy, with new doctrinal tests and tiers of scrutiny. But neither would such a Court simply set the anti-oligarchy constitution aside. Anti-oligarchy principles are too fundamental to the American constitutional order and to our democracy of opportunity tradition of constitutional argument. Mindful of the three branches' joint and several obligations to uphold the anti-oligarchy principle, such a Supreme Court would reason very differently about the interplay between its own decisions and the political economy. When confronted with legislation whose aim and effect is to act as a constitutional bulwark against oligarchy, such a Court would weigh this heavily, applying a strong presumption, with deep roots in our constitutional tradition, toward upholding the law.

If *Citizens United* and its offspring return us to the Progressive Era, the Obamacare case calls on us to retrace tracks laid down in the battles over the New Deal. In particular, the case was litigated as a dispute about the scope of federal power—the power to tax, to spend, and to

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[131] *W. Tradition P'ship v. Att'y Gen. of Mont*., 271 P.3d 1, 8 (Mont. 2011) (internal quotation marks omitted) (quoting Michael Malone and Richard Roeder, *Montana: A History of Two Centuries* 176 (Seattle: University of Washington Press,1976)), *rev'd sub nom. Am. Tradition P'ship*, 132 S. Ct. 2490.
[132] Ibid. 9.
[133] *Am. Tradition P'ship*, 132 S. Ct. 2490.
[134] *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

regulate commerce. From this perspective, the Constitution enters the picture only as a constraint: the constitutional question is whether limitations on Congressional power *permit* the law's enactment.[135] Justice Ginsburg plainly saw the stakes in the Court's tightening of these constraints, and noted ominously that both the Chief Justice's opinion and the Joint Dissent "bear a disquieting resemblance" to the "long-overruled decisions" of the *Lochner* era.[136]

There were only the barest hints of the constitutional argument on the other side: that the Affordable Care Act (the ACA or Obamacare) might itself address infirmities that are of constitutional importance. Even among commentators and political activists outside the court, those who did articulate a constitutional imperative for the ACA did so in terms of an individual "right" to health care. The *structural* constitutional stakes were absent.[137]

Yet when viewed through the lens of the democracy of opportunity tradition, that is just where the most profound constitutional implications of the case can be found. In the New Deal fights over the scope of Congressional power, the stakes on *both* sides were plain. The question was whether we would continue to have a democracy of opportunity that sustained a broad middle class. As the scope of health care itself has expanded over the past half-century, both access to care and the potentially ruinous cost of large medical expenses have loomed ever larger over the nation's opportunity structure. Medical debt and bankruptcy have become an important component of all debt and bankruptcy; health insurance has become a central marker of the security of middle-class jobs. But this is a double-edged sword: employer-based health insurance had also, in the pre-ACA world, become a driver of "job-lock," where people's opportunities to pursue a new career path or set out to start a business of their own are thwarted by the need to keep their health insurance. With health care now accounting for, in the Court's telling, "17.6% of our Nation's economy,"[138] "its high cost, its unpredictability, and its inevitability" have made health care and health insurance central to the economic life of every American, and a key criterion on which Americans evaluate all job opportunities.

Meanwhile, before the Medicaid expansion, the pre-ACA Medicaid program was plainly inadequate as a means of providing health care to the American "working poor." The Social Security Act and other New Deal measures were crafted in ways that tended to exclude African-Americans and the Medicare/Medicaid distinction reproduced this divide, with the Medicaid program subject to far more limitations and state control. The inadequacy of pre-ACA Medicaid left many working Americans unable to afford health insurance; they were compelled to pursue their lives and ambitions under the enormous and avoidable burden and peril of going without it. This flouts what Americans long understood as a bedrock constitutional commitment to a political economy in which hard work earns one a decent and dignified livelihood. Exactly what that means has changed according to the standards of one's day. But in today's America, a worker without access to health insurance is recognizably lacking the economic and physical

[135] *See Sebelius*, at 2257 ("We ask only whether Congress has the power under the Constitution to enact the challenged provisions.")
[136] Ibid., 2629
[137] The closest anyone comes to acknowledging such stakes is one oblique sentence, in which Justice Ginsburg states that the "Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it."
[138] Ibid., 2609.

security that are among the basic components of what we now understand to be a middle-class life.

The ACA addresses these problems. An in-kind basic entitlement to health care from the state, even if filtered through the private insurance industry, functions as a kind of initial endowment for the modern era, a down payment on what is needed to successfully navigate today's opportunity structure. Both the so-called "individual mandate" and Medicaid expansion, in other words, were doing constitutional work that the Court in *NFIB* did not acknowledge.

The Medicaid expansion in particular had a constitutional warrant that the Court overlooked, one that encompasses at least two different strands in the democracy of opportunity tradition—the principle of inclusion and the principle of a broad, open, accessible middle class. The law brings poor Americans into the common constitutional destiny of work and opportunity, along a path the Great Society began to chart. Sadly enough, it was a path shadowed by the New Deal's accommodations to Jim Crow thirty years earlier. With its decision hobbling the Medicaid expansion in *Sibelius*, the Court helped assure that the segmented racialized divisions of New Deal social policy—which Congress quite self-consciously hoped to overcome via that expansion—would continue to shape and limit health insurance for poor Americans today.[139]

The Court found the Medicaid expansion "coercive" in respect of states' rights under the Tenth Amendment and the structural principles of federalism. The constitutional value on the losing side of the case was simply the federal government's spending power. But extending the health-insurance preconditions of a middle class life past the boundaries of recalcitrant states is not just any spending project, and it is no coincidence that it involved a bit of pushing against recalcitrant states. The Medicaid expansion was an attempt to use federal power to compel states to set up their medical infrastructures in a way that promotes rather than diminishes equal opportunity along lines of both class and race. This ought to have inflected many major features of the Court's analysis in *NFIB v. Sebelius*.

The question of whether a state's medical system will reinforce inequality of opportunity or diminish it—especially for citizens who have long been disproportionately and deliberately excluded from major dimensions of middle-class life—is not merely a question of public policy. It is also a constitutional question, one that sits squarely at the intersection of two strands of the democracy of opportunity tradition. We have spent more than a century now arguing about the shape of these constitutional commitments. These arguments are unlikely ever to end. Reinvigorating all of the strands of this essential American constitutional tradition can help us understand the import of policy choices and legal and constitutional doctrines in this and many other fields. The regulation of such diverse fields as health care, education, banking and credit, antitrust, and campaign finance often seem quintessential areas in which the state makes policy choices, constrained occasionally by constitutional limits enforced by courts. But that story is incomplete, and obscures some of the deepest and most important relationships between each of these fields and our constitutional order. The choices we make in all of these fields shape our constitutional political economy in ways that many past generations of Americans recognized,

[139] *See generally* Stephen M. Griffin, *Race, Federalism and Constitutional Change*, __Duke L.J. ___ (forthcoming, 2016); Tomiko Brown-Nagin, *Two Americans in Healthcare: Federalism and Wars Over Poverty from the New Deal-Great Society to Obamacare*, 62 Drake L. Rev. 981 (2014).

and that we ought to recognize again, shaping the opportunities each of us enjoys for liberty and the pursuit of happiness.