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Christopher Tomlins, Berkeley Law*

The Progressive Imaginaire: A Critique of *The Anti-Oligarchy Constitution*

Fishkin, Joseph, and William E. Forbath. 2022. *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy*. Harvard University Press.

Abstract. This essay appraises Joseph Fishkin and William Forbath’s *The Anti-Oligarchy Constitution* (2022). The book proposes that an examination of American history since the founding of the republic discloses a polity that, at least incipiently and thereafter occasionally explicitly, promised its members lives of material well-being sufficient to their responsibilities as citizens of a republic. The authors argue that this promise, which they dub “democracy-of-opportunity,” was honed in battle down the years with champions of “oligarchy and exclusion” for mastery of the instrumentalities of “constitutional political economy.” They affirm the constitutive capacities of constitutionalism as a progressive fighting faith that can revive democracy-of-opportunity in the twenty-first century. This essay sympathizes with the authors’ broad objectives, but does not agree with their arguments. It argues that the lesson LPE scholars should take from this critical encounter is that the law of the current conjuncture cannot reconstruct that conjuncture’s economic foundations.

Keywords: Badiou, Lacan, Lochner, Marx, constitutionalism, opportunity, political economy

The project of this book is to help readers imagine a different constitutional political economy and a different way of fighting about constitutional political economy.
—Fishkin and Forbath (2022, 423)

It’s absolutely not a question of telling us what’s good—the good state or good politics—and of making progress in anything whatsoever. All of that is only imaginary impotence. What there is, is a logic that captures a real and requires the hastening of the act.
—Badiou (2018, 132)

“Constitutional political economy.” It is not a phrase that trips lightly off the tongue. Therein, for Joseph Fishkin and William Forbath, lies the problem—a whale of a problem, if the size of their book is any measure: near six hundred pages of substance and argument, claim and prescription, appraisal, evaluation, and remedy. What do they have to tell us?

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I. The Pledge

Contemporary Americans are, sadly, distanced from their history. In that history, the authors' keywords—"constitution" and "political economy"—have belonged together, intimates for nearly two hundred years, until cleft apart in the mid-twentieth century and reconceived as estranged inhabitants of entirely distinct professional loci, entirely differentiated as modes of knowledge and expertise: law, politics, and economics. From the creation of the republic through the New Deal, things had been different. Americans had understood the economic and political promise of the lives they lived to be bound inextricably to the terms on which "We the People" had agreed to form one nation. That understanding made "constitution" much more than some law-imbued words scratched on parchment, early entrusted to the care of juridical elites, defining membership, and distributing authority among the different departments of a distant federal government. The formative implications of "constitution" extended deep into the material lives of the people themselves, not just noun but verb, immediate and urgent, to be argued over, contested, legislated, and realized precisely because of their immediacy. This history's constitution is not a dusty archive of matters agreed on once upon a time, it is a medium that constitutes lives. It is a *constitutive* constitution.

Political economy was the science of constitution: system and structure, morphology and philology, the set of terms, the concepts, and the institutional forms through which the constitutive constitution was created and in which the contest over its implications was joined. It was, on the one hand, a science of the intelligentsia, developed in learned books like Adam Smith's *Wealth of Nations* (1776), or Matthew Carey's *Essays on Political Economy* (1822), popularized in the works of David Ricardo, and Nassau Senior, and John Stuart Mill, and their American epigones.¹ It was a science descended from Aristotle's *Politics*, from the seventeenth century's "political arithmetick," from continental cameralism, *Polizeiwissenschaft*, and physiocracy (Booth 1993; Dubber 2005; Tomlins 1993, 35–59). But it was not founded there, or at least not there alone; for it was also a science scrawled painstakingly in misspelled words on bits of autodidactic paper folded and sewn together, never published, like William Manning's *The Key of Liberty* ([1798] 1922). In Manning's Massachusetts farmhouse, constitution and political economy lay cheek by jowl, describing the task of a "free government" as securing "the safty and hapyness" of the whole population (Manning [1798] 1922, 13; see also Merrill and Wilentz 1993). Something of this cousinage between refined texts and earthier colloquialisms is on display in the subtitle of Carey's *Essays*, which in effect joins him and Smith with Manning as if they were a single expositor of the province of political economy: *The Most Certain Means of Promoting the Wealth, Power, Resources, and Happiness of Nations*. This was a means, as Carey concluded, to be *Applied Particularly to the United States*.

This intimacy, of constituted nation and constituting science, was no singular flash in the founding pan. "The striking thing about most of the constitutional debates we explore in this book, from the founding era through the New Deal, is that *all sides* were making arguments about constitutional political economy" (Fishkin and Forbath 2022, 6). Four-fifths of *The Anti-Oligarchy Constitution* is devoted to a synthetic history of two hundred years of constitutional conflicts, from the creation of the republic until the Great Society, designed to prove exactly this point and thereby sustain the authors' most fundamental claims: that the activity of *constituting* "We the People" as a polity is

¹ On the English political economists, see, generally, O'Brien (1975). By "American epigones" I mean such as, for example, Thomas Roderick Dew (1802–1846), professor of history, metaphysics, and political law at the College of William and Mary.

continuous (no transcendent, frozen, original intentions here); that the terms of the material life and lives of “We the People” thereby constituted cannot be pried apart from the activity of constituting, hence the book’s governing locution of “constitutional political economy”; and, most importantly, that the natural people living those lives are therefore constituted not simply as legal persons but as material persons. “Citizenship” (or membership, or civic belonging) may mean the assemblage of rights that create their possessors as legally equivalent subjects, but it also means the assemblage, or denial, of material endowments that enable their possessors to live dignified lives sufficient to their civic responsibilities.

Acknowledged fitfully, and always selectively, throughout the two hundred years of constitutional conflicts traversed in the body of the book, this conception of civic equality as a material and not simply a legal condition received its most extensive airing during the New Deal, when it animated Franklin Delano Roosevelt’s call for the creation of a “democracy of opportunity”—opportunity for all, untrammelled by lack of political or economic capacity. Roosevelt’s call for a democratic constitutional political economy of opportunity becomes the authors’ own. They read it back and convert it from the outset onward to their need to name the long-lived American historical tradition of safety and happiness that they contend has been misplaced and forgotten, and that they wish to recover and reanimate for the present. The “*democracy-of-opportunity* tradition,” they tell us, “is as old as the republic itself” (Fishkin and Forbath 2022, 3). But it does not dwell alone. It forms one side in a Manichaean contest with a distinctly different tradition, which is the constitutionalism of oligarchy and exclusion, a constitutionalism that has its own name and its own political-economic instantiation, likewise wrenched here from particular historical circumstances to do battle royale across two centuries with democracy-of-opportunity: the desiccated laissez-faire political economy of Lochnerism (*ibid.* at 6, 31, 107, 139–50).

In *The Anti-Oligarchy Constitution*, “Lochner” is much more than the surname of the hapless Utica NY German immigrant baker Joseph Lochner, whose conviction in 1899 for violating New York’s Bakeshop Act, N.Y. Lab. L. §§ 110–15 (1895), was overturned six years later in *Lochner v. New York*, 198 U.S. 45 (1905). It is more even than the label relentlessly attached ever since by “progressives” to any and every instance of juridical antagonism to restraints on liberty of contract or indeed anything that smacks of rent-seeking, redistributive “interventions” to redress prevailing economic disadvantage. Here it is inflated backward and forward into a transhistorical constitutional political economy of privilege, the King Ghidorah that the Mothra of democracy-of-opportunity has had to confront down the years.² Reconstruction was the first comprehensive iteration of a democracy-of-opportunity, and it was Lochnerism *avant la lettre* that broke it. The New Deal was the second iteration, and to succeed it had to vanquish Lochnerism *de facto*. And it is Lochnerism reascendant as neo-Lochnerism that has undermined and swept away the bastions of democracy-of-opportunity that the New Deal constructed. It now reigns so thoroughly that alternatives to it have been defined out of existence and hence forgotten.

With some decorative additions, this is the story, in a nutshell, that Fishkin and Forbath present. Their objective is not just to recover what has been expelled from contemporary memory, but to deploy it anew in a resumption of the warfare between competing political economies that, in effect, defines American history.

² See, for example, *Ghidorah, the Three-Headed Monster*, directed by Ishiro Honda (Tokyo: Toho Co. Ltd., 1964).

II. The Turn

By now it must have become clear that *The Anti-Oligarchy Constitution* is something other than the academic exercise that publication by a university press and one hundred pages of endnotes normally signify. Indeed, the authors make no bones about it. Their book is a summons to “our fellow liberals and progressives” (18) to confront the three-headed monster of oligarchy, inequality, and privilege, and to do so through a renewal of constitutional argumentation, but *outside* the unfriendly confines between First and Second Streets NE, and East Capitol Street and Maryland Avenue NE. Their cudgel will be the native-born democracy-of-opportunity tradition.

As Fishkin and Forbath define it, the tradition is formed of three braided strands.

The first, and most venerable, is the *anti-oligarchy* strand, highlighted in their book’s title. Oligarchy means the mutually reinforcing concentrations of economic and political power that privileged minorities wield to controvert and undermine America’s constituted institutions. Like their English radical Whig counterparts, the founding generation called such concentrations of power “corruption.” Democracy-of-opportunity deplores corruption. It seeks to dilute concentrations of power, and to build countervailing associations of the many to oppose the few.

The second is the *republican* strand. The democracy-of-opportunity tradition is deeply imbued by a morality of distributive fairness—“how economic opportunities are structured for ordinary Americans” (9)—because only distributive fairness can produce the mass middle class essential to the maintenance of a republican polity. The connotation of “middle class” to the authors is not that which lies between wealthy upper and impoverished lower in a scheme of social stratification; it is rather what William Manning would have called “sufficiency” or “competency”—the capacity for honest self-maintenance that was the expectation of “the middling sort” of people around the turn of the nineteenth century (see Vickers 1990, 3-29). In Fishkin and Forbath’s modern translation, this becomes “a set of social baselines” that guarantees “an ‘American standard’ of material comfort and security, along with the wherewithal and opportunities to make a life of value in one’s own eyes” (Fishkin and Forbath 2022, 9). In effect, here is the massive post-WWII middle class envisaged by, for example, the New Deal’s labor law reforms and the 1944 GI Bill.

Finally comes a principle of *inclusion*, across lines first of race, and then sex, and extending indeed to all “invidious group-based distinctions” (ibid., 10). Imagined only fitfully at first and afterward realized more often in the breach, inclusion nevertheless became part of the democracy-of-opportunity tradition during Reconstruction, when it was written into the Constitution itself, and later much more fully realized during the New Deal.

The bulk of *The Anti-Oligarchy Constitution* is devoted to layering historical flesh onto these bones of contention. I do not doubt the seriousness of purpose with which Fishkin and Forbath approached that task. I have called their work “synthetic,” by which I mean it is work that draws on their acquaintance with a very extensive body of academic research, and that fashions that research into an organized narrative that provides support for the arguments they advance. Yet it is quite evident that the authors do not believe that their arguments are intellectually dependent on the evidence they accumulate in their support, for the ultimate aim of their book is not historical, as such, at all. Their aim is contemporary and aspirational. It is to reckon with the absence from the present of the tradition

invented—called into being—by the authors through the process of definition,³ and to explore what the consequences of its insertion into “our modern understanding of the Constitution” might be (18). Those readers “whose chief interest” lies in “the implications of our argument for contemporary constitutional politics” are actually given leave to dispense altogether with the entire historical narrative, the 80 percent of the book that separates its definitional introduction from its climactic conclusion in chapter 9 (*ibid.*). This is entirely understandable because the authors’ foundational point is not that constitutionalizing political economy to produce democracy-of-opportunity is valid because the history they have adduced shows it to have had a past presence, but that it is valid because it is desirable. Marx—who was not an advocate but a critic of political economy—elevated his materialist conception of history because he thought it a decisive and scientific repudiation of the claims that he criticized. Without its rigorous historical argumentation, *Capital* would be nothing. Here, the history is, to put it politely, ornamental; or impolitely, filler.

Fishkin and Forbath should agree with me on this point. For, if their history were not filler, if it were in some fashion theoretically essential to their enterprise, it would have to be judged, unfortunately, inadequate to the task. Their synthesis is a descriptive narrative of American history firmly anchored in the scholarship of the second half of the twentieth century. It joins the socio-labor and labor law history that hit its highest notes between 1970 and the early 1990s to the broad body of nineteenth-century political history championed by people like C. Vann Woodward and Eric Foner, and to the New Deal history of which the celebratory highlights were written in the 1950s and 1960s by Arthur Schlesinger Jr. and Irving Bernstein.⁴ Fishkin and Forbath’s Progressives are democratizing good guys, not the organizational technicians of “post-progressive” history.⁵ Indeed, the rhythm of the account is classic progressive history, a rhythm of up and down, thrust and parry, reform and reaction, almost in a kind of Popular Front “who rules at home” vein⁶—a history of two centuries of determined struggles to widen the promise of America so as to include its downtrodden in the “American Dream.”⁷ This kind of narrative always has a “bloodied but unbowed” quality. Faults and reverses are acknowledged but eyes remain fixed on the glittering prize, which is always the New Deal, the moment of charismatic fulfillment.⁸ Such is the moral fervor of the genre that distinctly dubious characters, like the great shyster, William Jennings Bryan, get sorted into the ranks of the good. Bryan, agent of the co-option of late-nineteenth-century agrarian radicalism, here becomes “the avatar of Populist outrage” (171). The genre is also parochial, written very much “in the American grain” (Williams 1925). Much of its content was sketched by Hendrik Hartog (1987) almost forty years ago in his celebration of constitutional history “from below.” Here, Hartog’s bottom-up perspective is

³ By “invented” tradition I mean to invoke Eric Hobsbawm’s description of “responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition” to characterize what Fishkin and Forbath attempt here (Hobsbawm and Ranger 1983, 2). Hobsbawm adds, “It is the contrast between the constant change and innovation of the modern world and the attempt to structure at least some parts of social [and in this case also intellectual] life within it as unchanging and invariant that makes the ‘invention of tradition’ so interesting for historians of the past two centuries” (*ibid.* at 2). As an alternative to imagining traditions, Fishkin and Forbath might have considered the “history of concepts” associated with, for example, the work of Reinhart Koselleck in Germany and Raymond Williams in the Anglophone world.

⁴ This literature is too vast to recapitulate in a footnote. My complaint is not that the synthesis is clumsy, for it is not. My complaint is that it is very dated and rather porous. As I try to show, it has too many blind spots and provincialisms to be able to perform as a historical representation of American political economy.

⁵ For a taste of what this entails, see Galambos (1969, 25–45; 1970, 279–90; 2005, 1–38).

⁶ See, (very) generally, Denning (1997).

⁷ This is what my Johns Hopkins dissertation advisor, the Louis Galambos of note 5 above, used to describe as “biff and bang history.”

⁸ A point well made in Novak (2022, 259–72).

supplemented by inspiring heroes added from the top down: Lincoln as the embodiment of the economy of free labor; FDR as the embodiment of what an anti-oligarchy constitution might look like.

This is history that has little to offer the rising generation of American historians, so it is a good thing it was not written with them at all in mind. Still, the disengagement is sad, because it is in the work of that generation that one finds the strongest representation to date of the braiding of a broad conception of political economy with a theory of American history and of American democracy—the genus of interpretation that has come in the last fifteen years to be called settler colonialism, and that is necessarily global rather than purely local in its ultimate implications.⁹ If one is seeking “the economic foundations” of the American polity, this is where much of one’s energy should be focused. But the historical scholarship on which Fishkin and Forbath balance their arguments almost entirely predates this body of work, and so they tell us rather little about the relationship between constitutional thought and the violent expansion of European settlement: no colonizing impulse here, no “border law,” no Mexican War (Rosen 2015; Gomez 2007). Jacksonian “Herrenvolk democracy” was “a tragedy of American political and constitutional development from which we are still disentangling ourselves” (Fishkin and Forbath 2022, 77), not the fated and inescapable consequence and extension of (at that point) more than two centuries of what Sven Beckert calls “war capitalism” (2014, 29–82). The 1862 Homestead Act was a democratizing distribution of “public lands” to the landless, not the next state-sponsored step westward in a genocidal war for the command of continental resources against First Nations peoples. The political economy of slavery is treated in the book almost entirely as a sectional phenomenon; the chapter on “The Second Founding” (Reconstruction) when “America reconstituted itself into a racially inclusive republic of free labor and equal citizens” (109) seems to me just a tad naïve,¹⁰ a progressive “up” to be followed by the reactionary “down” of the Gilded Age; and so we proceed, up hill and down vale, in a rollercoaster narrative, to the ultimate sugar high of the New Deal, followed by the devastating down of its long slow ebb and eventual neoliberal strangulation. As showmanship this narrative is skilled and entertaining, and I do not discount those qualities at all. Academic history is distinctly distanced from the general public audiences that public intellectuals desire to reach. The latter being clearly the target in this case, Fishkin and Forbath have chosen correctly to lighten the reader’s burden. In this essay, however, I am addressing that segment of scholarly readers closely engaged in the advancement of the intellectual enterprise of Law and Political Economy. As such, my conclusion is that this is not a narrative of American history as I currently understand it or practice it. It is history written in the exceptionalist tradition, history as wish fulfillment. For those desirous of engaging in critical historical analysis of Law and Political Economy it does not offer a model I would recommend.

III. The Prestige

As history, then, in my view, *The Anti-Oligarchy Constitution* fails, except, perhaps, in one regard, its penultimate chapter, “The Great Society and the Great Forgetting,” which properly draws attention to the fatal reliance of liberals/progressives on a juridical path of ascendancy after they lost their grip on politics, and to the simultaneous disciplinary fragmentation of “political economy” into discrete

⁹ A genre of interpretation generally attributed in the first instance to Australian historians, notably the late Patrick Wolfe, settler colonialism has become in the last fifteen years a major and vital component in North American historical studies and throughout the Anglosphere. For an overview, see Veracini (2013, 313–33). For work of particular relevance to American legal history, see Frymer (2017), Tomlins (2010).

¹⁰ Compare, for example, Hartman (1997, 115–206).

technocratic discourses. As intellectual history the story of fragmentation is told in great detail, and with a real eye to the intersection of the juridical and the technocratic, by Kunal Parker in *The Turn to Process: American Legal, Political, and Economic Thought, 1870–1970* (2023). Parker’s analysis also calls into question *The Anti-Oligarchy Constitution’s* argument that fragmentation is a mark of the *second half* of the century, which has real implications for the book’s overall argument. Finally, Fishkin and Forbath manage to perform their own “great forgetting” by omitting the Vietnam War and its economic effects from their account of the “eclipse” of the conditions in which some form of “progressive political economy” and the attendant post-WWII “compression” of economic inequality had come to be possible (363).¹¹ These cavils apart, Fishkin and Forbath’s account of the conditions in which neoliberalism’s “great unraveling” of the modest US welfare state became possible is acute.

“The Great Forgetting” is the lead-in to the final chapter’s climactic prescriptive agenda for “reinventing” the anti-oligarchy constitution that the great forgetting has rendered mute. We who have slogged up from the introduction here rejoin those readers who skipped ahead on the aerial tram to find out how the authors want contemporary constitutional politics to change so as to repurpose and remobilize what has been forgotten. We encounter a comprehensive menu of recommendations that the imagined audience (variously described as liberals, progressives, social democrats, socialists, Congress, courts, presidents, and indeed all Americans) “should” or “must” undertake to achieve the objective that the authors have embraced. The authors are law professors, so this final form of prescriptive address is to be expected. Indeed, in a way *The Anti-Oligarchy Constitution* is like a monster law review article: an introduction that identifies a problem for resolution; a long and detailed argument attended by curated empirical evidence that makes the persuasive case; and a crowning prescription for action. The whole is carefully road-mapped to send its different reader segments off in this or that direction to maximize their reading efficiencies: “Readers whose chief interest is the implications of our argument for contemporary constitutional politics may wish to skip ahead and begin with that chapter. Readers chiefly interested in one of the critical periods we discuss are welcome to begin with that one. For readers who wish to understand the whole arc and the richness of the democracy-of-opportunity tradition, and its role in the American story, we offer the chapters in the order they appear” (18). Considered as an artifact, the book is—and quite properly, for such is its reason for being—a carefully constructed device for the production of agreement with its authors’ conclusions.

That, at least, is the paratextual surface of the artifact (Genette 1991). Can one burrow beneath the surface? What can one extract from within this highly constructed shell? What is its—perhaps involuntary—“rational kernel”? I have said that I would not recommend *The Anti-Oligarchy Constitution* as a model for those desirous of engaging in critical historical analysis of law and political economy, but is there some other interior reason for recommending it, for example as the enactment of a theory about the relationship between law and material life (something that students of law and political economy should surely want to engage)?

I will respond to these questions first elliptically, then directly.

The elliptical approach returns me to “The Great Forgetting,” less as a chapter in a book, more as a claim about being. Democracy-of-opportunity *was*, and then it *was not*. This “switch in time” is deeply reminiscent to me of the retreat from “the passion for the real” that Alain Badiou identifies in *The*

¹¹ On inequality, “compression,” and the explosive post-1980 restoration of inequality, see Gordon (2016); see also, generally, Piketty (2014; 2020).

Century as the experience of the past fifty-odd years. The difference is that Badiou names this retreat not as the creation of a void, or an absence (a forgetting) but as a “restoration.” Passion for *the real* is what burst upon the world in the later nineteenth century and remained with it for going on a hundred years. *Restoration* “is above all an assertion regarding the real: to wit, that it is always preferable to have no relation to it whatsoever” (Badiou 2007, 26). Restoration, then, is a return to a prior condition of being, to what has generally prevailed: the dreamworld of semblances, the symbolic order constructed in law and language. *The Century* describes a long moment of exception (roughly a century) in which materiality—determinate being—fights its way to the center of things.

Fishkin and Forbath tell us something different. First, they want their readers to believe that even if not always acknowledged, determinate being in some form has always been at the center of things. Their *sine qua non*, after all, is “We the People”—a population with needs and expectations. But how do they establish the material being of “We the People” at the center of things? Through legal emplacement. Material being is at the center of things because it is *constituted* as such. From this ur-statement flows the entirety of their argument. Securing the material lives of “We the People,” ensuring “the safty and hapyness” of the whole population, was and remains the essential meaning of constituting a republic.

On one hand, this is actually a huge claim. Unlike the French Revolution’s *Declaration of the Rights of Man and Citizen*, which cognizes only a qualified *legal* subjectivity as a definition of civic belonging—“Men are born . . . free and equal *in rights*,” the extent of which in exercise “can only be determined *by law*”—the people of *The Anti-Oligarchic Constitution* are represented as subjects with material and not just legal claims, to which “law” must respond. Fishkin and Forbath fudge this a bit by calling it “democracy-of-opportunity,” but what their claim amounts to is really something one might call democracy-of-condition. “We the People” premised their constitution on its capacity to constitute their material well-being, their “safty and hapyness”: Justice, Tranquility, Security, General Welfare.

Fishkin and Forbath want to persuade doubters to re-up for *constitutional* battling because their democracy-of-opportunity tradition promises recognition and satisfaction of present material needs and interests, just as it had in the past. Fishkin and Forbath’s best example of recognition and satisfaction, not just as a modern innovation but acknowledged from the outset and therefore evidence of a tradition that can be judged foundational, lies in Michele Landis Dauber’s work on charitable appropriations for disaster relief (Dauber 1998; 2012). Generally, however, democracy-of-opportunity leans heavily on opening up “opportunity” rather than ensuring specific material outcomes, as in the Homestead Act, 12 Stat. 392 (1862) (opportunity to make something of oneself through family farming), or the Reconstruction amendments and associated legislation (opportunity to make something of oneself by joining in the range of activities hitherto open only to free white citizens), or the 1935 National Labor Relations (Wagner) Act, 49 Stat. 449 (1935) (opportunity to make something of oneself through engagement in collective bargaining protected by countervailing guarantees of “full freedom of association” assuring “actual liberty of contract” to designated segments of the workforce).

But in all of this lies peril and vulnerability as well as opportunity. Democracy-of-opportunity certainly has real material promise, for its objective is to govern material circumstance. But that promise is legally constituted both in extent, and as such. The condition of legal constitution in a democracy-of-opportunity does not oblige the delivery of material content. Indeed, as the authors demonstrate, democracy-of-opportunity can wink in and out of existence: it can be established, promoted, forgotten, retrieved, and modified. It is not a thing, it is an idea. Material life is not its determinant. Material life is its subject.

Because democracy-of-opportunity is an idea, what I am calling determinate being/material life remains prey to the symbolic order. Here is my direct response.¹² This is the Hegelian trap that Feuerbach denounced and that Marx criticized in *On The Jewish Question* (Marx [1844] 2003) and would eventually argue could be resolved only by inversion (because Marx appreciated Hegel's dialectic and wanted to hang on to as much of it as he could). "It is not the [legal] consciousness of men that determines their [social] existence, but their social existence that determines their consciousness" (Marx [1859] 2003, 263; see also Sayers 2022). This familiar statement seems like one with which those whose objective is "reconstructing the *economic foundations* of American democracy" would want to agree, except that behind Fishkin and Forbath's democracy-of-opportunity it is precisely the legal that determines (constitutes) the social. (If this were not so their book would have no meaning.) And so, although their point is that the *particulars* of democracy-of-opportunity have been forgotten, in Badiou's sense Fishkin and Forbath are in general busily engaged in the project of *restoration*—the reestablishment of the authority of the symbolic order. They sense that there is an objection here to their project, but they dismiss it as "profoundly wrongheaded" (427). This is a rather odd locution for so critical an element in their argument. It seems to mean that their critics fail to realize that *their* symbolic order is a *good* symbolic order rather than the bad one that conservatives have wrought.

If we acknowledge, with Badiou, that in capitalism "the real of Capital is the real of universal dispersal, circulation, and absolute atomization," (Badiou 2018, 110) our contemplation of that real is almost invariably a denial of it because it is shocking and brutal—an obscenity, a psychosis (see Aristodemou 2014; Brennan 1993). We put in its place a dreamworld of meanings that defends us from the real by tempering its trauma. *The Anti-Oligarchy Constitution* is a contribution to that dreamworld from "the left," from self-described "liberals and progressives." The symbolic order can be made to work for us. For Marx, however, the objective was not to perpetuate the dreamworld but to awaken the world from its dream of itself, so that it might change. This is the "passion for the real" that Badiou identifies as the characteristic of the century that ended around 1970, to be followed by the resumption of denial that "restoration" signifies.

We often forget that Marx was a law student, and that much of his thinking, as a materialist, was formed in a dialogue with his study of law. As a young man, still struggling to get past Hegel, he expressed the relationship between law and materiality in the form of a truth-obligation. "The law is not exempt from the general obligation to tell the truth. It is doubly obliged to do so, for it is the universal and authentic exponent of the legal nature of things. Hence the legal nature of things cannot be regulated according to the law; on the contrary, the law must be regulated according to the legal nature of things" (Marx [1842] 2003, 227). Things had a legal nature, but that legal nature was not imparted to them by law. It was that part of their nature that informed law. If law was not true to that legal nature, it was simply an obfuscation, a lie. "[I]n the concrete expression of a living world of ideas, as exemplified by law, the state, nature, and philosophy as a whole, the object itself must be studied in its development; arbitrary divisions must not be introduced, the rational character of the object itself must develop as something imbued with contradictions in itself and find its unity in itself" (Marx [1837] 2003, 12). We see here a suspicion of metaphysics and the elaboration of a conception of law not as right, or reason, or ideal conceptual structure, but as historical fact, an emanation of material life. Here in microcosm, says Donald Kelley, one encounters "the first Marxian prefiguring of historical materialism . . . formulated in the context of a fundamental, and even revolutionary, critique of systematic jurisprudence" (1978, 355).

¹² The remainder of this section reconsiders and reformulates arguments first offered in Tomlins (2021).

One can discern in these writings the impulse to embrace Comte, to embrace *empirical* investigation of *material* life in reaction to the grip of the gapless perfectionism of form celebrated in the *other* nineteenth-century science with which Marx had been wrestling, the science of *Pandektenrecht*, the “self-completing and thus autonomous system” of German legal science (Goodrich 2018, 102–03; Berkowitz 2005). This is the trajectory that would lead Marx, as he explained himself, away from jurisprudence to political economy (Marx [1859] 2003). But as I have stressed, Marx’s encounter with political economy was a critical encounter, not an embrace but a means to an end. Marx was a *critic* of political economy—his was not an alternative socialist version of it. *Capital* begins with the thing itself, the product of labor, the original nature of which is to satisfy human needs. We watch it become a commodity, and we encounter the serial conditions of its existence as such, and their implications, all the way through Volume 1 (Marx [1867] 2003). But we never forget (or should not forget) that beginning, because the object of the exercise is to understand all those subsequent conditions of existence as layers of obfuscation piled onto the product of labor originally created to satisfy human needs. As William Clare Roberts has observed, *Capital* is a “critique of the forms of thought proper to capitalism, and to the capitalism that gives rise to them, in the name of liberation” (2017, 74). At its core lies a radical and emancipatory politics of freedom as the rejection of domination, an assault on the legalities of exchange that promise individual freedom but fetishize commodities in the market and license despotic command within the labor process. Its political target is the humanistic “individualizing and moralizing” tendencies of nineteenth-century socialism that would cure exploitation by purifying exchange, and that have remained with us in the reformist rights talk of our own generation of liberals and progressives. These are the dreams from which Marx wished to arouse the world, symptoms all of the gulf “between appearances and reality, seeming and being” (Roberts 2017, 147) that haunts humanity.

IV. The Curtain

In targeting “the forms of thought proper to capitalism,” Marx’s critique of political economy takes aim at the symbolic order. In doing so, it also demonstrates just how difficult it is to disentangle the symbolic from the real.¹³ Indeed, it is so difficult, and the symbolic order so powerful, that it often seems that our only option may be simply to accept and live with our impotence in the face of a symbolic order that, after all, *protects* us from the real, the terrifying other, the abyssal life that we seek at all costs to avoid.

For the last fifty years (not coincidentally the years of *restoration*) critical theory has lavished its attention on the symbolic order. Perhaps no single historical intellect has had greater influence on the attention that has been lavished than Walter Benjamin, whose writings were so comprehensively devoted to the nature of the symbolic. Benjamin’s involuntary elevation to hero figure of cultural studies is an index of the elevation of attention to the symbolic to its current point of utter ubiquity. Yet we would do well to remember that Benjamin’s preoccupation with the symbolic was devoted to finding its fractures, the points at which it might be penetrated, seen through (Tomlins 2020a). Just as Marx wished to wake the world from its dream about itself, so too Benjamin wished “to find the constellation of awakening” (*ibid.* at 20–23).

¹³ Even the heroic attempt in the “Preface” to *A Contribution to the Critique of Political Economy*—Marx at his most “austerely structural” (Callinicos 1988, ix)—is not immune from entanglement. See Tomlins (2021).

Like Badiou in Benjamin's wake, both Jacques Lacan and Louis Althusser address the symbolic order in the moment of *restoration*, the ending of the passion for the real, the moment in which the world has turned its back, and thus once more surrendered to impotence. None of them are implicated in this restoration of impotence. All—like Marx, like Freud—are rendering impotence *visible* by calling it to our attention. Each in his own way opens us to the possibility of an “unblocking”; the “fall of th[e] figure of the subject-supposed-to-know” that makes way for “an act” (Badiou 2018, 25).¹⁴ Each is antiphilosopher, one who does not attempt to plug our holes by filling them with meaning, but who seeks to hasten the act, which is precisely indifferent to meaning. For the act is a leap of faith. It guarantees nothing. But it is a leap of necessity.

If even the most radical political economy cannot be disentangled from the symbolic, logic from meaning, then nothing remains but decision—choosing to choose. “That’s what the act is: [determinate] being at the point where there is nothing but the possibility of choosing” (Badiou 2018, 160). The act is Benjamin’s “leap in the open air of history,” which he described as “the dialectical leap Marx understood as revolution” (2006, 395; see also Runia 2014). Here the Marx of the *Manifesto* joins the Marx of *Capital*, because it is in exactly that conjunction—of passion with science—that the hastening of the act is contemplated, and decisions are reached.

V. The House

It is entirely possible—perhaps probable—that Fishkin and Forbath will find this critique unfair. Theirs is an attempt to live in the present, and with the present, and to summon such resources from the past as can assist them in altering the trajectory of the present to whatever degree may be possible (inevitably modest, such is the contemporary conjunction of forces) so as to render the lives lived by the mass of Americans just a little bit less vulnerable to contemporary America’s manifold inequalities.¹⁵ After all, *restoration* signifies the resumption of the complete and utter entanglement of the real with the symbolic that, if we adopt a world historical scale of secular temporality, had really been interrupted only momentarily. It could be argued with great force that as a field of study, Law and Political Economy is precisely a signal instance of that entanglement, and also a way of studying that entanglement, and hence that “constitutional political economy” and “democracy-of-opportunity” are as good a pitch as any for the proper object of study.

Still, if one wished to offer a retort to *The Anti-Oligarchy Constitution’s* program for reconstruction of the economic foundations of American democracy, what better example than Marx’s own retort of May 1875 when, aging and infirm and no doubt cantankerous on account of both, he sent Wilhelm Bracke a curt annotation of the unity program adopted by the German Social-Democratic Workers’ Party and the General German Workers’ Union as they joined to form the Socialist Workers’ Party of Germany. It was (rather like today) hardly a moment of promise. Four years after the Franco-Prussian War, thirty years after the heady days of 1848, the new Germany, finally united in one *Reich*, stood supreme over a supine European continent, a triumphant instantiation of Bismarck’s authoritarian

¹⁴ On the act, see Aristodemou (2019, 347, 361). On the relationship between Lacan’s act and Badiou’s event, see Bell (2011, 105–20). For a distinct articulation of the act, see Tomlins (2020a, 17–20; 2020b).

¹⁵ The sentiment is understandable. There is, nevertheless, something profoundly conservative, Burkean, in its articulation. “Our answers . . . look to the future, in significant part, by drawing on America’s past. We think that approach is inevitable when making constitutional claims and arguments. It is central to the American constitutional tradition to bring the past constantly to bear on the present, as we try to build a future constitutional order that Americans can recognize as authentically ours” (Fishkin and Forbath 2022, 424).

conservatism hand in glove with deep Prussian Hohenzollern reaction. The unity program was, in its querulous way, defiant. It was also, Marx thought, deeply confused.

Marx's annotation is known as the *Critique of the Gotha Programme* ([1875] 2003). We can confine ourselves to one fragment of the *Critique*, that in which Marx responds to the statement "The emancipation of labour demands the raising of the means of labour to the common property of society and the collective regulation of the total labour, with a fair distribution of the proceeds of labour" (ibid. at 83). What on earth does this mean, he asks. What is "a fair distribution"?

Do not the bourgeois assert that the present-day distribution is "fair"? And is it not, in fact, the only "fair" distribution on the basis of the present-day mode of production? Are economic relations regulated by legal concepts, or do not, on the contrary, legal relations arise from economic ones?

...

Any distribution whatever of the means of consumption is only a consequence of the distribution of the conditions of production themselves. The latter distribution, however, is a feature of the mode of production itself. The capitalist mode of production, for example, rests on the fact that the material conditions of production are in the hands of non-workers in the form of capital and land ownership, while the masses are only owners of the personal condition of production, of labour power. If the elements of production are so distributed, then the present-day distribution of the means of consumption results automatically. If the material conditions of production are the collective property of the workers themselves, then there likewise results a distribution of the means of consumption different from the present one. The vulgar socialists (and from them in turn a section of the Democrats) have taken over from the bourgeois economists the consideration and treatment of distribution as independent of the mode of production and hence the presentation of socialism as turning principally on distribution. *After the real relation has long been made clear, why retrogress again?* (Marx and Engels [1875] 2003, 84, 87-88)

Why indeed? The law of the current conjuncture cannot reconstruct the economic foundations of that conjuncture. Clarity about what is possible requires disentanglement of the elements of one's situation, clarification of the components of the conjuncture—not because one's objective is to plunge immediately into wish-fulfilling revolutionary struggle (the ultraleftist error), but precisely in order to know *how* to proceed.

1848 was long in the past, but its advice was, and is, still pertinent:

All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and *man is at last compelled to face with sober senses, his real conditions of life*, and his relations with his kind. (Marx and Engels [1848] 2003, 487)

Here is the beginning of the moment of exception, the beginning of the century that will end in 1970. Its lesson is that in order to understand the relation of law and political economy, law and production, law and capitalism, we must first disentangle them. "Constitutional political economy" is undoubtedly

a site on which disentanglement can proceed, but it is not itself a means to that end. For it assumes as a unity that which must in fact be broken apart, if we are to find the fragment of truth within.

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