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The Political Economy of “Constitutional Political Economy”

Jeremy K. Kessler*

Introduction

Since the early 1990s, constitutional history has experienced a renaissance.¹ This revival had many causes, but three stand out: the Rehnquist Court’s attack on formerly sacrosanct features of the “New Deal agenda”;² Reagan-Era reassessments of American political development by political scientists, historians, and historical sociologists;³ and the frustration of constitutional scholars with the inability of legal process theory or political philosophy to produce “authoritative constitutional principles.”⁴ Spurred by legal crisis and this mix of disciplinary innovation and stagnation, law professors began to tell new stories about our constitutional heritage.⁵ They focused on the sources and significance of the New Deal’s “constitutional revolution,”⁶ while also re-examining the constitutionalism of the Founding and Reconstruction in light of New Deal transformations.⁷

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1. See Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1059–60 (2005) (recognizing that “New Deal scholarship became hot in the early 1990s”).

2. *Id.* at 1058–59.

3. See *id.* at 1070–72 (describing the emergence of “new institutionalism”).

4. G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 607 (2002).

5. *Id.*

6. See, e.g., 1 BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 5 (1998) (calling for re-examination of the conventional account of the “revolution,” according to which “the Supreme Court suddenly and substantially reversed its position in . . . 1937 . . . [in] response to such external political pressures as the 1936 election and the Court-packing plan”); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19–22 (1996) (reviewing competing accounts of the lessons learned from the Court’s change of course in 1937); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 205 (2000) (describing the “constitutional revolution” as an interpretive revolution that resulted in “a new orthodox conception of constitutional adaptivity”); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1898–1934 (1994) (suggesting that a significant part of the Court’s transformation occurred before the Court-packing crisis of 1937).

7. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 122–29 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*] (examining the relationship between the Founding and the New Deal); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 274–78 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*] (applying analysis of the New Deal to Reconstruction).

Given the centrality of the New Deal to this project, constitutional historians seemed to be heading toward a fundamental reconsideration of the relationship between constitutional law and political economy. That is, after all, what New Deal constitutional conflict was all about: the extent to which the Constitution allowed a national political movement to alter the country's economic life in fundamental and lasting ways. And yet, the new generation of constitutional historians generally avoided political economy as such. To be sure, their histories carefully reconstructed early twentieth-century debates about the constitutional authority of the state and federal governments to displace common law economic regulation. But the focus remained on the purely *legal* logics and purely *political* events that led the federal judiciary to get out of the business of adjudicating the constitutional merits of various schemes of economic regulation.⁸ The *economic* reasons that political and judicial actors might have had for transforming constitutional democracy received little attention.⁹

This exclusion of economic reason from constitutional analysis is symptomatic of what Professors Joseph Fishkin and William Forbath call the “Great Forgetting.”¹⁰ From the Founding through the New Deal, Fishkin and Forbath demonstrate, the discourse of “constitutional political economy” was a fundamental feature of American constitutionalism. It was only in the wake of the epochal New Deal synthesis—judicial deference to political regulation of the economy and judicial guardianship of civil liberty and equality—that constitutional political economy became something of a

8. The dominant historiographical background was the contest between “externalists,” who asserted the primacy of politics over law in explaining the New Deal “revolution,” and “internalists,” who “highlight[ed] the primacy of law over politics, pointing to doctrinal changes that began well before 1937” and questioning the very premise that the New Deal was a “revolutionary” event. Kalman, *supra* note 1, at 1054–55; see also WHITE, *supra* note 6, at 29–32 (responding to Kalman’s reconstructed narrative). Successful attempts to synthesize the two approaches have not transcended their shared assumption that law and politics exhaust the causal repertoire of constitutional change. See, e.g., ACKERMAN, TRANSFORMATIONS, *supra* note 7, at 279–311 (portraying the conflict between the Old Court and the New Deal in terms of the proper relationship between law and politics in a democracy); DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, at 6–7 (2014) (asserting that the “crucial factor” in the Court’s response to the New Deal was “the proper design of the administrative state[, which] combined politics and law”).

9. For a detailed and explicit repudiation of the political-economic analysis of constitutional change, see ACKERMAN, FOUNDATIONS, *supra* note 7, at 203–21. For a notable exception, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 199 (1993) (“[T]he *Lochner* era is the story of how a changing social structure exposed the conservatism and class bias inherent in dominant ideological structures first formulated and institutionalized by the framers of the U.S. Constitution; it is the story of how an ideology that was fairly (albeit not completely) inclusive around the time of the founding became more and more exclusive as . . . capitalist forms of production matured.”).

10. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (forthcoming 2017) (manuscript at 7–8) (on file with the Texas Law Review).

dead language.¹¹ Prior to that time, constitutional actors across the ideological spectrum spoke in terms of constitutional political economy, believing that “economics and politics [we]re inextricably linked, and [that] a republican constitution require[d] a republican political economy to sustain it, and vice versa.”¹²

By recovering this language, Fishkin and Forbath’s book-in-progress, *The Anti-Oligarchy Constitution*, offers a radical alternative to the constitutional histories that emerged in the 1990s to defend the New Deal synthesis. Fishkin and Forbath’s new constitutional history¹³ promises to recast the New Deal as a contingent and incomplete resolution of a centuries-long struggle to achieve the *political-economic conditions* that the Constitution requires—“requires” in the double sense of “demands” and “depends upon.” This struggle is still ongoing and even accelerating, Fishkin and Forbath report, yet it has become increasingly “one-sided.”¹⁴ First, the post-WWII economic boom dissipated, taking with it much of the middle class that the New Deal and Great Society legal orders had hoped to create.¹⁵ Then, conservative lawyers and politicians stepped up their attacks on the New Deal and Great Society’s remaining achievements, trumpeting a constitutional political economy in which private property free of overweening public management is the pillar of constitutional democracy.¹⁶ Confronted by these dire conditions, legal liberals have forgotten how to fight back, rendered mute by the New Deal synthesis itself, which ironically and erroneously implied that political economy was no longer a matter of constitutional concern.¹⁷ Hoping to even the odds, Fishkin and Forbath offer liberals a grammar of *egalitarian* constitutional political economy—“the constitution of opportunity”—that was once spoken fluently and

11. *Id.* (manuscript at 65–66).

12. *Id.* (manuscript at 47).

13. Professor Risa Goluboff has recently identified a different “new constitutional history,” one that emphasizes the contingency and pluralism of constitutional law, and the agency of “everyday” citizens and social movements in shaping that diverse and indeterminate legal field. See Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2326, 2329 (2013) (reviewing KENNETH W. MACK, *REPRESENTING THE RACE* (2012)); Risa Goluboff, *The New Constitutional History: Toward a Manifesto* (Apr. 12, 2016) (unpublished manuscript) (on file with author). Although Goluboff’s “new constitutional history” is clearly distinct from Fishkin and Forbath’s project, the former’s emphasis on social history has also raised questions of political economy that the constitutional history of the 1990s tended to neglect. See generally RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014); REUEL SCHILLER, *FORGING RIVALS* (2015); KAREN TANI, *STATES OF DEPENDENCY* (2016).

14. FISHKIN & FORBATH, *supra* note 10 (manuscript at 72–73).

15. *Id.* (manuscript at 70). For the contingency of postwar prosperity on wartime dynamics, see THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 355–56 (Arthur Goldhammer trans., 2014).

16. See FISHKIN & FORBATH, *supra* note 10 (manuscript at 73–76) (describing the libertarian revival).

17. *Id.* (manuscript at 65–66).

effectively by those Americans who argued that the Constitution *prohibited* oligarchic concentrations of wealth and *mandated* the political and judicial construction of a broad, inclusive middle class.¹⁸

By placing the discourse of political economy back at the center of constitutional debate, Fishkin and Forbath have—by any fair measure—done more than enough. Yet scholarly innovators tend to find the ranks of their critics swelled by those who have benefited most from their labor. This Essay is no exception to the oedipal rule. It argues that Fishkin and Forbath could go further still in integrating political economy and constitutional history. At times, their detailed analysis of the *discourse* of “constitutional political economy” comes at the expense of a more fully materialist account of the political-economic conditions and effects of that discourse.¹⁹ Such a discursive emphasis, in turn, risks an overly optimistic assessment of the past virtues and present utility of “the constitution of opportunity,” the egalitarian dialect of constitutional political economy that Fishkin and Forbath commend to legal liberals today.

These criticisms are initial responses to an unfinished manuscript, generously shared by Fishkin and Forbath at an unusually early stage in order to benefit younger scholars working on similar subjects. Accordingly, they are intended not as conclusive judgments but rather as interjections in an ongoing conversation, one that will be significantly advanced by the publication of *The Anti-Oligarchy Constitution*.

The remainder of this Essay proceeds in three Parts. Part I traces Fishkin and Forbath’s ambivalent relationship with political economy to the earlier tradition of “critical legal history,”²⁰ a tradition that provides *The Anti-Oligarchy Constitution* with a good deal of evidentiary support and methodological inspiration. Although radical in its own way, critical legal history’s commitment to the primacy of legal ideas, institutions, and discourses over social and economic forces in explaining legal change may make it more rather than less difficult to “bring political economy back

18. *Id.* (manuscript at 11–13).

19. This critique seeks to reopen the debate about the “constitutive” power of law that Forbath and other “critical legal historians” won in the early 1990s, displacing an earlier tradition of American legal history that viewed law as “reflective” of more basic social and economic relations and needs. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* ix–xiii (1991); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 22 n.17 (1993); Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 60 (1984). Questioning the constitutive—or constructive—power of legal discourse, however, need not entail a return to the Whiggish instrumentalism of midcentury American legal history or the more reductionist variants of Marxist legal theory. See *infra* Part I.

20. For overviews of the tradition, see Gordon, *supra* note 19; Jessica K. Lowe, *Radicalism’s Legacy: American Legal History Since 1998*, 36 *ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE* 288 (2014); and G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 *SW. L.J.* 819 (1986).

in”²¹ to constitutional history. Notably, Forbath’s own contributions to critical legal history have always been distinctive in their sensitivity to the generative power of class conflict.²² It is surely this special sensitivity to the material conditions of legal change, rather than critical legal history’s generic interest in exploring the richness and presumed autonomy of legal discourse, that should guide the study of constitutional political economy going forward. Parts II and III sketch an alternative interpretation of some of Fishkin and Forbath’s discursive evidence in light of neglected political-economic factors.

Part II proposes that for much of American history, the constitution of opportunity was an essentially antifeudal discourse spoken by various factions of the emerging bourgeoisie and petty bourgeoisie. Fishkin and Forbath do demonstrate that, at times, this discourse predicted and tried to mitigate the economic inequalities intrinsic to capitalist development.²³ But the balance of their evidence suggests that, more often than not, the function of the constitution of opportunity was either to accelerate this development or to offer false hope about its consequences, or both. Put differently, the constitutional language of political-economic “opportunity” that Fishkin and Forbath trace from the 1770s through the late nineteenth century echoed the uneven development of capitalism in a nation beset by “belated feudalism.”²⁴ The utility of such an antifeudal discourse for contending with the inequalities of modern capitalism may be more limited than Fishkin and Forbath suggest.

21. Cf. BRINGING THE STATE BACK IN (Peter B. Evans, Dietrich Rueschemeyer et al. eds., 1985).

22. See generally FORBATH, *supra* note 19; William E. Forbath, *Courting the State: An Essay for Morton Horwitz*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 70 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010); William Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) [hereinafter Forbath, *Caste*]; William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 643 (Michael Grossberg & Christopher Tomlins eds., 2008); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985) [hereinafter Forbath, *Ambiguities*].

23. FISHKIN & FORBATH, *supra* note 10 (manuscript at 5).

24. See generally KAREN ORREN, BELATED FEUDALISM (1991). For weaker versions of this argument, see AMY DRU STANLEY, FROM BONDAGE TO CONTRACT (1998); and ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR (1991). Forbath himself has described in great detail the process by which “[c]apitalist production arose unevenly in different places and industries over several decades, generally between the 1820’s and 1870’s,” while offering evidence that, at least in some sectors, the “ancient” common law of labor relations that Orren finds dominant throughout the nineteenth century was actually an invention of late nineteenth century courts. Forbath, *Ambiguities*, *supra* note 22, at 801–06. Splitting the difference, Christopher Tomlins has argued that only in the late eighteenth century did an American variant of the British common law tradition become dominant, heralding the subordination of labor relations to capital and displacing radical, alternative visions of the American mode of production, visions that would be revived without success in the 1820s and 1930s. See TOMLINS, *supra* note 19, at 23–26, 232–97.

Part III turns to the New Deal and the Great Forgetting of constitutional political economy that followed in its wake. On a strict interpretation of the belated feudalism thesis, the victory won by the constitution of opportunity in 1937 represents little more than the achievement of properly capitalist labor relations outside the Jim Crow South.²⁵ But even if the New Deal's iteration of the constitution of opportunity did not only create a more stable capitalist society but also mitigated its economically inegalitarian tendencies, the popularity of this discourse was disturbingly brief. Fishkin and Forbath's evidence suggests that the constitution of opportunity enjoyed something like discursive supremacy during the nine years between the 1936 presidential campaign and President Roosevelt's declaration of the "Second Bill of Rights" in 1944.²⁶ But then it went silent.²⁷ The Great Forgetting occurred and constitutional political economy dropped out of mainstream constitutional discourse altogether, spoken only by economic libertarians intent on rolling back the New Deal as a constitutional aberration.²⁸ This Part argues that Fishkin and Forbath's explanation of the Great Forgetting neglects the determinate political-economic event of the post-WWII period: the United States' war against communism, a war between monopoly capitalism and state socialism launched precisely at the moment when the economically egalitarian interpretation of constitutional political economy apparently became unspeakable.²⁹ The word "communism" does not currently appear in Fishkin and Forbath's text. Yet the history of the relationship between American political economy and American constitutionalism in the second half of the twentieth century cannot be told without it.

I. From Critical Legal History to "Constitutional Political Economy"

From the perspective of American legal historiography, *The Anti-Oligarchy Constitution* represents not only an alternative to the constitutional history of the 1990s, but also the culmination of a decades-long project to recover the radical legal perspectives of American workers from the Founding Era to the early twentieth century. This project rejected the traditional, "exceptionalist" account of American workers as lacking in

25. ORREN, *supra* note 24, at 29–30; *cf.* CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS* xi–xii (1985) (reaching a similar conclusion about the ultimate function of New Deal labor law, but arguing that radical alternatives to both precapitalist and capitalist labor relations were on the table in the early twentieth century). For Southern labor relations during the New Deal, see IRA KATZNELSON, *FEAR ITSELF* 131–94 (2013).

26. FISHKIN & FORBATH, *supra* note 10 (manuscript at 58–61).

27. *Id.* (manuscript at 64–65).

28. *Id.* (manuscript at 73).

29. *See generally* CAMBELL CRAIG & FREDRIK LOGEVALL, *AMERICA'S COLD WAR* (2009); Anders Stephanson, *Cold War Degree Zero*, in *UNCERTAIN EMPIRE* 19 (Joel Isaac & Duncan Bell eds., 2012).

“class consciousness” and possessed of an individualistic ideology that distinguished them from their European peers.³⁰ Drawing on new scholarship in labor history, William Forbath and fellow critical legal historians in the 1980s and 1990s insisted that the “history of the workplace in industrializing America is one of recurring militancy and of class-based, as well as shop- and craft-based, collective action.”³¹ Given this long record of radicalism, new puzzles emerged:

[W]hy, by the early 20th century, did most [workers] end up supporting unions and political parties that were more conservative than those embraced by their counterparts abroad? If the American labor movement was not born with a comparatively narrow interest group outlook or an inveterate bias against broad, positive uses of law and state power, then how did that outlook and bias become dominant in the labor movement by the early 1900s?³²

In answering these questions, critical legal historians distinguished themselves by looking beyond the traditional social and economic explanations: greater economic mobility and greater ethnic and racial conflict gradually eroded worker solidarity.³³ Decentering these more materialist accounts, Forbath and others argued that law took the whip hand when it came to breaking worker radicalism in late nineteenth century America.³⁴ Then, workers pressed a radical legal vision that would have given them greater autonomy in the workplace and a greater share of the returns to capital, but they were defeated in the courts.³⁵ Confronted by late nineteenth century labor militancy, a probusiness judiciary constitutionalized outdated and sometimes mythical common law rules that constrained labor activism, prolabor health and safety regulations, and

30. William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law*, 16 L. & SOC. INQUIRY 1, 5–6 (1991).

31. *Id.* at 6.

32. *Id.* at 7.

33. *Id.* at 7–9.

34. See generally FORBATH, *supra* note 19; VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER (1993); TOMLINS, *supra* note 19; TOMLINS, *supra* note 25.

35. See FORBATH, *supra* note 19, at 6–8 (arguing that judicial review “helped make broad legal reforms seem futile”); HATTAM, *supra* note 34, at ix (arguing that “a strong judiciary created a politically weak labor movement in the United States”); TOMLINS, *supra* note 25, at 68 (“The combination of sustained judicial condemnation and employer hostility . . . contributed to a pronounced fall in [unions’] overall rate of growth, beginning soon after the turn of the century.”).

prolabor schemes of economic redistribution.³⁶ In response, the labor movement was forced to trim its sails.³⁷

Why did a group of legal historians committed to rediscovering the radicalism of American workers privilege legal over social and economic explanation, even where—as in Forbath’s case³⁸—their histories took careful note of the material interests of the relevant legal actors, including the class position of the judiciary? One obvious answer is that the prevailing nonlegal explanations were not supported by sufficient empirical evidence.³⁹ But critical legal historians tended to harbor a much broader methodological—and even metaphysical—objection to social and economic explanations of legal change. This objection stemmed from their critique of the then-dominant “law-and-society” school of legal history.⁴⁰ Law-and-society historians viewed law as reflective of, and responsive to, the “needs” or “interests” of American society.⁴¹ In its most politically conservative form, this “functionalist” or “instrumentalist” historiography described legal change as a rational process of resolving social and economic problems that ineluctably led to greater social and economic welfare.⁴² While many law-and-society historians distanced themselves from such a Panglossian description of American legal development, critical legal historians nonetheless viewed the law-and-society approach as

36. See Forbath, *Ambiguities*, *supra* note 22, at 805 (noting the ahistoricism of “supposedly time-honored and inviolable [property] rights” developed by courts in the late nineteenth century); see also FORBATH, *supra* note 19, at 6–8 (noting that the “courts’ harshly repressive law of industrial conflict helped make broad, inclusive unionism seem too costly”); HATTAM, *supra* note 34, at 30 (describing the use of the common law doctrine of criminal conspiracy “to regulate the increased harm that often accompanied collective action”).

37. See, e.g., FORBATH, *supra* note 19, at 96–97 (“In the shadow of so many broken big strikes and bootless broad initiatives, many thought it wise to conserve and build upon what ‘worked’—minimalist politics, craft unionism, high dues, and restrained but well-calculated strike policies.”); HATTAM, *supra* note 34, at 204 (arguing that labor “[v]oluntarism . . . was the AFL’s strategic response to the unusual configuration of state power in the United States,” namely the existence of “an obstructionist court from 1865 through 1895”).

38. See *supra* note 22 and accompanying text.

39. Cf. Forbath, *supra* note 30, at 7–9 (noting the inadequacy of many traditional socioeconomic explanations for the comparative weakness of the American labor movement, such as the hypothesis that American workers enjoyed unprecedented opportunities to enter the middle class).

40. For a highly sensitive critique of law-and-society historiography, see Gordon, *supra* note 19, at 59–87. For an earlier, more uncompromising critique, see Mark V. Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman’s “A History of American Law,”* 1977 WIS. L. REV. 81 (1977).

41. See Gordon, *supra* note 19, at 59–74; Lowe, *supra* note 20, at 288; White, *supra* note 20, at 832.

42. Gordon, *supra* note 19, at 59–65.

tainted by teleology and political quietism—an at-best unwitting defense of the “liberal capitalism”⁴³ that had come to dominate modern American society.⁴⁴

Given their political objections to the law-and-society approach, an obvious place for critical legal theorists to turn would have been Marxism, and a few did.⁴⁵ But one of the most striking aspects of critical legal history was its propensity to attack the “instrumentalism” of Marxist legal theory with *almost* as much vigor as it attacked the “liberal instrumentalism” of law-and-society scholars.⁴⁶ While Marxist instrumentalism might have “considerably more explanatory bite” than the liberal alternative, it was nonetheless beset by “a great many problems,” the greatest being its assumption that the content of law was determined by—and ineluctably served the interests of—a dominant, capitalist class.⁴⁷ Just like liberal instrumentalism, then, Marxist instrumentalism treated law as a mere reflection of more basic social and economic relations.⁴⁸ Rejecting both

43. *Id.* at 59.

44. See White, *supra* note 20, at 833–35. For a powerful interpretation of the political background of critical legal history, tracing its roots to disillusionment with midcentury modernization theory, see NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 437–77 (1995).

45. See, e.g., Mark Tushnet, *A Marxist Analysis of American Law*, in 1 *MARXIST PERSPECTIVES* 96 (1978).

46. Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW* 641, 644–46 (David Kairys ed., 3d ed. 1998).

47. *Id.* at 646; see also *id.* at 653–54 (explaining that critical legal theory differs from “most forms of Marxist thought” in several other respects as well: in its refusal to “treat capitalism as a totalizing system”; in its recognition that “the forms of liberal-democratic-capitalism that we are used to are only a few among the many ways of being liberal-democratic-capitalist” and that “among the forms that might be brought into being, ours are both worse and better”; in its affirmation that “[t]he resources for ‘revolutionary reform’ are . . . often to be found in our own traditions, customs, and practices”; and in its rejection of the idea that legal reform must be “oriented toward capture of central state machinery”). Such wide-ranging criticisms of Marxism—going well beyond the supposed instrumentalism of Marxist legal theory—were characteristic of critical legal history in its heyday. See, e.g., TOMLINS, *supra* note 19, at 20 (citing V. I. LENIN, *WHAT IS TO BE DONE?* (1937)) (“Contrary to classic theories of revolution . . . transformative action does not need to be qualitatively distinct from the normal or routine activities which reinforce [social] contexts.”).

48. This rather simplistic characterization of Marxist legal theory was in keeping with the highly influential, mid-1970s polemics of the English historian E. P. Thompson. See generally E. P. THOMPSON, *THE POVERTY OF THEORY & OTHER ESSAYS* (1978); E.P. THOMPSON, *WHIGS AND HUNTERS* (1975). Thompson unfortunately issued these attacks on Marxist legal theory without the benefit of access to his primary antagonists’ contemporaneous writings, which offered significant correctives to earlier, more reductive accounts of the relationship between law and political economy. See LOUIS ALTHUSSER, *ON THE REPRODUCTION OF CAPITALISM* 53–170 (G. M. Goshgarian trans., Verso 2014); NICOS POULANTZAS, *STATE, POWER, SOCIALISM* (Patrick Camiller trans., Verso 2014). Given Thompson’s contempt for both men, and his ideological commitment to the rule of law as “an unqualified human good,” THOMPSON, *WHIGS AND HUNTERS*, *supra* at 266, it is unlikely that familiarity with their later work would have altered his views. Critical legal historians, however, have always been uncomfortable with Thompson’s normative evaluation of Anglo-American law, if not his historical methodology. See, e.g.,

liberal and Marxist instrumentalism, critical legal historians argued that law was “constitutive”—not reflective—of social and economic relations.⁴⁹ Furthermore, law’s constitutive power was inherently “indeterminate,” capable of being used by legal actors in a variety of different ways, toward a variety of different social, economic, and political ends.⁵⁰ In light of the constitutive and indeterminate nature of law, critical legal historians insisted that explanations of legal change would not generally be found in “deeper”⁵¹ social or economic factors, but rather in the field of law itself, where self-consciously legal actors contended with each other and with legal institutions over the meaning of legal “language.”⁵²

The Anti-Oligarchy Constitution owes a clear debt to Forbath’s earlier work and to other critical legal histories of American labor relations. The book supplements the evidence base of these histories in two main ways: first, by emphasizing the extent to which workers, their advocates, and their adversaries spoke in distinctively constitutional terms,⁵³ second, by incorporating a more complex account of the role that race played in shaping these discursive battles.⁵⁴ While Fishkin and Forbath do not explicitly adopt critical legal history’s methodological tenets (and while Forbath was always more materialist than other critical legal historians), the importance of legal discourse to explaining legal change persists and presents something of a contradiction. On the one hand, Fishkin and Forbath’s manuscript seeks to break with the constitutional history of the 1990s, a historiography that marginalized the political-economic nature of American constitutionalism.⁵⁵ On the other hand, the manuscript remains marked by the critical legal history of the 1980s and 1990s, a historiography that asserted the primacy of legal discourse over social and economic forces

TOMLINS, *supra* note 19, at 22, 22 n.18 (embracing Thompson’s “unexceptionable critique of instrumentalism” but criticizing his utopian evaluation of “the rule of law”); Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 565 (1977) (book review) (criticizing Thompson’s failure to apply his normative analysis of the rule of law to the relevant historical data). Accordingly, legal historians in the critical tradition might yet find something of value in Marxist alternatives to law-and-society instrumentalism and their own post-Marxist constructivism, especially to the extent that they seek to specify the causal relationship between economic inequality and legal change. The alternative, a tragic legal liberalism, is spelled out in Sanford Levinson & Jack M. Balkin, *Morton Horwitz Wrestles with the Rule of Law*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 483 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

49. FORBATH, *supra* note 19, at ix–xiii; TOMLINS, *supra* note 19, at 26; Gordon, *supra* note 19, at 100–09.

50. FORBATH, *supra* note 19, at 170–72; TOMLINS, *supra* note 19, at 19–20; Gordon, *supra* note 19, at 114.

51. Forbath, *supra* note 30, at 4.

52. FORBATH, *supra* note 19, at 170–71.

53. Forbath laid the groundwork for this move in his bravura article, *Caste, Class, and Equal Citizenship*. See Forbath, *Caste*, *supra* note 22.

54. See FISHKIN & FORBATH, *supra* note 10 (manuscript at 13–58).

55. See *supra* notes 8–9 and accompanying text.

in explaining legal change.⁵⁶ The result is a constitutional history that insists on the centrality of political economy but analyzes it primarily as a species of legal discourse rather than as a material structure of power. Ironically, then, the legacy of critical legal history risks pulling Fishkin and Forbath’s project back in the direction of mainstream constitutional history. Although these two, roughly contemporaneous historiographical traditions had quite different political valences, they actually shared the same post-Marxist tendency to discount the material conditions of legal change.

Beginning with the methodological assumption that both traditions rejected—the assumption that political economy is determinative⁵⁷ of legal ideas, institutions, and discourses—might lead Fishkin and Forbath to a different interpretation of their evidence. This Essay does not purport to defend this alternative assumption—the defenses are well-known and were available, if unpopular, at the time of critical legal history’s formation⁵⁸—or to offer an exhaustive reinterpretation of *The Anti-Oligarchy Constitution*. It suggests only that critical legal history’s emphasis on the “relative autonomy” of law,⁵⁹ absent a symmetrical emphasis on the “relative autonomy” of political economy, is responsible for some of the more puzzling features of Fishkin and Forbath’s history of constitutional political economy. These features may become less puzzling once the political-economic conditions of legal discourse are more fully incorporated into the story.

56. See *supra* notes 42–54 and accompanying text.

57. “Determinative” is often read to mean “absolutely” or “exhaustively” determinative. There is no reason to do so. At the Symposium, David Grewal helpfully proposed the phrase “negative determinism,” connoting the idea that material forces take some legal and political possibilities off the table, but do not determine the selection among those that remain. Alternatively, the concept of “determination in the last instance” suggests a stronger, positive determinism that nonetheless ascribes agency, contingency, and efficacy to legal and political conflicts. See ALTHUSSER, *supra* note 48, at 53–56, 140–63, 209–31 (arguing that the “reproduction of the relations of production” depends on relatively autonomous legal and political apparatuses and the defeat of working class insurgencies that occur within them).

58. See, e.g., LOUIS ALTHUSSER, *ESSAYS IN SELF-CRITICISM* (Grahame Lock trans., 1976); PERRY ANDERSON, *ARGUMENTS WITHIN ENGLISH MARXISM* (1980); POULANTZAS, *supra* note 48.

59. Gordon, *supra* note 19, at 101. Critical legal historians’ adoption of the language of relative autonomy was peculiar given the origins and function of that term in Marxist state theory. See RALPH MILIBAND, *THE STATE IN CAPITALIST SOCIETY* 51 (1969); NICOS POULANTZAS, *POLITICAL POWER AND SOCIAL CLASSES* 190–91 (Timothy O’Hagan trans., 1973). For these theorists, saying that legal or political institutions could achieve relative autonomy did not entail any limit to materialist explanation. To the contrary, the capacity of such institutions to act against the short-term interests of dominant class fractions was explicable in terms of the longer-term interests of capitalist development. *Id.* As used by critical legal historians, however, law’s relative autonomy generally implied an epistemological or metaphysical break, such that at least some legal phenomena exceeded materialist explanation. See *supra* notes 42–54 and accompanying text.

II. The Constitution of Opportunity Between Feudalism and Capitalism

In the same year that Forbath placed the “constitutive” power of law at the center of the history of American labor relations,⁶⁰ Karren Orren’s *Belated Feudalism* offered an alternative interpretation of that history.⁶¹ While Orren did not deny the power of legal actors to shape American political economy, she placed greater emphasis on the fact that these actors operate within “real” political-economic structures that “channel and react to events and lend a direction to historical change.”⁶² In particular, Orren argued that for most of its political-economic history, the United States featured relations of production with a markedly feudal cast, pervaded by the same law of master and servant that had governed wage labor since the fourteenth century.⁶³ That is, wage labor in the United States was long defined by the distinctive feature of the feudal mode of production: the direct extraction of labor power by legal and political coercion, in the form of the criminalization of vagrancy and the judicial prescription of the conditions of employment.⁶⁴ According to Orren, this feudal regime of American labor governance provided “the foundation of capitalist development”: the expansion of free markets in commodities depended on unfree labor markets in both the North and the South.⁶⁵ On this account, the unionization movement of the late nineteenth and early twentieth centuries

60. FORBATH, *supra* note 19, at x.

61. *See generally* ORREN, *supra* note 24.

62. Karren Orren, *Institutions, Antinomies, and Influences in Labor Governance*, 19 L. & SOC. INQUIRY 187, 189 (1994).

63. ORREN, *supra* note 24, at 12, 71–79. For the classic debates about the relationship between the development of waged labor and the development of capitalism, see generally THE BRENNER DEBATE (T. H. Aston & C. H. E. Philipin eds., 1985); THE TRANSITION FROM FEUDALISM TO CAPITALISM (Verso 1978).

64. *See* ORREN, *supra* note 24, at 68–117. Under a capitalist regime of labor governance, by contrast, labor power is extracted by means of economic coercion—the unequal bargaining power between capital and labor that determines employment contracts in a free labor market.

65. *Id.* at 70; *see also* Orren, *supra* note 62, at 190 (“I see the late 19th century as a period in which commercial relations were governed along voluntary principles and labor along prescriptive ones. But more than that: the voluntarism of commercial relations in the 19th century *presumed* hierarchy in labor relations for its effective functioning . . .”). In hypothesizing the asynchronous development of capitalism in labor and commercial relations, Orren happily pillaged traditional Marxist theory, and presaged contemporary American scholarship on the history of slavery and capitalism. *See, e.g.*, WALTER JOHNSON, RIVER OF DARK DREAMS 2–3 (2013) (emphasizing the interrelationship between the development of global commodities markets and the persistence of slave labor in the South). At the same time, Marxist theorists and historians have gradually renounced the traditional view of a sharp break between feudalism and capitalism, noting the persistence of feudal political and labor relations well into the twentieth century. For an overview, see generally *A History of Separation: The Rise and Fall of the Workers’ Movement, 1883-1982*, ENDNOTES, Oct. 2015.

represented not a thwarted attempt to achieve social democracy but the long-delayed transition of American labor relations from feudalism to capitalism.⁶⁶

In its purest form, the thesis of *Belated Feudalism* remains controversial,⁶⁷ although Forbath and others have cited it approvingly for the softer thesis that “the law of the employment relationship in nineteenth- and early twentieth-century America remained one of hierarchy and subordination, of status as much as of free contract.”⁶⁸ In any event, this Part invokes *Belated Feudalism* not as a more accurate narrative of American labor relations than that provided by the critical legal historians, but rather as one example of a political economic metanarrative within which Fishkin and Forbath’s account of constitutional political economy could be fruitfully situated. Indeed, one continually catches glimpses of this metanarrative—the surprisingly long political-economic struggle for capitalism and against feudalism—while reading *The Anti-Oligarchy Constitution*.

To begin with, the founding tenets of the constitution of opportunity tradition were explicitly antifeudal in character: the abolition of “hierarchies, titles, and aristocratic forms of privilege,” including “primogeniture and entail”; and the formation of a “republic” of enfranchised property holders, a mix of merchant and agrarian elites and white male settlers who were able “to exit the wage labor market” due to “relatively high wages” and the availability of “[c]heap fertile land.”⁶⁹ This nascent capitalist order, however, depended on the persistence of an essentially feudal class of “property-less, super-exploited labor generally not freemen but enslaved for life.”⁷⁰ This order also featured an unresolved disagreement: whether the legal abolition of feudal property relations was sufficient to secure a property-owning republic⁷¹ (abolition of feudal labor relations, according to Orren, was not yet on the table);⁷² or whether, instead, continued political management of property relations would be necessary.⁷³ Over the next century, those who held the latter view would promulgate a welter of competing programs with shifting political

66. See ORREN, *supra* note 24, at 209–30.

67. For an early critique, see Catherine Fisk, *Still “Learning Something of Legislation”: The Judiciary in the History of Labor Laws*, 19 L. & SOC. INQUIRY 151 (1994). For a more thoroughgoing attack on the idea of continuity between feudal labor relations and American labor law, see CHRISTOPHER TOMLINS, *FREEDOM BOUND* (2010).

68. Forbath, *Caste*, *supra* note 22, at 21 & nn.86 & 89 (citing ORREN, *supra* note 24F); see also STANLEY, *supra* note 24, at 83–84 & n.41 (citing ORREN, *supra* note 24).

69. FISHKIN & FORBATH, *supra* note 10 (manuscript at 13–14).

70. *Id.* (manuscript at 14).

71. *Id.* (manuscript at 15) (“An end to primogeniture and entail, Webster argued, would produce, over time, that ‘equality of property’ that is ‘the very soul of a republic.’”).

72. ORREN, *supra* note 24, at 68–71.

73. FISHKIN & FORBATH, *supra* note 10 (manuscript at 15).

economic valences: from plans for general education so that the children of poorer families might one day hold civil office (quite radical at the Founding, though derided by Fishkin and Forbath in its late twentieth-century variant as not a political-economic program for achieving a democracy of opportunity);⁷⁴ to more activist schemes of property redistribution (very radical if rarely implemented);⁷⁵ to more mandarin schemes of monetary policy and infrastructure investment (not radical when pursued by Federalists at the national level, somewhat radical when pursued by the Democratic–Republican Party at the state level, less radical when pursued by the “new Republicanism” once again at the national level, more radical when pursued by populists and progressives in the early twentieth century).⁷⁶

Fishkin and Forbath place great emphasis on the political defeat of the Federalists, after which “no mainstream party ever again openly proclaimed itself the party of elite rule.”⁷⁷ From then on, they explain, parties “might defend the wealthy, but not the wealthy’s right to rule . . . always proclaim[ing] fealty to ‘equal rights’ and broad distribution of prosperity for the producing classes.”⁷⁸ But this “dialectic . . . of constitutional political-economic discourse”⁷⁹ is as striking for its political-economic ambiguity as for its radicalism. As Fishkin and Forbath note, this dialectic was used by the new Republicans to defend the second national bank, and they spoke it all the way into the Panic of 1819, “the nation’s first ‘traumatic awakening to the capitalist reality of boom and bust.’”⁸⁰ As articulated by a party dominated by “rising enterprisers and Southern planters” and swelled by smallholders, opposition to “the wealthy’s right to rule” and support for “equal rights” and “prosperity” for independent producers sound less like a radical agenda than the minimal legal conditions for a capitalist polity where political membership was tied to modest property qualifications.⁸¹

Of course, this negative assessment is terribly teleological, and what matters most for Fishkin and Forbath is the *elasticity* of the dialectic of

74. *Id.* (manuscript at 15–18, 71).

75. *Id.* (manuscript at 15).

76. *Id.* (manuscript at 18–23, 75–76).

77. *Id.* (manuscript at 24).

78. *Id.*

79. *Id.*

80. *Id.* (manuscript at 23) (quoting CHARLES SELLERS, *THE MARKET REVOLUTION* 137 (1991)).

81. *Id.* (manuscript at 23–24); cf. Michael Zakim & Gary J. Kornblith, *Introduction: An American Revolutionary Tradition*, in *CAPITALISM TAKES COMMAND* 1, 10 (Michael Zakim & Gary J. Kornblith eds., 2012) (arguing that the “contradictions—dare we say, dialectics—of a society organizing itself around the liquidity, fungibility, and incessant maximizations of the commodity were largely lost on an American gentry anticipating a bright future of material abundance”).

“opportunity”—its ability to accommodate “thicker distributional claims” when formal talk of equal rights “grew strained and thin.”⁸² And, according to Fishkin and Forbath, that is just what the dialectic did during the Jacksonian period:

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 over the paths of national and regional development the elites were blazing. . . . A farmer-worker populace, voting directly, in mass numbers, in a presidential election for the first time . . . muster[ed] democracy against “the paper system” and its “new aristocracy” of enterprise. . . . 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.”⁸³

Jacksonian Democracy undoubtedly marked a major transformation in our constitutional system, but the political-economic benefits of this “Constitutional Millennium” prove difficult to pin down.⁸⁴ First, as Fishkin and Forbath readily acknowledge, “Jacksonians wedded white farmers’ and workers’ democratic aspirations to the racist causes of southern slavery and Indian Removal.”⁸⁵ Accordingly, “[s]laves’ and women’s productive work was . . . excluded from the Jacksonians’ generous conception of equality for the nation’s producers,”⁸⁶ as the promise of white male property ownership—still recognized as the basis of real political-economic freedom—became irredeemably tied to violent territorial expansion.⁸⁷

Second, the growth of the franchise that undergirded Jacksonian populism was itself a mixed political-economic bag, sundering the concepts of political and economic freedom in troubling ways. At the Founding, Gouverneur Morris and James Madison had fought for higher property qualifications for national elections precisely to forestall a return to “aristocracy.”⁸⁸ Madison explained that the British Parliament had become

82. FISHKIN & FORBATH, *supra* note 10 (manuscript at 24).

83. *Id.* (manuscript at 24–25).

84. The canonical negative assessment is SELLERS, *supra* note 80. For criticism of Sellers’s method, if not the balance of his conclusions, see Zakim & Kornblith, *supra* note 81, at 6–7.

85. FISHKIN & FORBATH, *supra* note 10 (manuscript at 27).

86. *Id.*

87. See AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 99–175 (2010).

88. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 18–19 (rev. ed. 2009).

corrupted because property qualifications were too low.⁸⁹ Expanding on the point, Morris warned:

Give the votes to people who have no property, and they will sell them to the rich. . . . The time is not distant when this country will abound with mechanics and manufacturers, who will receive their bread from their employers. Will such men be the secure and faithful guardians of liberty? Will they be the impregnable barrier against aristocracy?⁹⁰

As this quote indicates, the heart of the argument for property-based suffrage was the reality that wage laborers were not free but bound, economically and legally, to their masters: “Those who were subject to another’s government—that is, all those either legally or economically dependent on others—should, as people who were ruled in their private lives, be excluded from governance.”⁹¹ The propertyless represented what Orren called the feudal remnant of American society, and as such were the closest link to the feudal past that the Founders hoped to escape.⁹² In a compromise, the question of economic qualifications for national suffrage was left to the state governments; at the time of the Founding, somewhere between thirty and forty percent of white men could not vote.⁹³

The gradual elimination of property-based political citizenship was tied to a commercial and demographic explosion that swelled the cities and pushed the nation westward. The population more than doubled between 1790 and 1820, from less than four million to just under ten, and doubled again by 1850.⁹⁴ By then, nearly all economic barriers to white male suffrage, whether in the form of property holding or tax payments, had fallen.⁹⁵ Yet the new property-poor and propertyless voters—the “Poor Many” who swept Jackson and his party into power⁹⁶—found themselves in a “contradictory state of affairs,” their “political rights of self-government joined to economic vulnerability and dependence.”⁹⁷ The decoupling of property ownership from republican self-government led to the political emancipation of the poor, but it also made the “power of property to govern . . . more difficult to see and attack.”⁹⁸ As Robert Steinfeld puts it:

As the nineteenth century wore on, wage workers complained more and more bitterly that the power of property was making them slaves

89. *Id.* at 18.

90. *Id.*

91. STEINFELD, *supra* note 24, at 185.

92. ORREN, *supra* note 24, at 228–30.

93. KEYSAR, *supra* note 88, at 19–21.

94. *Id.* at 22.

95. *Id.* at 24–25.

96. FISHKIN & FORBATH, *supra* note 10 (manuscript at 24–25).

97. STEINFELD, *supra* note 24, at 186.

98. *Id.* at 186–87.

to their employers. . . . But their argument was . . . difficult and [] contradictory. Having prevailed in their contention that they were among the self-governing . . . and having gained the franchise on this basis, wage workers found it more difficult to argue that their propertylessness subjected them to the rule of others.⁹⁹

The Jacksonian discourse of constitutional political economy that Fishkin and Forbath celebrate undoubtedly gave voice to the political-economic frustrations of this new mass polity.¹⁰⁰ But it is less clear that constitutional attacks on the “moneyed aristocracy” of Northern industry and banking offered this polity much economic relief.¹⁰¹ Summarizing the Jacksonian diagnosis of the country’s ills, Fishkin and Forbath write that “[t]he central problem was that economic inequality inevitably has corrosive effects on political equality.”¹⁰² But the erosion of political rights that the propertyless had only recently won—a victory partly attributable to the economic forces that also oppressed them—was simply not the central problem they faced. Nor was it “the accumulation of overgrown individual fortunes.”¹⁰³ Their most pressing problems were rather local employers, landlords, and lenders, and the laws that governed relations between them.¹⁰⁴ Having just cast off one vestige of actual feudalism, politically emancipated white men still faced feudal labor relations in some regions and industries, and equally or more exploitative capitalist labor relations in others.¹⁰⁵ The antifeudal accents of Jacksonian constitutional political economy certainly had rhetorical appeal, but it remains unclear to what extent they offered economic respite to the new electoral class.¹⁰⁶

99. *Id.* at 187.

100. FISHKIN & FORBATH, *supra* note 10 (manuscript at 24–25).

101. *Id.* (manuscript at 25–26).

102. *Id.* (manuscript at 26).

103. *Id.* (quoting 8 REG. DEB. 3359 (1832) (statement of Rep. Bell)).

104. For employer–employee relations, see the discussions of sources *supra* note 24. For landlords and lenders, see Elizabeth Blackmar, *Inheriting Property and Debt: From Family Security to Corporate Accumulation*, in CAPITALISM TAKES COMMAND, *supra* note 81, at 93–95; Jonathan Levy, *The Mortgage Worked the Hardest: The Fate of Landed Independence in Nineteenth-Century America*, in CAPITALISM TAKES COMMAND, *supra* note 81, at 39.

105. For the persistence of feudal labor relations, see generally ORREN, *supra* note 24; STEINFELD, *supra* note 24. For the antebellum shift in the labor force toward “highly productive industrial and commercial elements of the economy,” see Robert E. Gallman & John Joseph Wallis, *Introduction*, in AMERICAN ECONOMIC GROWTH AND STANDARDS OF LIVING BEFORE THE CIVIL WAR 1, 3 (Robert E. Gallman & John Joseph Wallis eds., 1992) [hereinafter AMERICAN ECONOMIC GROWTH].

106. One obstacle to bringing political economy back into early republican constitutional history is the relative paucity of data that confronts economic historians of the period, especially with respect to the propertyless and property poor. For overviews of the problem, see Robert A. Margo, *Wages and Prices During the Antebellum Period: A Survey and New Evidence*, in AMERICAN ECONOMIC GROWTH, *supra* note 105, at 173; Lee Soltow, *Inequalities in the Standard of Living in the United States, 1798–1875*, in AMERICAN ECONOMIC GROWTH, *supra* note 105, at 121.

Fishkin and Forbath seem to recognize this uncertain fit between rhetoric and reality when they turn to the third ambiguity of Jacksonian constitutional political economy: that it could be so quickly co-opted by democracy's opponents, the Whigs. While "Whigs spurned [the] 'leveling' outlook" of Jacksonians, "[t]hey shared with their foes the . . . republican maxim [that] the citizen's political equality and independence must rest on a measure of economic independence, and that demanded property-holding."¹⁰⁷

[The Whigs'] vision was a burgeoning commercial republic, not a backward-looking agrarian one, but it was no less a republic with a broad, wide-open, propertied middle class. Thus, they loudly affirmed that a true "American" system of political economy must provide as ample as possible a supply of decent livelihoods for the laboring classes, along with wide opportunities for laborers to become proprietors, and broad avenues to wealth and distinction for the gifted and ambitious "poor beginners." Not surprisingly, Whigs contended that their own economic policies were best suited to these core commitments. And more than that: They argued that Jacksonian nostrums like free trade, hard money and "limited government" only hurt the very classes the Jacksonians claimed to champion.¹⁰⁸

In many respects, the Whigs were right, or at least closer to being right than the Jacksonians. The latter's anti-aristocratic attacks on the largest industrialists and bankers likely brought more economic chaos than relief to the growing urban proletariat and rural poor.¹⁰⁹ Perhaps most notably, Jacksonian constitutional political economy actually accelerated the pace of incorporation and the consequent intensification of corporate competition and capitalist labor relations.¹¹⁰

Over the long run, of course, the Whig and then Republican constitutions of opportunity would falter too. President Lincoln's vision of universal smallholding and small-scale manufacture—premised on the elimination of indigenous resistance to Western labor migration and unrealistic expectations about the egalitarian potential of capitalist development—did put an end to the massive feudal remnant that was black slavery.¹¹¹ But after a brief flirtation with more radical solutions,¹¹²

107. FISHKIN & FORBATH, *supra* note 10 (manuscript at 30).

108. *Id.*

109. See Jane Knodell, *Rethinking the Jacksonian Economy: The Impact of the 1832 Bank Veto on Commercial Banking*, 66 J. ECON. HIST. 541, 547–48 (2006) (noting that the bank veto had "destabilizing monetary effects"); Peter L. Rousseau, *Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837*, 62 J. ECON. HIST. 457, 458 (2002) (arguing that Jacksonian monetary policy played a role in the Panic of 1837).

110. See Robert E. Wright, *Capitalism and the Rise of the Corporation Nation*, in CAPITALISM TAKES COMMAND, *supra* note 81, at 145, 160–67.

111. See FISHKIN & FORBATH, *supra* note 10 (manuscript at 35–44).

Republicans bridled at the massive redistribution that would have been necessary to approximate a multiracial property-owning republic. Consigning recently freed slaves to neofeudal peonage, Republicans also refused to stamp out the vestiges of feudal labor relations in the North, decrying labor voluntarism as the gateway to socialism and transforming victorious Union soldiers into strikebreakers.¹¹³ The industrial oligarchy of the late nineteenth century won the electoral support of Northern workers and farmers not by recognizing their claims for constitutional authority in matters of economic governance, but rather by doling out military pensions and tariff protections to soften the blow of their increasingly subaltern status.¹¹⁴ Such strategies of population management were at least as old as the absolutist states of early modern Europe.¹¹⁵

In sum, the constitution of opportunity seems to have been a vivid discourse for grappling with the intricate relationship between a belated feudalism and a booming capitalism in nineteenth-century America. But the speakers of this discourse rarely, if ever, understood the full complexity of their political-economic situation, and consistently failed to master it. Of course, this conclusion has all the unearned benefit of hindsight. But if we know now that the constitution of opportunity so often proved misleading or ineffectual in the nineteenth century, why should we expect it to fare better today? The most hopeful answer is that such a discourse works best once capitalism is (almost) the only game in town and everyone knows it. This leads to the question of how the constitution of opportunity weathered the twentieth century.

112. *See id.* (manuscript at 46–54).

113. *See id.* (manuscript at 44–46, 51–52); *see also* ERIC FONER, RECONSTRUCTION 460–605 (updated ed. 2014) (exploring the relationship between Reconstruction politics and Northern labor politics); ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH 174 (2015) (noting post-Civil War conflicts over labor republicanism); DAVID MONTGOMERY, CITIZEN WORKER 115–62 (1993) (analyzing the political response to the post-Civil War labor movement).

114. *See* RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900, at 4–15 (2000).

115. *See, e.g.*, ROBIN BLACKBURN, BANKING ON DEATH, OR INVESTING IN LIFE 36–39 (2004) (discussing pension systems in the early modern period); RONALD FINDLAY & KEVIN H. O’ROURKE, POWER AND PLENTY 227–310 (2007) (discussing import tariffs in the early modern period).

III. The Constitution of Opportunity Between Capitalism and Communism

The current version of Fishkin and Forbath's manuscript concludes with a powerful recommendation: "Rebuilding the democracy of opportunity . . . requires reimagining and democratizing the forms of ownership and control that prevail over the means of work and social production, much as both radicals and elite liberal reformers set out to do during the last Gilded Age."¹¹⁶ Democratization of the means of production—what came to be called "economic democracy" during the New Deal¹¹⁷—was and remains a radical program, but it is also rife with political-economic ambiguity. As Fishkin and Forbath emphasize, such a program does not necessarily entail collective ownership of the means of production—socialism or communism. Indeed, Fishkin and Forbath suggest that, by the turn of the twentieth century, proponents of the constitution of opportunity had come to accept that the United States "was destined to have a vast, permanent class of propertyless wage earners."¹¹⁸ In this respect, even the most radical constitutional political economists had made their peace with capitalism, in one form or another.

Here, the consequences for political-economic analysis of focusing on the discourse of constitutional political economy are striking. In the current version of their manuscript, Fishkin and Forbath have yet to discuss the specifically *anti-constitutionalist* and *anti-capitalist* movements for political-economic transformation that roiled twentieth-century America, including the Socialist Party of America and, later, the Communist Party.¹¹⁹ Such movements contributed to the relative popularity of left-wing (yet still constitutional and capitalist) political economy—the least threatening of several radical alternatives—while also repeatedly exposing it to charges of guilt by association.¹²⁰ This dialectic between socialist and capitalist reform is crucial to explaining the rise and fall of the twentieth century's constitution of opportunity, and will hopefully be incorporated in Fishkin and Forbath's final text.

At the dawn of the new century, proponents of the constitution of opportunity abandoned the "old idea . . . that ownership of productive property . . . was the material basis of middle-class-ness and of full

116. FISHKIN & FORBATH, *supra* note 10 (manuscript at 90).

117. See ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 72 (Houghton Mifflin Co., 2003) (1958).

118. FISHKIN & FORBATH, *supra* note 10 (manuscript at 55).

119. See ALAN DAWLEY, *STRUGGLES FOR JUSTICE* 218–253, 371–408 (1991); EUGENE M. TOBIN, *ORGANIZE OR PERISH* 148–150, 203–237 (1986); see also AZIZ RANA, *THE RISE OF THE CONSTITUTION* 81–102 (forthcoming 2018) (on file with author) (discussing the Socialist Party of America's radicalized discourse, in which the Constitution was depicted as a "trick[]," an instrument of class rule).

120. See generally LANDON R.Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* (2013).

membership in the political community.”¹²¹ In its place, they embraced the “new insight” that the “economic base” of full, free, and dignified citizenship could be secured for wage labor by means of an intricate web of legal regulation: “minimum wages and maximum hours laws,” “safety standards,” “social insurance,” and, perhaps most importantly, collective bargaining.¹²² This “new constitutional narrative of economic and social development,” which held that the Constitution *mandated* the creation of a unionized republic of wage laborers, experienced some initial success during the Progressive Era but truly came into its own during the New Deal, a regime that remains the cornerstone of liberal legal thought.¹²³ And yet the emphatically *constitutional* program to democratize American capitalism—the intellectual infrastructure of the New Deal—has been lost.¹²⁴ Why?

One answer frequently given by American historians when asked to explain the decline of the New Deal order is its refusal—or inability—to extend the promise of economic egalitarianism to African-Americans and women.¹²⁵ Building on this historiographical tradition, Fishkin and Forbath astutely analyze the extent to which the constitution of opportunity excluded racial and sexual egalitarianism, both during the Progressive and New Deal Eras.¹²⁶ Fishkin and Forbath also allude to other externalist explanations: the “postwar boom years” and “the rise of professional economists” to positions of influence in government “muted” the sorts of political disagreement that were once fought out on constitutional terrain.¹²⁷ But “the most essential thread” in their explanation of the “Great Forgetting” is strikingly legal and internalist.¹²⁸ Because the New Dealers secured their political-economic vision by convincing the Supreme Court in 1937 that this vision was not of constitutional concern, permitted but not required by the Commerce Clause and the Fifth and Fourteenth Amendments, “the paradigmatic constitutional battleground” shifted from “economic policy” to “civil liberties—and later, civil rights.”¹²⁹ In an “ironic result,” the “fight over New Deal economics” (a fight that was, in truth, fueled by deep constitutional commitments) was “settled” by taking political economy off the constitutional table.¹³⁰

121. FISHKIN & FORBATH, *supra* note 10 (manuscript at 56) (emphasis omitted).

122. *Id.* (manuscript at 56–57) (emphasis omitted).

123. *Id.* (manuscript at 57–59).

124. *Id.* (manuscript at 65).

125. See generally KATZNELSON, *supra* note 25; ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY* (2001); ROBERT O. SELF, *ALL IN THE FAMILY* (2012).

126. See FISHKIN & FORBATH, *supra* note 10 (manuscript at 58, 60–61).

127. *Id.* (manuscript at 65).

128. *Id.* (manuscript at 65–66).

129. *Id.*

130. *Id.*

The problem with this explanation is that political economy was not, in fact, taken off the constitutional table during the late 1930s and 1940s. Or rather, it only makes sense to say that it was if one adopts the sort of rigidly formalistic and judge-centered understanding of constitutionalism that Fishkin and Forbath otherwise reject.¹³¹ To the contrary, the “switch in time” of 1937 was swiftly followed by a series of severe constitutional challenges to the New Deal political-economic order.¹³² These challenges were themselves fueled by domestic and international political-economic crises, as the United States lapsed back into a bruising recession in mid-1937, and Nazi aggression—culminating in the Molotov–Ribbentrop Pact with communist Russia and the invasion of Poland in 1939—threatened to shutter all of Eurasia to free trade.¹³³ Aided by economic failure at home and the ascendance of fascism and communism abroad, conservatives in Congress, the bar, and the press launched an all-out assault on the New Deal administrative state, decrying it as the anticonstitutional beachhead of domestic totalitarianism.¹³⁴

This offensive was well-served by the coincidence of the 1937 recession with the Congress of Industrial Organizations’ unpopular strike wave.¹³⁵ The CIO’s campaign was seen by some as a cause of the downturn and by many others as symptomatic of the New Deal’s irresponsible encouragement of the most radical—even communist—elements of the labor movement.¹³⁶ As Professor Barry Karl writes: “Amid declining industrial production and soaring unemployment, the call for more radical action was replaced by concern for what the supposed radical action of the New Deal had already done”¹³⁷ That summer, Roosevelt’s court-packing plan was defeated, not because it was no longer “necessary,” but because moderate and conservative legal and media elites successfully

131. *See id.* (manuscript at 63) (distinguishing between court-centered and more popular forms of constitutionalism that had been prominent features of American legal and political debate prior to the mid-twentieth century).

132. *See* Jeremy K. Kessler, *A War for Liberty: On the Law of Conscientious Objection*, in 3 THE CAMBRIDGE HISTORY OF THE SECOND WORLD WAR 447, 459–60 (Michael Geyer & Adam Tooze eds., 2015).

133. KATZNELSON, *supra* note 25, at 246–47; ADAM TOOZE, THE WAGES OF DESTRUCTION 318–21 (2006).

134. *See* LARRY CEPLAIR, ANTI-COMMUNISM IN TWENTIETH-CENTURY AMERICA 53–64 (2011); JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 211–324 (1967); RICHARD POLENBERG, REORGANIZING ROOSEVELT’S GOVERNMENT 55–78 (1966); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 749–50 (2016) (reviewing ERNST, *supra* note 8).

135. *See* BARRY D. KARL, THE UNEASY STATE 136–39 (1983).

136. *See id.* at 136–39, 154 (drawing the connection between public unease with the perceived radicalism of organized labor and a growing distrust of the New Deal in light of the 1937 recession).

137. *Id.* at 154.

painted it as an unconstitutional putsch against the rule of law.¹³⁸ “An alliance of southern Democrats and Republicans” rejected much of the rest of the President’s second-term agenda the following fall, delivering Roosevelt “perhaps[] the most significant defeat of his presidency.”¹³⁹ Legislative resistance to the New Deal only stiffened when President Roosevelt responded to his 1937 losses with a failed purge of Jim Crow Democrats in the 1938 primaries—a last-ditch effort to extend the constitution of opportunity to the South.¹⁴⁰

Meanwhile, the American Bar Association (ABA) prepared a series of broadsides against the “administrative absolutism” of the New Deal, comparing its regulatory agenda to the illiberal regimes of Nazi Germany and Stalinist Russia, and its constitutional defenders to Soviet legal theorists.¹⁴¹ The focus of these attacks on New Deal administration was the National Labor Relations Board (NLRB), the institutional foundation of the constitution of opportunity’s unionized republic of wage laborers. In the 1938 midterms, moderate Republican lawyers assailed the NLRB as corrupted by “class feeling,” and argued that only less biased personnel and more restrictive procedures could legitimate an agency tasked with answering “fundamental questions of human right and even of human liberty.”¹⁴²

In 1940, Roosevelt himself purged the agency of its left-wing members, battered by charges of communist infiltration.¹⁴³ That same year, the ABA’s proposal to subject New Deal agencies—the NLRB foremost among them—to onerous new procedures and expansive judicial review passed both houses of Congress.¹⁴⁴ Facing an imminent war with Nazi Germany, Roosevelt vetoed the bill on national security grounds.¹⁴⁵ But the needs of military mobilization led the President himself to embrace an increasingly antitotalitarian constitutional discourse that contrasted an Anglo-American tradition of limited government and individual rights with

138. See Kessler, *supra* note 132, at 458–61 (discussing this framing). Reflecting the mood of the time, a constituent of Senator William Borah—himself a strong defender of judicial independence—described Roosevelt’s plan as a “headlong rush into the CHASM where STALIN, MUSSOLINI, and HITLER have led their countries.” PATTERSON, *supra* note 134, at 87. The *New York Herald Tribune* agreed: “This is the beginning of pure personal government. Do you want it? . . . Look around the world—there are plenty of examples—and make up your mind.” *Id.* (quoting Dorothy Thompson, N.Y. HERALD TRIB., Feb. 11, 1937, at 23).

139. KARL, *supra* note 135, at 168.

140. *Id.* at 160–61; KATZNELSON, *supra* note 25, at 175.

141. Special Committee on Admin. L., Am. B. Ass’n, *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 343, 361 (1938).

142. ERNST, *supra* note 8, at 98–101.

143. STORRS, *supra* note 120, at 61–62.

144. See Kessler, *supra* note 134, at 754–56.

145. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 690 (2010).

the statist legal regimes of the United States' enemies, including, at the time, Soviet Russia.¹⁴⁶ In the wake of WWII, with Nazi Germany defeated but Russian troops on the doorstep of Western Europe, President Truman signed into law a watered-down version of the ABA's prewar legislative program—the Administrative Procedure Act (APA).¹⁴⁷ Hailed at the time in manifestly constitutional terms as a “bill of rights for the administrative state,”¹⁴⁸ the APA is recognized today as “super-statute” of constitutional significance.¹⁴⁹

Debates about the exact political-economic valence of the APA are still ongoing.¹⁵⁰ But there was and remains little doubt about the significance of the next three quasi-constitutional attacks on the constitution of opportunity. In the 1946 midterms, the Republican Party took control of Congress for the first time in eighteen years.¹⁵¹ Running on a platform of rabid anticommunism, the Republicans accused the Truman administration of Soviet sympathy and anticapitalist subversion.¹⁵² In March 1947, Truman covered his right flank by instituting a federal loyalty apparatus, which continued the purge of left-wing administrators begun seven years earlier at the NLRB.¹⁵³ That same month, with Republican support, the President funneled \$400 million to anticommunist forces in Greece and Turkey, and announced the “Truman Doctrine,” declaring that “it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.”¹⁵⁴ Then in May, just as the Cold War was heating up, the Office of Price Administration, a powerful wartime mechanism of property control, was liquidated.¹⁵⁵ Finally, in June, Republicans joined with Southern

146. See generally Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW* 185 (Daniel R. Ernst & Victor Jew eds., 2002); John W. Wertheimer, *A “Switch in Time” Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s*, in *53 STUDIES IN LAW, POLITICS, AND SOCIETY* 3 (Austin Sarat ed., 2010).

147. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *NW. U. L. REV.* 1557, 1669–75 (1996). For continuities between the APA and the earlier anti-New Deal administrative law reform bill, see *id.* at 1590–93; and James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 *J. POL'Y HIST.* 206, 210–12 (1996).

148. JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE* 60 (2012) (internal quotation marks omitted).

149. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 *U. CHI. L. REV.* 393, 466 (2015).

150. See generally Kessler, *supra* note 132.

151. ROBERT J. DONOVAN, *CONFLICT AND CRISIS* 237 (1977).

152. *Id.* at 231–34.

153. STORRS, *supra* note 120, at 84.

154. JAN OZMAŃCZYK, 4 *ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS* 2378–79 (Anthony Manzo ed., 2003).

155. See MEG JACOBS, *POCKETBOOK POLITICS* 225–31 (2005).

Democrats to override Truman’s veto of the Taft–Hartley Act, a direct assault on the NLRB and the industrial unions that had formed the base of the New Deal coalition.¹⁵⁶

A series of amendments to the New Deal’s crown jewel, the 1935 National Labor Relations Act, Taft–Hartley spelled the beginning of the end of the unionized republic of wage labor.¹⁵⁷ The law vindicated many of the demands of the still-fledgling, but constitutionally portentous, “right to work” movement, privileging individual “choice” over collective action in the workplace and subjecting labor administration to greater judicial control.¹⁵⁸ It also required every union leader to file an affidavit swearing:

that he is not a member of the Communist Party or affiliated with such party, *and that he does not believe in*, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.¹⁵⁹

The enemies of the New Deal’s constitution of opportunity had discovered a powerful new constitutional political economy in anticommunism, which portrayed a great deal of federal microeconomic regulation as anathema to constitutional democracy while entrenching new forms of labor discipline as constitutional bulwarks against communist lawlessness.¹⁶⁰ This anticommunist constitutionalism had already stopped the New Deal in its tracks in the late 1930s.¹⁶¹ While President Truman tried to resist the harshest effects of anticommunism on New Deal labor relations, his 1947 declaration of war against communism assured its supremacy.¹⁶²

Fishkin and Forbath pick up this thread in their last chapter, noting that the defeat of unionization lies at the heart of our contemporary “Gilded Age,”¹⁶³ and tracing this defeat back to Taft–Hartley and subsequent “right to work” legal victories of the 1950s and early 1960s.¹⁶⁴ But they treat this

156. See GRISINGER, *supra* note 148, at 86–90; NELSON LICHTENSTEIN, *LABOR’S WAR AT HOME* 238–41 (2d ed. 2003).

157. Labor Management Relations (Taft–Hartley) Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–97 (2012)).

158. See LEE, *supra* note 13, at 77 (quoting Cecil DeMille, who felt that despite his loss in the courts “his position had been vindicated by Congress in the Taft–Hartley Act”); FISHKIN & FORBATH, *supra* note 10 (manuscript at 82 n.230) (noting that Taft–Hartley loosened unions’ control over the individual worker’s “right to work”).

159. Labor Management Relations (Taft–Hartley) Act, 1947 § 9(h), 61 Stat. at 146 (emphasis added).

160. For the connection between New Deal critics and early Cold War political economy, see CEPLAIR, *supra* note 134, at 75–78.

161. See *supra* notes 133–47 and accompanying text.

162. See *supra* notes 148–57 and accompanying text.

163. FISHKIN & FORBATH, *supra* note 10 (manuscript at 69).

164. *Id.* (manuscript at 82–83, 82 n.230).

resurgence of “libertarian” constitutional political economy almost like a natural fluid, filling the empty vessel that the “Great Forgetting” of egalitarian constitutional political economy left behind.¹⁶⁵ By putting Taft–Hartley and its progeny back in the political-economic context of late New Deal and early Cold War anticommunism, a different picture emerges: one in which the constitution of opportunity was not forgotten but purged.¹⁶⁶

Fishkin and Forbath’s trope of “forgetting” depends on their description of the “postwar period” as an era in which “the parties . . . were simply not all that far apart. Their divisions over economic matters did not disappear, but with the anti-New Deal faction defeated, those divisions were smaller.”¹⁶⁷ But the anti-New Deal faction was not in fact defeated. The constitutional political economy of anticommunism that this faction had settled on in the late 1930s became the bipartisan *lingua franca* of the postwar world. Anticommunism precluded—at times through criminal sanctions¹⁶⁸—widespread support for Fishkin and Forbath’s constitution of opportunity and its call to “democratiz[e] the forms of ownership and control that prevail over the means of work and social production.”¹⁶⁹ The comparatively small political-economic differences between Democrats and Republicans in the 1950s and 1960s were an index of the extent to which each party had recast itself as what Fishkin and Forbath elsewhere call a “party of the Constitution” or a “party of Principle”¹⁷⁰—committed not to the maintenance of the New Deal order but to the re-articulation of a subset of the New Deal’s political-economic ambitions within the parameters of anticommunism.

To be sure, the constitutional political economy of anticommunism was not simply antistatist or economically libertarian in the traditional sense. The relatively egalitarian exercise of the federal government’s taxing and spending authority and its expansion of civil rights were, in part, constitutional responses to the challenge of a competing, communist egalitarianism.¹⁷¹ But anticommunism also steadily corroded the legal and

165. *Id.* (manuscript at 64–67); *cf. id.* (manuscript at 73–76) (discussing the “libertarian revival”).

166. *See, e.g.,* WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY* 107 (1986) (“As the decade of the 1940s drew to a close, the politics of anticommunism had exerted a chilling effect on virtually all progressive causes.”).

167. FISHKIN & FORBATH, *supra* note 10 (manuscript at 65).

168. *See generally* ROBERT M. LICHTMAN, *THE SUPREME COURT AND MCCARTHY-ERA REPRESSION* (2012); ELLEN SCHRECKER, *MANY ARE THE CRIMES* (1998); STORRS, *supra* note 120.

169. FISHKIN & FORBATH, *supra* note 10 (manuscript at 90).

170. *Id.* (manuscript at 21–22, 39, 50).

171. *See* CRAIG & LOGEVALL, *supra* note 29, at 113–14, 136–38; MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* 12 (2000); AARON L. FRIEDBERG, *IN THE SHADOW OF THE GARRISON STATE* 81–97 (2000); James T. Fisher, “A World Made Safe for Diversity”: *The Vietnam Lobby and the*

political infrastructure that would prove necessary to preserve economic egalitarianism in the face of growing monetary and fiscal imbalances. These imbalances reached a tipping point as early as 1968,¹⁷² exacerbated by several features of anticommunist political economy: Cold War military spending;¹⁷³ fragmentary unionization under conditions of continual red-baiting (union density steadily declined after 1954);¹⁷⁴ the proliferation of capital-friendly tax expenditures;¹⁷⁵ and the failure to impose more labor-friendly wage–price ratios.¹⁷⁶ This last intervention would have given workers a greater share of the returns to capital while loosening the bond between middle-class prosperity and inflationary growth. But it was anathema in an anticommunist republic.

Conclusion

Amid growing economic inequality, and growing awareness of that problem in the legal academy,¹⁷⁷ *The Anti-Oligarchy Constitution* has done the vital work of bringing political economy back into constitutional history, where it has long been absent. But that absence is itself explicable by political-economic developments that Fishkin and Forbath’s narrative does not yet fully capture. This Essay has argued that a fuller integration of political-economic analysis and constitutional history will require more attention to the political-economic conditions of constitutional discourse, even where that discourse is itself “about” political economy. These conditions include the anticonstitutional and anticapitalist social movements that shaped the constitution of opportunity during the twentieth century.

Politics of Pluralism, 1945–1963, in COLD WAR CONSTRUCTIONS 217 (Christian G. Appy ed., 2000).

172. See ROBERT SOLOMON, THE INTERNATIONAL MONETARY SYSTEM, 1945–1981, at 114–27 (updated ed. 1982); Robert M. Collins, *The Economic Crisis of 1968 and the Waning of the “American Century”*, 101 AM. HIST. REV. 396 (1996).

173. See IRVING BERNSTEIN, GUNS OR BUTTER 358–78 (1996); JULIAN E. ZELIZER, TAXING AMERICA 255–78 (1998); Collins, *supra* note 172, at 401.

174. See GERALD MAYER, CONG. RES. SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 12 (2004); see also JENNIFER KLEIN, FOR ALL THESE RIGHTS 250–52 (2003) (describing antilabor smear campaigns of the mid-twentieth century); Nelson Lichtenstein, *Pluralism, Postwar Intellectuals, and the Demise of the Union Idea*, in THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM 83, 83 (Sidney M. Milkis & Jerome M. Mileur eds., 2005) (tracing the decline of unions and the political influence of organized labor in the post-WWII period).

175. See ZELIZER, *supra* note 173, at 86–98.

176. See NELSON LICHTENSTEIN, STATE OF THE UNION 98–140 (2002); MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE 58–82 (1977); Shane Mage, *The “Neutrality” of the Wage-Price Guidelines*, in THE GREAT SOCIETY READER 159, 163–64 (Marvin E. Gettleman & David Mermelstein eds., 1967).

177. See generally David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014) (reviewing PIKETTY, *supra* note 15); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. (forthcoming 2016) (on file with author); Symposium, *Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014.

The political economy of Cold War anticommunism, in turn, supplanted both this anticapitalist tradition and its moderate double—the constitution of opportunity. Accordingly, the construction of a more egalitarian political economy will not simply be a matter of remembering a forgotten constitutional language. The success of such a project will depend upon the destruction of the material and discursive structures that silenced this language in the first place.