TO: Tulane Conference  
FROM: Willy Forbath  
RE: Explaining the Great Forgetting

Joey Fishkin and I are completing a book entitled *The Anti-Oligarchy Constitution*. It is about constitutional political economy in the U.S. from the Revolution to the present. One of the many problems of constitutional change the book addresses is what Joey and I call “the Great Forgetting.” Until roughly the mid-1940s, those who favored a broad distribution of wealth, power and opportunity made arguments in this key. Then, they stopped. What, for present purposes, we can simply call progressive constitutional political economy was forgotten. How and why did this forgetting happen? That is the constitutional change my paper sets out to narrate and explain.

I have included the first seven pages of the book’s Introduction to provide some context. The rest of the paper consists of the three final sections of the book’s chapter on the New Deal. They are still in rough draft. Criticisms, comments and suggestions large and small: most welcome!
The Anti-Oligarchy Constitution

Joseph Fishkin & William Forbath

Introduction

We live in a time of profound and justified economic and political anxiety. Americans have long been deeply attached to an idea of America as a middle-class nation, one with few of us on the economic margins, abundant opportunities to reach a secure place in the middle class, and a fair shot at wealth and distinction for everyone. We have also long been deeply attached to a political dimension of this vision: an America in which political power and opportunity are widely distributed among the people, rather than being concentrated in the hands of a few. Half a century ago, it seemed reasonable to believe that both the economic and political dimensions of this vision described where the nation was headed.

Not so today. Economic inequality has been rising, quietly, for decades. The Great Recession laid bare just how much. America’s vaunted middle class is now shrinking and embattled, with a substantial group edging downward toward a more precarious place, closer to that of the poor, and a smaller group edging upward toward significant wealth. Wealth and economic clout are becoming more concentrated at the top, to a degree that recalls the last Gilded Age; it is also becoming increasingly clear that along with that concentrated wealth comes concentrated political power. These phenomena unsettle basic assumptions and have profoundly shaken our politics. Our nation is once again beginning to look like what reformers throughout the nineteenth and early twentieth centuries meant when they talked about a society with a “moneyed aristocracy” or a “ruling class”—an “oligarchy,” not a Republic.

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

Throughout the nineteenth and early twentieth centuries, waves of reformers of widely different stripes confronted crises in the nation’s opportunity structure resembling the one we are experiencing today. They responded with constitutional claims. The content of these claims varied, but at the core of these reformers’ arguments was the idea that we cannot keep our constitutional democracy—our “republican form of government”—without constitutional restraints against oligarchy and a political economy that sustains a robust middle class, open and broad enough to accommodate everyone.²


2 The boundaries of who belonged in this category of “everyone” were fraught and contested. Those boundaries are the object of the third major principle that we argue became central to the tradition we are describing—a principle of inclusion.
Such arguments are, at their heart, structural constitutional arguments. Unlike the structural mode of interpretation familiar to us today, which builds claims about topics like the separation of powers and federalism on institutional relationships within the political sphere, arguments about constitutional political economy begin from the premises that economics and politics are inextricable, and that our constitutional order rests on and presupposes a political-economic order.3

Arguments about constitutional political economy have many different valences. They are not exclusive to the waves of reformers that most interest us in this book. Indeed, the striking thing about many of the constitutional debates of the nineteenth and early twentieth century that we will explore in these pages is that all sides were making arguments about constitutional political economy. But our primary focus is on recovering and reconstructing a tradition of arguments about constitutional political economy that we call the democracy of opportunity tradition.

Arguments in this tradition are highly attuned to the threat of oligarchy: the danger that concentrations of economic and political power may be mutually reinforcing—and, if sufficiently extreme, may threaten the Constitution’s democratic foundations. There are several ways to fight the threat. One is to target the mechanisms by which economic and political power are converted into one another, defining these mechanisms as forms of corruption. Another is to build and maintain robust secondary associations, which can give the many a means of challenging the political or economic dominance of the few. Some arguments in this tradition aim to open new channels of democratic politics that circumvent oligarchic political power. Others aim to break up oligarchic concentrations of economic power, defining them as monopolies and subjecting them to legal sanction.

Arguments in this tradition also hold, more broadly, that economic opportunities in our society must be structured in an open, democratic way. Part of the anti-oligarchy idea is that avenues to wealth and distinction must be open to ordinary Americans, rather than reserved for a privileged few. But there is also a broader principle, conceptually distinct from anti-oligarchy: that the roads to a middle class life must be broad enough to accommodate everyone, so that the economy will reliably produce the mass middle class that is the social and economic base of republican government and a structural condition of fair access to opportunity. While its implications shift dramatically over time as the American economy changes, this second principle remains recognizable.

Finally, these arguments have sometimes been deeply intertwined with a principle of inclusion: that the democracy of opportunity must extend to all the people, across lines of race, and later sex, and other invidious group-based distinctions. Today, this third principle is the only part of the democracy of opportunity tradition that sounds like a constitutional argument. As we will discuss below, it was embraced only fitfully by the reformers and advocates in the tradition we are sketching. But we will argue that all three of these principles together—anti-oligarchy, a broad and open middle class, and inclusion—are necessary components of the most coherent version of the democracy of opportunity tradition, and the only version that remains compelling today.

The strands of the democracy of opportunity tradition beyond the principle of inclusion—the arguments against oligarchy and for building a broad middle class—may seem to be drawing on what Cass Sunstein calls “constitutive commitments”: fundamental commitments, constitutive of important aspects of our national identity, yet not to be found within the Constitution itself.4 But this distinction is anachronistic,

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3 This premise is the economic analogue of the modern premise that the Constitution is inevitably entwined with—and not neutral with respect to—the nation’s social order. See Jack M. Balkin, The Constitution of Status, 106 YALE L.J. 2313, 2313–14 (1997).

4 See CASS R. SUNSTEIN, THE SECOND AMERICAN REVOLUTION: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 62 (2004). Advocates of constitutional welfare rights have argued otherwise—that in
as applied to the constitutional thinking of these nineteenth and early twentieth century reformers. These reformers were interpreting the Constitution as they understood it, and they said so. They offered arguments based on constitutional text and history, and arguments based on commitments embodied in the Declaration of Independence, as well as arguments in a straightforwardly structural mode. At the same time, their project was not exclusively interpretive. These reformers also offered constitutional amendments and reforms—many of them successful—at both the state and federal levels. All were aimed at protecting what they saw as an underlying constitutional commitment to a democracy of opportunity: a political economy in which power and opportunity are dispersed among the people rather than concentrated in the hands of a few.

Arguments in the democracy of opportunity tradition animated a protracted series of hotly contested constitutional debates about class and opportunity. In general, all sides in each of these debates—both proponents and opponents of the democracy of opportunity tradition—made extensive arguments about constitutional political economy. Most often, one side invoked the distributive commitments of the democracy of opportunity tradition, while the other side called forth anti-redistributive constitutional precepts. Frequently, all sides claimed to be safeguarding or restoring fair equality of opportunity and a broad middle class. All assumed that the principles at stake in these political-economic battles were constitutional principles; the dispute was about which way our constitutional commitments pointed.

Today, there remains broad agreement that it is important to promote opportunity, avoid oligarchy, and build a robust middle class open to all. These principles remain mainstays of American politics. However, we have lost the idea that they are constitutional principles. Indeed, from within the current conventions of our constitutional discourse it is not obvious what the claim that they are constitutional principles even means. Much of this book is a work of reconstruction: a work aimed at understanding the shape and texture of the democracy of opportunity tradition. But ultimately the aim of the book is also to reckon with the consequences of this tradition’s disappearance—and to explore what might be at stake in recovering some version of it as part of our modern understanding of our Constitution.

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

Or consider a different problem: the inability of tens of millions of Americans who comprise the so-called “working poor” to afford health insurance, and to pursue their lives and ambitions free from the enormous and avoidable peril of going without it. Absent the Affordable Care Act’s expansion of Medicaid, these Americans were unable to obtain a form of security that has become one of the hallmarks of what it is to be part of the American middle class. Here again, there is constitutional contestation around this issue. But the Constitution enters the story very late, and only as a potential roadblock, in the form of a Spending Power question. Does the Spending Power permit Congress to expand Medicaid?

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

Understood in the light of the tradition we are reconstructing, in both of these examples the Constitution belongs at the beginning of the story, not the end. The first question is whether the Constitution requires lawmakers to enact measures like the ones the Court struck down. In past rounds of debate about constitutional political economy, arguments of this form were common. Proponents of the democracy of opportunity tradition in different eras often responded to constitutional claims that Congress lacked the power to enact laws like these with constitutional claims that Congress had not only the constitutional power to do so, but also the constitutional duty.

Such arguments were directed primarily to the political branches, and only secondarily to the courts. They reflect a constitutional world that was once familiar but is now much less so, in which many of the central debates were clashes over the affirmative constitutional obligations of the political branches, especially the legislature. And yet such arguments have consequences across all the branches, including in the courts. In court, these arguments can help make visible the constitutional claims and interests at stake on both sides of many important disputes—not only on the side asserting constitutional constraints on what Congress may do.

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

Today, the contemporary libertarians who are the lineal descendants of the advocates of Lochnerism continue to make an array of constitutional claims that are recognizable as constitutional political economy. These arguments hang on many different doctrinal hooks. They inform interpretations of the Commerce Clause, the separation of powers, the First Amendment, even the Equal Protection Clause.

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Whatever the doctrinal setting, the underlying force of these claims comes from a particular vision of the relationship between the Constitution and our economic life that would be very familiar to veterans of many nineteenth and early twentieth century constitutional struggles over banking, currency, credit, labor, trusts, and federal power over economic matters.

All that is missing is the libertarians’ traditional opponents: the advocates of the democracy of opportunity tradition. Their political descendants live on, too, but we have forgotten that their arguments are constitutional arguments. With the exception of the inclusion strand, the entire democracy of opportunity tradition today reads as mere “policy” argument, with no particular mooring in the Constitution. This means the constitutional playing field is decidedly uneven. It leaves our constitutional order doubly vulnerable to the advance of the new *Lochner*ism—first, because there are no principles of commensurable constitutional weight to press back against that advance, and second, because this way of thinking obscures the contestable political-economic foundations of the new *Lochner*ism itself, which ought to be contested both in the courts and outside them.

We think the libertarians get much wrong but one big thing right: The Constitution really can be understood to make substantive demands on our political economy. The question is how we should understand the content of those demands and their relationship to constitutional law. Constitutional claims have a special place in American political and legal discourse. To a great extent they are the coin of the realm. Today, no less than a century ago, they can operate not only as legal principles in court, but also as touchstones of legislation and banners of political movements. They do so now on the deregulatory right; the question is whether advocates of a revived democracy of opportunity tradition will be able to do the same…..
The Half Life of New Deal Constitutional Political Economy: Jim Crow and the Great Forgetting

We have seen how the Great Forgetting of progressive constitutional political economy was first set in motion inadvertently, by the way New Deal attorneys framed their defenses of the Wagner Act and Social Security Act before the Court. In Congress and in public discourse, we saw New Dealers champion their legislative agenda in terms of implementing a new “constitutional economic order,” brimming with positive social and economic rights and affirmative governmental duties. But the attorneys saw nothing to gain by trying to win judicial assent to this outlook, which was wildly at odds with the views of the Court. So, while New Dealers in Congress and public debate left no doubt about the essential constitutional work they believed the new statutes were doing, they defended them before the Court on commerce and spending clause grounds. Their public-political arguments focused on constitutional duty and new fundamental rights, but their claims in court only revolved around the scope of federal power.

And of course, after the “switch in time” in 1937, these claims prevailed. But what New Dealers sought and won from the Court was not a decision to make the New Deal constitutional political economy its own, but simply a decision to step aside and allow other actors—the ones New Dealers believed were best equipped to do the constitutional work—to carry on.

More than that. We already have noted how in the late ‘30s and early ‘40s, a gulf gradually began to open between two understandings of this work. In public-political debate, addressing class inequality and the distribution of the risks and rewards of industrial life via regulation and structural social and economic reforms remained constitutional business. There were constitutional social and economic rights to be fully realized and safeguarded and others yet to be enacted. But in Court, such work was best cast as simply social and economic regulation, about which the Court’s Constitution, properly understood, had nothing to say. Judicial guardianship should focus on civil liberties and the rights of religious and racial minorities.

The gulf began with late ‘30s cases like Carolene Products and its not-yet-canonized footnote...
Here commenced the judicial codification of the view that there simply weren’t any constitutional stakes in such distributional questions, but only the play of rival interests in the open field of interest group politics. But of course, that view only flowered and became a central feature of the Great Forgetting, when what counted as “the Constitution” and a “constitutional argument” became vastly more court-centered. That view could only take hold when outside the courts, in legislative and administrative arenas, the language of constitutional political economy had largely given way to a technocratic discourse of economic and social policy and “private ordering” – a process we already have seen beginning in the spheres of banking and, even, partially, in anti-trust, but which still seems almost unimaginable in the worlds of labor and social provision at the center of New Deal rights talk. That point would arrive only around mid-century, when a comparatively narrow Cold War “consensus” about the economic and social order had eclipsed New Deal liberalism’s larger reform ambitions; only then would both elite and popular understandings begin to see the judicially “preferred” rights of racial and religious minorities, criminal defendants and unpopular speakers as the only kind of constitutional rights.  

Meanwhile, much remains to be explored, if we are to understand what happened to the New Deal embodiment of the democracy of opportunity tradition in the arena of politics, executive action and public debate. How and why did popular understandings and public memory of the New Deal revolution forget the robust second Bill of Rights and the social democratic constitutional political economy it evoked, replete with governmental duties to prevent oligarchy from ever recurring and to secure industrial democracy, decent work and livelihoods and a middle class standard of economic security for all Americans “regardless of race, station or creed”? 

Much of the answer lies in a dramatic set of political and constitutional confrontations that unfolded entirely outside the courts, after the standard accounts tell us the New Dealers had won their

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7 U.S. v. Carolene Products, 304 U.S. 144, 153 n. 4 (1938)
8 See infra, ch. 8, at __-__. See also ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1995).
constitutional revolution. What the New Dealers won was the battle for judicial accommodation; but they lost their hard-fought quest to “complete the New Deal” and bring the second Bill of Rights down to earth in the form of legislation and governmental institutions. They lost the key legislative- and administrative-constitutional battles, from the late ’30s onward. Every serious revolution produces a counter-revolution. So it was in the case of Reconstruction; so it was here. As was the case during the 1870s-’90s, the conservative counter-revolution of the 1930s-’40s waged its battles in boldly constitutional terms. It fought for the old Constitution of private property, states’ rights and white supremacy; and it took back much ground. It brought to a screeching halt the process of legislating fundamental social and economic rights and building up the state capacity to realize them; it went further, and cut back the most transformative rights and institutional reforms the New Dealers had enacted. In this fashion, the counter-revolution we are about to examine ushered in the Great Forgetting, uprooting from post-war American politics and public life much of the constitutional vocabulary, ideological repertoire and institutional foundations New Dealers had fashioned to forge and defend their vision of a modern and inclusive democracy of opportunity.

One of the three core anti-New Deal constitutional principles we just flagged may seem surprising. Of course, the old rights of private property and what anti-New Dealers had begun calling “free enterprise” would be central to any anti-New Deal constitutional politics; likewise, states’ rights and limited national government. But white supremacy? What has race got to do with these battles over constitutional political economy?

Everything, as it turned out. Key to understanding the victories of the counter-revolution – and its decisive role in the Great Forgetting – is understanding Jim Crow’s part in the tragic end of New Deal reform. By the same token, we think, remembering the forgotten civil rights movement that emerged to combat Jim Crow in this era may be a useful step in reimagining an inclusive democracy of opportunity today.

It did not take long for clear-eyed students of Congressional politics to begin spotlighting Jim
Crow’s lead role in shaping the fortunes of New Deal reform. The first scholarly account of the links between Dixiecrat power and the partial, half-finished shape of the New Deal was by the great Texas-born political scientist, V.O. Key. Key coined the phrase “the Southern Veto” to describe the hammer lock on Congress that the Southern Democrats enjoyed by dint of their numbers, their seniority, and their control over crucial committees. Key described how the Dixiecrats exercised this power to veto civil rights legislation; hence, the New Deal’s notorious failure to enact a federal anti-lynching law.9 But Key noted that the Dixiecrats used their veto power far more broadly.

Hailing from an impoverished region with a populist tradition, most southern Democrats were staunch supporters of the New Deal until the late ’30s. But the Southern delegation was under the sway of a ruling elite Key dubbed the “oligarchy” of “Southern Bourbons,” who were determined to insulate the region’s separate, racially-segmented, caste-ridden labor market. In exchange for the Southern delegation’s support for New Deal programs, the Bourbons insisted on exacting decentralized administration and standard setting of all labor measures and demanded that key bills exclude the main categories of southern labor.

Otherwise, asked Senator Carter Glass of Virginia, how "were they going to get blacks to pick and chop cotton when Negroes were receiving [on federal work programs] more than twice as much as they had ever been paid," and when old-age insurance and social security bills had provisions that "would demoralize the region" until the southern committee heads rewrote them.10 The Bourbons were blunt, if sometimes darkly paranoid, in the old Southern style. Thus, Congressman “Cotton Ed” Smith railed against the administration’s original Fair Labor Standards bill, "Any man on this floor who has sense enough to read the English language knows that the main objective of [the original bill] is, by human legislation, to overcome the splendid gifts of God to the South.”11

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9 See V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1949).
11 Wright, supra note __, at 219.
And in the old Southern style, the Bourbons defended their peculiar labor institutions by appealing to states’ rights. The outrage to "our region" also "outrage[d] the Constitution," by threatening to "set up a dangerous and all-powerful board . . . in Washington" in "utter violation of States' rights, local self-government, [and] local self-determination of our own sociological and economic problems."12

By allying with northern Republicans, or by threatening to do so, the Dixiecrats stripped all the main pieces of New Deal legislation of any design or provision that threatened the separate southern labor market and its distinctive melding of class and caste relations, its racial segmentation, and its low wages. Consider, for example, the Social Security Act. The Committee on Economic Security had crafted the administration’s proposals to propitiate the southerners. For that reason, FDR prodded the Committee to produce proposals favoring state-level autonomy; and it did - albeit with national minimum standards – in both the unemployment insurance and assistance for the needy-aged, dependent children, and blind programs.13 Only the old-age benefits program would be purely federal.14

But the Dixiecrats exacted more concessions from the congressional sponsors of the administration bill. The Committee’s national standards for unemployment and old-age insurance were sacrificed, and the administration's core commitment to include all employed persons in the unemployment and old-age insurance schemes was abandoned. Most starkly, the Dixiecrats expelled agricultural and domestic workers from the nation’s core social insurance programs, thereby drumming out the great majority of black Americans, who worked in these two sectors.15

The AAA, the NRA, the National Labor Relations and Fair Labor Standards Acts, were all

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13 Foreshadow ADC/AFDC as sole source of federal assistance for poor blacks – hence racialized shape of War on Poverty and emergence of welfare rights movement chronicled in ch. 8.
15 See generally KATZNELSON, FEAR ITSELF, supra note XX; ALTMeyer, supra note XX, at 34; PERKINS, supra note 338, at 296-301; WITTE, supra note XX; Kenneth Finegold, Agriculture and the Politics of U.S. Social Provision, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES, supra note XX, at 199-234.
tailored in this fashion. More encompassing and inclusive bills, bills with national, rather than local, standards and administration, enjoyed solid support from the northern Democrats (and broad but bootless support from disenfranchised southern blacks and poor whites); but the southern Junkers and their "racial civilization" exacted a price, and FDR, willingly at first, paid up.\textsuperscript{16} This "gentleman's agreement' that held the party . . . together appeared unshakable. The White House and the Dixie courthouse seemed solidly allied.\textsuperscript{17} Then, however, as the 1936 election approached and business opposition to the New Deal intensified, Roosevelt grew more attentive to two crucial constituencies: the insurgent industrial unions of the CIO and the black voters of the large cities of the North.

As these groups began to bulk large in his 1936 reelection bid, Roosevelt’s social and economic rights talk grew more robust and universal, and the southern attacks began. Governor Talmadge of Georgia convened a "Grass Roots Convention" to "uphold the Constitution" against "Negroes, the New Deal and . . . Karl Marx,"\textsuperscript{18} while Senator Glass challenged the white South to show “spirit and courage enough to face the new Reconstruction era that Northern so-called Democrats are menacing us with.”\textsuperscript{19}

The next few years brought more "interference." Minimum wage legislation, CIO organizing drives, rural poverty programs, and recurrent political initiatives and mobilizations among the disenfranchised, both white and black, began to undermine the political and economic sway of Key’s oligarchy of Southern industrialists and Black Belt landowners. Although early New Deal programs like the AAA had been tailored by these local southern elites, and their powerful representatives in Congress, to pour aid into southern agriculture without upsetting the plantation


\textsuperscript{17} SITKOFF, supra note XX, at 103.

\textsuperscript{18} Id. at 106.

\textsuperscript{19} Id. at 109-110; see also WEISS, supra note XX, at 186.
system, the very inequities of these programs from tenants' and sharecroppers' perspective sparked protests and national debate. CIO organizers, NAACP leaders, and progressive New Deal administrators lent support to grassroots movements like the biracial Southern Tenant Farmers Union. They wheedled new programs from sympathetic New Dealers in Washington like Secretary of Agriculture Henry Wallace.  

Just as FDR had cemented his alliance with industrial labor and redoubled his attacks on corporate “tyrants,” and Executive support for upstart blacks and poor whites was mounting in what hitherto had been secure provinces of “States’ rights” and “local self-government” by Southern elites, judicial safeguards against all these dangers seemed to be crumbling. In the fall of 1937, after the Court had handed down *West Coast Hotel Co. v. Parrish* and *Jones & Laughlin*, who could say its steadfastness in upholding the old Constitution was still to be counted on? For all these reasons, the New Deal's foes in Congress were galvanized. A group of conservative southern Democrats in the Senate met with like-minded Republican senators to consider a more formal alliance against the New Deal. The counterrevolution contemplated party realignment in the name of the old Constitution, and its leaders authored a manifesto.

The conservative senators drafted a “statement of principles,” which became known as the “Conservative Manifesto.” If the Court was giving up the constitutional battle against economic radicalism and centralized government, they would carry it on. The Manifesto proclaimed their devotion to the Constitution of states' rights, liberty of contract, and the property rights of the owners of capital. The attempt at forming a new conservative party foundered, but the coalition and its role as bulwark for

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21 PATTERSON, supra note XX, at 98-910.


23 Id. at 1936-38.
the old Constitution held firm and prevailed against Northern New Dealers’ efforts to “complete the New Deal” by fashioning a political economy that really could deliver on the vision of national guarantees of work and decent livelihoods and a full complement of social insurance rights – “regardless of station, race or creed,” in the words of FDR’s 1940s “second Bill of Rights.”

Quite simply, the conservative coalition brought the New Deal project of legislating fundamental social and economic rights to a halt. The 1938 Fair Labor Standards Act (FLSA) was the last such measure to be enacted – and we already have noted how thoroughly the Dixiecrats managed to hobble the administration’s inclusive bill and its national minima. To be sure, the Administration and Northern lawmakers set out to remedy the many gaps, exclusions and anomalies in the SSA and FLSA. Thus, for example, they tried restoring the Committee on Economic Security’s original provision for national (as opposed to state) administration of unemployment insurance. They tried to ensure that every citizen, through private or public employment or through public aid, would receive at least the minimum wage specified by the FLSA. They also tried to enact national health insurance. And, as we have seen, they crafted measures like the Full Employment Bill of 1945, addressing the “all-important right to work,” “to useful, remunerative, regular…employment.” We have seen how the administration’s Bill set forth an unequivocal federal commitment to full employment and provided for the data-gathering and policymaking capacities commended by the NRPB. But after the FLSA in ‘38, all these later efforts were defeated.

To the ire of Congressional conservatives, who declaimed against “Roosevelt constitutional tyranny,” the administration's late ‘30s and early ‘40s executive branch reform bills envisioned

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24 See Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), reprinted in 13 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41-42 (Samuel I. Rosenman ed., 1950) (outlining social and economic rights as part of modern meaning of old Bill); see also Franklin D. Roosevelt, Address to the Congress on the State of the Union, reprinted in 12 FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 21, 30-31 (Samuel I. Rosenman, ed., 1950) (earlier expounding new fundamental rights including right to work and assurance against major economic hazards).
25 See Forbath, New Deal Constitution, supra note ___, at 207.
new administrative capacities in the executive branch to oversee fiscal policies, work programs, and public investment in the name of full employment. But the conservative coalition managed to cripple, undo or dismantle all these measures. World War II had brought war-time labor shortages, national mobilization, central state expansion and a burgeoning of national governmental controls on local and state economies. With this, virtually the entire southern delegation openly joined ranks with the minority-party Republicans to defeat FDR’s executive reorganization plans, gut the Full Employment Bill, along with countless other labor, health and housing measures, and abolish the NRPB, all in the name of limited government, individual liberty, private property and states’ rights.

Together, these gutted, defeated and dismantled laws and agencies would have produced a post-World War II American state much more akin to those fashioned in the capitalist democracies of post-war Europe than the state we got. They would have laid foundations for broader, more inclusive social insurance along with active national labor market and full employment policies, and sustained the public rhetoric and governmental commitments embodied in Roosevelt’s strikingly social democratic second Bill of Rights.

By thwarting this, the conservative coalition went a long way to bring about the Great Forgetting in public discourse and memory. Broad social and economic rights talk fell into disuse after the decisive defeats the New Deal agenda suffered in the 1940s.

“A New Reconstruction Era”: the New Deal’s Forgotten Civil Rights Movement

Roosevelt and the New Dealers could not forever ignore and repress the contradiction between

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28 Forbath, New Deal Constitution, supra note ___, at 207.
29 See, MARION CLAWSON, NEW DEAL PLANNING: THE NATIONAL RESOURCES PLANNING BOARD 328-332 (1981). Stephen Bailey provides the most detailed legislative history of the administration’s Full Employment Bill. Bailey Chronicles the efforts of Truman and his cabinet to pressure Congress into passing the administration’s 1945 Bill. He makes clear that the key players in gutting the Bill were all Southern Democrats == Congressmen Carter Monasco of Alabama and Will Whittington of Mississippi in particular. Their key positions on the Expenditures Committee, on the subcommittee that drafted the House substitute bill, as well as on the Conference Committee enabled them to engineer a bill that would “exclude the last remnants of what he considered to be dangerous federal commitments and assurances [including the world of the title]”, as well as the original bill’s provisions for new planning and budget offices and capacities. STEPHEN BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 165 (1950). “The emasculation, or as some wit put it, the ‘Manasco-lation’ of the policy commitments and the economic program of the original bill needs no further elucidation here.” Id. at 167.
their goal of a full-blown, modern democracy of opportunity and their accommodations with the Southern reactionaries. As the Dixiecrats became open opponents of New Deal reform, and the “gentlemen’s agreement” between the White House and the Dixie courthouse collapsed, Roosevelt and Northern New Dealers began gingerly to turn against Jim Crow.

We have glimpsed something of the strenuous, but defeated and largely forgotten, efforts of the late ‘30s and early ‘40s to “complete the New Deal” by enacting FDR’s social-democratic second Bill. Now, we need to take a look at the impressive, but equally forgotten, labor-based civil rights movement and voting rights campaigns that emerged in the South during these years. Where the 1960s civil rights movement had its institutional base in the black Church, this 1930s-‘40s movement emerged out of the new industrial unions, the first labor outfits to welcome black workers since the Knights of Labor in the 1880s. Its vanguard was the half million black workers who joined CIO unions. Where the constitutional vision of the 1960s civil rights movement emphasized integration and bringing down “whites only” laws, this one’s vision partook of New Deal constitutional political economy. Its focus was on work, labor, livelihoods and economic inequality, seeking through mobilization, voter registration drives, and legislation and litigation to bring black America into the fold of New Deal social reforms and social and economic citizenship via a reconstituted Democratic Party.

The Justice Department and many leading congressional New Dealers lent these efforts a genuine measure of support. And even the pragmatic and cautious Roosevelt lent a hand, as he came to see the need to to oust the reactionary Southern kingpins in order to realign the Democratic Party into a national organ of New Deal liberalism.

Thus, Senator Glass of Virginia was not wrong. In the late ‘30s and early ‘40s, a “new Reconstruction era” did menace the South, and “Northern so-called Democrats” were a key force behind it. The


31 See, Robert Korstad & Nelson Lichtenstein, Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement, 75 J. AM. HIST. 786 (1988); SULLIVAN, supra note, XX.
Reconstruction analogy is apt, of course, because the Northern New Dealers had in common with the Reconstruction Republicans eighty years earlier the politico-constitutional aim of enfranchising the black South as a new southern base for their party.

But equally important, the analogy is apt - and this forgotten chapter of civil rights history worth remembering - because these New Dealers and black and white labor progressives rekindled what we see as the central constitutional lesson of Reconstruction: that the principle of racial inclusion is essential – morally, politically and economically – to the democracy of opportunity project. And they tried to bring all three principles – anti-oligarchy and social and economic democracy, a broad, wide-open middle class way of life, and inclusion -- back together. They nurtured a civil rights constitutionalism subtly different from the one we have inherited from Brown v. Board in the way their constitutional outlook put political economy, work and livelihoods and substantive social and economic equality much more at the center of racial justice.

Emblematic of this difference is the way that the Thirteenth Amendment – so marginal to the 1960s’ civil rights jurisprudence - stood at the heart of New Deal civil rights lawyering, with its bar on slavery and coerced labor and its promise to make free labor universal. We have seen how the Thirteenth Amendment loomed large in organized labor’s anti-injunction campaigns: they called it “the glorious Labor Amendment.” When Roosevelt’s Attorney General Frank Murphy established a new Civil Rights unit in the Department of Justice, its attorneys seized on the Labor Amendment to go after the brutal coercion and exploitation of black workers in the turpentine camps and cotton and rice fields of the Deep South. The N.A.A.C.P. also grabbed hold of the 13th Amendment and took on board the cause of black tenant farmers and tobacco workers, challenging debt peonage and, in a few cases, the state violence that harried organizing campaigns.32

In the ‘40s, the N.A.A.C.P. also continued its campaign against residential segregation and restrictive covenants, enlisting the great legal Realist Robert Hale, whom we encountered applying the lessons of

32 The key work on these developments is Risa Goluboff’s great book, THE LOST PROMISE OF CIVIL RIGHTS (2010).
Realism on Senator Wagner’s behalf to challenge the notion that there was no salient state action involved in employers’ refusals to hire union workers or bargain with organized labor. Appealing to the Realist spirit of the Court’s New Deal Justices, the NAACP gained an injection of Realism into civil rights jurisprudence, in the justices’ subversive treatment of state action in Shelly v. Kramer.33

Seldom relied on, Shelly is still well-known. Forgotten in the annals of New Deal constitutionalism are the remarkable ways that New Deal friends of civil rights in Congress invoked the revolutionary idea of an affirmative right to state protection against “private” discrimination in employment, building on that notion as it had taken shape in the constitutional discourse around the Wagner Act.

We will see this unfold in a moment. But we should fill in a bit more of the context of these forgotten constitutional ideas. With its middle-class leadership and its bent toward litigation, the NAACP was ill-equipped to act in the workplaces and working-class neighborhoods where black Americans fought their most decisive battles in the New Deal era. The vanguard, as we noted, were the half million black workers who joined CIO unions, with their resounding demand, “Equal rights for Negro workers.”34 In the 1880s, African Americans had been a small part of the nation’s industrial workforce and so a small fraction of the Knights of Labor’s constituency; but by the 1930s black workers were a significant part of the nation’s industrial work force and central to union organizing throughout the nation: in southern metal and coal mining, longshore, and tobacco manufacturing, as well as in northern auto, steel, and meatpacking.35 Friend and foe alike agreed that the new industrial unions would not have prevailed without the militant support they won from black workers.36 One canny observer of New Deal politics concluded that the CIO's battle for black rights

33 334 U.S. 1, 18 (1948) (holding that court enforcement of restrictive covenants constitutes state action); Mark Tushnet, Making Civil Rights Law 308-10 (1994); on Robert Hale’s contributions, see Barbara Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement _-_ (2001)


36 Cayton & Mitchell, supra note XX; Lichtenstein, supra note XX; Reuther, supra note XX; Northrup, supra note XX; Zieger, supra note XX.
became a vital symbol of the CIO’s fight for equality for all Americans – especially in the minds of the first-generation offspring of Southern and Eastern European immigrants.37

From the Gilded Age through the “tribal ‘twenties,” you’ll recall, the so-called “new immigrants” from the peripheries of Europe were themselves treated as racial others, or, more exactly, racially in-between blacks and whites. These racialized “foreigners” – Russian and East European Jews, Poles, Italians, Slavs and the rest - numbered almost twenty million before the nation’s gates clanged shut. They constituted the majority of the country’s industrial proletariat. Yet, they were spurned as unorganizable misfits by most native-born trade unionists and despised as unassimilable by much of the nation’s political and cultural elites.

Kept at the margins of national political life, they had ample reason to feel subordinated, excluded and deprived of equal standing and opportunity, until the CIO and the New Deal Democratic Party brought their offspring into the mainstream in the 1930s and ‘40s. The industrial-union-based rekindling of the democracy of opportunity’s principle of ethno-racial inclusion included them! In this context, the identification by "new immigrant" workers with equal rights for black workers was not only symbolic; in contrast to its parents and its children, the 1930s-40s generation of working-class "ethnics" often proved ready to elect black shop stewards and union presidents.38

Meanwhile, the traditional leaders of the cause of racial equality found the CIO an alarming upstart. From Detroit and Chicago to Winston-Salem and Birmingham, NAACP newsletters and board meetings bristled with misgivings about the "new crowd" of black union activists and their demands for a "more militant civil rights program.”39 As a study by one of the NAACP's chief foundation funders


uneasily concluded, "the characteristic movements among Negroes are now for the first time becoming proletarian...", and a reporter for *Crisis*, the NAACP's national journal, observed that the CIO had become a "lamp of democracy" throughout the old Confederate states. "The South has not known such a force since the historic Union Leagues in the great days of the Reconstruction era."

This movement gained much of its dynamism from the creative tension that arose between unionized black workers and the federal government – a relationship that historians Nelson Lichtenstein and Robert Korstad compare to the one between the church-based civil rights movement and the national government two decades later. *Brown v. Board* legitimated the protest movement and sit-ins of the early '60s, and the latter, in turn, lent political force and urgency to *Brown's* dormant promise of racial equality. In like manner, the rise of inclusive industrial unions and the passage of New Deal labor legislation provided working-class blacks a new standard to legitimate grass roots civil rights protest and demands for reform. As we have seen, the 1935 National Labor Relations Act excluded agricultural workers to accommodate Jim Crow, and it contained no explicit antidiscrimination provision for the same reason. Nonetheless, the "one man, one vote" policy implemented in thousands of National Labor Relations Board elections enfranchised black industrial workers who never before had voted or participated as rights-bearers in the public sphere. The new unions offered black workers industrial citizenship - participating in union governance, deliberating and deciding upon workplace grievances and broader goals; and these experiences combined with the patriotic egalitarianism of the New Dealers' war-time propaganda to generate a militant rights-consciousness among black workers as powerful as that evoked by the Baptist spirituality of Martin Luther King, Jr. a generation later.

This was manifest in the labor-led voting rights movement across the South, and in the leading black trade unionist, A. Philip Randolph's union-sponsored "March on Washington for Jobs and Equal
Participation in National Defense," which the CIO underwrote. In 1941, Randolph called on "Negro America" to march on the capital: "[I]f American democracy will not give jobs to its toilers because of race or color . . . it is a hollow mockery."  

FDR responded by creating the Fair Employment Practices Committee (FEPC), which promised to end job discrimination in defense industries. The first civil rights beachhead in the federal government since the Freedmen's Bureau, the FEPC was a weak agency; but its interracial staff conducted well-publicized hearings and investigations, exposing racist conditions and spurring on black protest. Beginning in 1943, Randolph addressed rallies demanding a permanent FEPC to be organized "roughly like the NLRB" with similar authority to identify and adjudicate "violations of rights" and "go to court if necessary." Like the Wagner Act, this law would secure "the right to work without demeaning discrimination." The one protected the "dignity of union membership and industrial democracy"; the other would protect the "dignity of fair employment."  

Bills to transform the wartime FEPC into a permanent federal agency came before Congress in 1945, the same year that it took up the administration's Full Employment Bill. Both were cast as measures redeeming fundamental rights, as more and more Northern New Dealers brought racial equality squarely into their constitutional political economy. The social right to a “job for all who can work,” they declared, and the civil “right to work, irrespective of . . . race, color and creed” were “two sides of the same equation.” Both were “economic rights of American citizenship.”  

When Congress finally acted against employment discrimination, almost two decades later, in 1964, the right to a job had fallen out of the equation. As we’ll see, Dr. King and other left-leaning civil rights

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48 See generally id.
49 Daniel Bell, A. Phillip Randolph Leads Drive for Permanent FEPC, NEW LEADER, Sept. 18, 1943, at 1.
50 See REED, supra note XX, at 321-43 (discussing the plans for reconversion of the Fair Employment Practices Committee).
leaders continued to talk about the two rights as inseparable aspects of economic citizenship for all. But by the ‘60s, mainstream liberals no longer thought in terms of constitutional political economy; for ‘60s liberals, the only constitutional issue, the only fundamental right in play, was anti-discrimination.

In 1945, however, New Deal liberals were still clear on the constitutional stakes in both the Full Employment bill and the peace-time FEPC. And so were conservatives. The Dixiecrats unfurled a host of constitutional objections to the bills proposing a permanent FEPC, but they often began with criticism of the political motivations they saw behind the bills. Northern "so-called Democrats" were pandering to "get the votes of a certain race in this country."

That was the motive behind the raft of civil rights bills - anti-lynching bills, anti-poll tax bills, bills bringing black occupations under Fair Labor Standards coverage or setting national minimums for those standards, and now the FEPC bills - that northern New Dealers like Wagner and LaFollette had been trying to foist on Congress since the 1937-38 rift in the Democratic Party and the emergence of a full-blown anti-New Deal, cross-party conservative coalition.

Not only were Northern Democrats wooing the votes of blacks in cities like Wagner's New York and scores of other urban districts where by the late ’30s, the black vote was “important and sometimes decisive.” But even more ominously, the Northern Democrats seemed to yearned for the unthinkable spectacle of southern blacks voting en masse, as one leading Dixiecrat put it, "[i]n order . . . that I will not have an opportunity to fill this seat again."

This characterization was not wrong. With widely varying degrees of resolve, and for reasons both pragmatic and principled, northern New Dealers had begun trying to revive Reconstruction's promise of a democracy of opportunity that included black America.

Not only were the motivations behind the fair employment bills unsavory to the Dixiecrats; the idea of national legislation against private employment discrimination also was "in palpable violation of the Constitution." But "[w]hat is the Constitution between friends," one Dixiecrat acidly inquired, "especially if the question has to do in some way, directly or indirectly, with the suffrage of a Negro?"

53 Id.
54 See HENRY LEE MOON, BALANCE OF POWER: THE NEGRO VOTE 198 (1948); SITKOFF, supra note XX; WEISS, supra note XX.
Bourbon congressman explained that insofar as the proponents of a permanent, peace-time Fair Employment Practices Commission sought to rest the measure on the Fourteenth Amendment, on the grounds that the "right to work" free from discrimination was a privilege or immunity of national citizenship, their case flouted the Slaughter-House Cases clear account of the scope of that clause.

What was more, the FEPC bills’ drafters were ignoring the state action requirement of the Civil Rights Cases, and to the extent they purported to rest the bills on the Commerce Clause, they could not prevail unless Congress could now do anything at all under that clause. But surely, even in 1945, enough of the old Constitution’s liberty and property protections survived, if not on the Court, then at least in the halls of Congress: surely, Congress knew that it could not reach deeply into the realm of private life (compelling unwanted racial association) and invade the rights of private property beyond where even the states "operating in the vast realm of their reserved sovereignty" could properly venture. Even the states, as one Republican argued, could not enact the FEPC antidiscrimination norm without destroying "the right of free choice in hiring, discharging, or promoting employees."

The House sponsor of a permanent FEPC, Progressive Republican Congressman Charles LaFollette, rose to defend the bill’s constitutionality. What he and other proponents of the bill said in its defense confirms that New Deal constitutionalism in the hands of Congress’s ablest lawyers (LaFollette, for his part, would soon be sent by FDR to join Robert Jackson as deputy chief counsel at Nuremberg) was a different creature from the one we have been taught about in law school: not a body of ideas that thrust economic rights and liberties beyond the purview of constitutional concern, but one that recast such rights in a new mold, adequate to building a democratic political economy in the era of corporate capitalism.

Regarding the conservatives’ objection that the FEPC bill unconstitutionally interfered with "free
choice” in hiring and firing, LaFollette pointed out that the Court already had upheld a federal statutory intrusion on that freedom in the form of the Wagner Act's outlawing the discharge of a worker for union affiliation. The Court agreed “it was unlawful to refuse to employ a man because of his ...union activities.”\textsuperscript{61} Thus, it seemed to follow “as a matter of constitutional authority that Congress has the power to declare a thing to be discrimination” and “irrelevant and invidious” as far as employment opportunity was concerned.\textsuperscript{62}

But LaFollette and other defenders of the FEPC bill went further, addressing not only the scope of Congressional power to regulate private sector employment but also the nature of Americans’ new fundamental economic rights and Congress’s new governmental duties in the wake of the constitutional revolution. Here, again, as was the case during the debates over passage of the Wagner Act a decade earlier, LaFollette, along with Senator Wagner and others, reasoned as though the NLRA was a fundamental rights-bearing measure resting on the Fourteenth Amendment. The Wagner Act, on this reading, affirmed that the "the right of employment in industry or the right to work" had "the dignity of at least a quasi-property right” that the Constitution authorized Congress to safeguard.\textsuperscript{63} In “upholding the provisions of the…Act,” the Court had taken “a step forward” toward recognizing this “new concept of property.”\textsuperscript{64}

From here LaFollette continued his defense of the constitutional bona fides of the FEPC bill, and still he reasoned in terms of fundamental rights, not relying on the sweep of the commerce power, but instead claiming a warrant from the Court for Congress to protect this "right to work at gainful employment," at least against invidious discrimination, on the basis of race, as of union membership. There remained the state action requirement. But this he swept away as an artifact of a laissez-faire era, no longer constraining in an age of positive government. If the nineteenth-century Constitution forbade laws or customs requiring or upholding private race discrimination, and empowered Congress to sanction such

\textsuperscript{61} 91 Cong. Rec. 3673-74 (1945) (extension of remarks of Rep. LaFollette).
\textsuperscript{62} Id.
\textsuperscript{63} Id. at A3032.
\textsuperscript{64} Id.
laws or customs, then today it followed that Congress "also has the affirmative power to treat affirmatively with those discriminations and to prohibit them." Recall Professor Corwin’s parallel observation in *Constitutional Revolution, Ltd.* that *Jones & Laughlin* marked a “profound” recognition of “liberty…as something that may be infringed by other forces” than government; and "may require the positive intervention of government against these forces." 65

Other FEPC proponents reached the same result via Justice Harlan's *Civil Rights Cases* dissent. 66 There Justice Harlan suggested that the Fourteenth Amendment's grant of a national citizenship is itself a source of affirmative power to outlaw private, racially motivated deprivations of equal civil rights, such as the right to contract; in the alternative, he suggested that state action may be found where the private actor is a creature of state law, like a corporation. 67 Congress, too, in statutes like the Wagner Act, had underscored the publicly constructed character of the corporation and its power over employees. 68 Perhaps the New Deal Court, having absorbed the Realists’ insights about the public policymaking nature of private law and constitutional rights adjudication would do so here, putting Harlan’s theory to work, as Harlan aimed to do, in service of racial equality and democracy of opportunity. 69 At any rate, this was the theory of the drafters of the Senate FEPC bill, including Wagner and his staff, in providing that the "right to work and seek work without discrimination ...is declared to be an immunity, of all citizens of the United States, which shall not be abridged by any State or by an instrumentality or creature of the United States or any state." 70

Introduced again and again from 1945 onward, the administration’s bills to create a permanent FEPC

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65 See CORWIN, supra note XX
67 Id. at 58-59.
68 Thus, the Wagner Act: § 151. Findings and declaration of policy
The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
70 S. 101, 92d Cong. § 2 (1946).
either died at the hands of Dixiecrat committee chairmen or were vanquished by Dixiecrat filibusters.\footnote{71}{See REED, supra note XX, at _—._.}

Dixiecrats also killed the social right to work by gutting the administration's Full Employment Bill in committee.\footnote{72}{STEPHEN BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, 165-167 (1950).} These defeats hardly shocked sober-minded New Dealers. Eight years had passed since the Solid South and the conservative coalition had stopped the New Deal’s legislative engine in its tracks. And since the late 1930s, administration figures like Eleanor Roosevelt and Secretary of Agriculture Henry Wallace and lawmakers like Wagner and LaFollette had been contending that the future of New Deal reform hinged on attacking Jim Crow and southern disenfranchisement, and promoting civil rights in earnest.\footnote{73}{See SULLIVAN, supra note XX, at 59. (noting that, because “the poll tax and other restrictions kept most blacks and a majority of low-income whites from voting,” the people in the South most likely to support the New Deal were also those that were least likely to participate in elections).}

Already in ’38, they succeeded in prodding Roosevelt to step into a number of 1938 primary elections in the South, with the aim of defeating some of the most prominent Southern reactionaries.\footnote{74}{Id, at 65.} Roosevelt began openly to assail the South’s congressional bloc for stymying New Deal reforms simply because they threatened the South's "feudal economic system."\footnote{75}{“Fireside Chat” on Party Primaries, in 7 PUBLIC PAPERS, supra note XX, at 399.}

The president met with success in “woo[ing] southern labor and tenant farmers into the camp of his new liberalism,” as one of his Southern foes acknowledged.\footnote{76}{Quoted in SULLIVAN, supra note XX, at 66.} However, the effort to unseat these foes was doomed by the fact that the white primary, the poll tax, and other restrictions kept most blacks and a majority of low-income whites from voting.\footnote{77}{RALPH BUNCH, THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR 384-437 (1973).} If it did not defeat any conservative Democrats, FDR’s campaign to elect Southern liberals helped galvanize the labor-based civil rights movement. The 1938 primaries led to the founding of the Southern Conference on Human Welfare (SCHW), a biracial coalition of southern trade unionists and civil rights activists funded by the CIO to attack disenfranchisement and carry out the liberal realignment of the Democratic party.\footnote{78}{See generally, THOMAS KRUEGER, AND PROMISES TO KEEP: THE SOUTHERN CONFERENCE FOR HUMAN WELFARE, 1938-1948, at 18-19 (1967) (suggesting that both President Roosevelt and the Southern Conference for Human Welfare’s founders sought “an informal alliance between the progressive South and the National Administration”).}

"There is another South," SCHW President Clark Foreman assured the CIO Executive Committee,
"composed of the great mass of small farmers, the sharecroppers, the industrial workers white and
colored, for the most part disenfranchised by the poll tax and without spokesmen either in Congress,
in their state legislatures or in the press." 79 This South, he claimed, was the great majority of the
region's population. 80 Were it mobilized and enabled to vote, the South would become "the most
liberal region in the Nation." 81

In 1944, the Supreme Court decided Smith v. Allwright, 82 declaring the all-white primary
unconstitutional; 83 this combined with a generous influx of money and black and white organizers
from the CIO to produce an extraordinary voter registration drive in the South. 84 New Dealers of the
North and South hoped to witness a test of Foreman's hypothesis that a latent, biracial, liberal
majority existed among the South's disenfranchised citizens. In a few southern states like Alabama
and Georgia, the number of black and poor white voters increased severalfold. 85 A black leader in
Birmingham evoked "those 'first bright days of Reconstruction . . . [which] gave to our region its first
democratic governments.' It was time, he said, for 'history to repeat itself.'" 86

But that time had not arrived. Instead, the SCHW's voting campaign was put down by force and
fraud. The fraud, intimidation and violence that greeted the SCHW and the Southern movement to
revive the democratic promise of Reconstruction confirmed once more how dependent such a regional
movement ultimately was on a national commitment to decisive action based on a broad interpretation
of constitutionally protected civil and political rights. Presented with such a federal commitment, even
in the late 1930s or early '40s, perhaps a majority of hard-hit white southerners would have proved
willing to forsake old political identities rooted in states' rights and white supremacy, and wager on the
promise of a national program wedding democracy of opportunity to racial justice. But states' rights and

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80 Id.
81 Id.
82 321 U.S. 649 (1944).
83 Id. at 653-66
84 SULLIVAN, supra note XX, at 188-89.
85 Id. at 212, 216.
86 Id. at 191 (quoting Osceola McKaine)
white supremacy remained too deeply etched in the national government and party system from which such a program would have had to emerge.

**The Taming of the Labor Movement and the Eclipse of Progressive Constitutional Political Economy**

“War is the health of the state,” wrote the radical journalist Randolph Bourne as the world went to war in 1914;\(^87\) and as far as the American state is concerned, Bourne proved right. Wartime was state-building time during both World Wars. The great difference from our perspective was that World War II state-building unfolded in the context of an enormously powerful labor movement in close alliance with the New Deal administration. Thus, as government set about exerting greater and greater control over the war-time economy, what government erected were tripartite agencies and commissions composed of business, labor and “public” representatives, in which the latter two often enjoyed power roughly commensurate with that of capital. And as they looked ahead to peace time, many New Dealers, along with their labor allies, envisioned holding on to this: making permanent a labor-backed form of corporatism much like what came to characterize post-war social and economic policy in northern Europe. This was the institutional framework that the leaders of Roosevelt’s NLRB, WLB, NRPB, OPA and scores of other alphabet agencies envisioned for completing the New Deal and bringing the second Bill of Rights down to earth, replete with democratic controls over economic development and decision-making to assure that the erstwhile oligarchs never again enjoyed such lopsided authority over the political economy and ordinary Americans’ share of wealth, power and opportunity.\(^88\)

And no wonder. Remember, as New Deal experiments in state-building got underway, from the mid- ‘30s onward, capitalism seemed both unstable and parochial, in dire need of guidance from the state,

\(^{87}\) RANDOLPH BOURNE, SELECTED WRITINGS: 1911-1918 ___ (Olaf Hansen ed. 1992).

whatever the immediate interests of individual bankers, industrialists, managers and entrepreneurs. Neither morally nor practically did these seem the players on whom to confer the great preponderance of power to strike the deals that, in the aggregate, determined the nation’s economic fortunes. That way lay the chaos and rank injustice of market capitalism.

Instead, more and more, key industries’ key bargains were guided by a set of tripartite state institutions that oversaw wages, prices, profits and unionization. Beginning in 1941, even before the U.S. entered the war, “the price of steel and the rate of pay enjoyed by workers in that industry were set not at a Pittsburg bargaining table, but in the White House Oval Office.” More and more, vital economic issues were negotiated between trade unionists, business leaders and state actors. The successive appearance of all these alphabet agencies “seemed to signal the fact that the fate of organized labor and the fortunes of capital would be determined as much by a process of politicized bargaining in Washington as by the give and take of contractual collective bargaining.”

This regime of politicized bargains spoke the language of industrial democracy and rested on an amalgam of militant rights consciousness and burgeoning strikes and organizing, along with unprecedented political mobilization on labor’s part, as the industrial unions became the financial and organizational backbone of FDR and New Deal Democrats. (It bears remembering that Sidney Hillman and the CIO invented the political action committee or PAC for just this!) By the early ’40s, this new union consciousness reached roughly 35% of the entire electorate. Alongside this political-economic activism on labor’s part was a great war-time expansion of state capacity. And the fact that war-time labor disputes were addressed by powerful public bodies suggested to workers that resistance to arbitrary workplace authority and insistence on labor rights and economic citizenship were the new normal: FDR’s new “constitutional-economic” dispensation.

Since the mid-‘30s, organizing had been afoot across the industrial landscape and up and down the

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92 Id.
industrial ladder.\textsuperscript{93} Not only were the new industrial unions gaining industry-wide bargaining in everything from auto to steel to coal and rubber; they also were undermining corporate power from below, democratizing authority on the shop floor by organizing foremen - turning the bosses’ front-line officers against the bosses.\textsuperscript{94} Thus, at the ground level, the new labor law protections for organizing and collective action had helped destroy the old “foreman’s empire” and create what the CIO proudly called the “democratic system of shop government,” investing union shop stewards with authority to negotiate everyday workplace disputes backed by credible threats of disruption; while at the peak level of industry, union officials began to bargain with corporate executives for entire sectors and regions.\textsuperscript{95}

Recall that the Wagner Act had been enacted partly for just this purpose: to create labor organizations powerful enough to revive a flagging economy and build up mass purchasing power by raising wages across the industrial economy. The war-time state brought this bargaining under the auspices of the War Labor Board (WLB) and its companion the Office of Price Administration (OPA). The WLB and OPA regulated wage and price relations within and between industries and fashioned a broad policy of wage, price and profit guidelines, aimed at redistributing income into workers’ and consumers’ hands, along with a policy of redistributive wage compression, raising wages most in low-income sectors. So, for example, black wages rose twice as rapidly as white wages under this WLB/OPA regime, and weekly earnings in cotton, textiles and retail trade rose about fifty percent faster than in high-wage industries like auto and steel. By the war’s end, the WLB’s wage policy was explicitly egalitarian.\textsuperscript{96} And most New Deal liberals and labor leaders championed putting these institutions on a permanent footing, as the foundation of a post-war “incomes” policy.\textsuperscript{97}

\textsuperscript{94} Id.; See also, LICHTENSTEIN, LABOR’S WORK AT HOME, supra note X; NELSON Lichtenstein, The Main in the Middle: A Social History of Automobile Industry Foremen, in ON THE LINE: ESSAYS IN THE HISTORY OF AUTO WORK 153–89 (Nelson Lichtenstein & Stephen Meyer eds., 1989).
\textsuperscript{95} On the “foremen’s empire,” See, DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925 (2nd ed. 1999); On the “democratic system of shop government” see Lichtenstein, supra note ___; On sectoral bargaining, see id.; See also, ZIEGER, supra note X; Atleson, supra note ____.
\textsuperscript{97} ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (Reprint ed. 1996).
For their part, by war’s end, business leaders, were desperate to bring a halt to the encroachments of a social democratic minded phalanx of state agencies in league with a social-democratic minded labor movement. Business elites yearned for a reprivatization of labor-management relations and an end to war-time government controls on capital. At the drop of a hat, during the mid-1940s, captains of industry would speak feelingly about the demise of “individual autonomy” and the rise of a profoundly “unconstitutional,” “bureaucratic,” near totalitarian state of political-economic affairs. Publicly and privately, they expressed a deep and genuine sense of constitutional peril. If the union chieftains and their New Deal allies had their way, and if something like the “collectivist” regime they had fashioned during the Great Depression and the war became part of normal peace-time government, then “economic liberty” would perish forever, and the nation would be given over to “compulsion,” “slavery” and an end to “equality of opportunity.”

The heart of the problem was the enormous political and economic clout that organized labor had acquired over the previous decade. That power, in turn, rested on the despised Wagner Act and the intolerable measure of collective action it safeguarded, as well as the affirmative boost the Labor Board lent the industrial unions. All this had to be repealed, or at least sharply redrawn, with labor’s new rights substantially curtailed and employers’ old and undying rights recouped. Employers’ “right to manage” became a watchword of the movement to repeal the Wagner Act, behind which virtually every major corporation in every major industry rallied. “America is at the crossroads!” declared General Motors president Alfred Sloan, in the thick of a bitter hundred-day strike by the UAW in 1945-46. At stake was “the freedom of each unit of American business to determine its own destiny...” With workers organizing and striking without the old legal restraints, indeed with state support, it was no wonder that the “union bosses” were seeking “to tell us what we can make, when we can make it, where we can make it and how

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99 Id.; See also HOWELL JOHN HARRIS, THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940’S (1982); JOEL SEIDMAN, AMERICAN LABOR FROM DEFENSE TO RECONVERSION (1st ed. 1953).
100 HARRIS, supra note ___; FONES-WOLF, supra note ___.
101 Id.
102 HARRIS, supra note ___; JAMES GROSS, RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW, (1981); FONES-WOLF, supra note ___.

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much we can charge…” But this could not continue; it flouted the “fundamental right” of “every business unit in America” to “manage its own affairs.”

The Court may have upheld the Wagner Act with its “switch in time” in 1937; and by the mid-’40s, the Court was dominated by New Deal justices. These were merely facts on the ground, however; they signified a shift in the terrain of constitutional battle – not a constitutional settlement on matters of substance. In Congress, in rival Executive agencies, and in public debate, constitutional political economy was still very much in contention. Constitutional scholars write about the mid-1940s as the period when the “New Deal settlement” was consolidated. But there was nothing remotely like a New Deal constitutional settlement as far as contemporary captains of industry and conservatives in Congress were concerned: Not as long as the supposed new rights of labor and supposed new powers of the National Labor Relations Board, and many other features of New Deal and war-time state regulatory authority, were left standing. Looking back on the repeal of the 18th Amendment, in which he had had a hand, GM’s Sloan predicted, “It took fourteen years to rid this country of prohibition. It is going to take a good while to rid the country of the New Deal, but sooner or later the ax falls and we get change.”

The Dixiecrats shared the business elites’ and conservative Republicans’ loathing for the CIO and many features of New Deal centralized statecraft. They too were determined to curtail the industrial unions’ newly minted, federally guaranteed collective freedoms. That seemed the only sure way to weaken labor’s clout and with it, the prospect of the CIO/New Deal liberal coalition’s carrying on with their racially egalitarian, social-democratic vision of the post-war political economy and a realigned, post-war Democratic Party. This was the politico-constitutional backdrop for Taft-Hartley.

The catalyst was the election of ’46. In industry after industry, management was setting out to retake authority lost during war and keep a lid on wages as war-time government involvement receded. This provoked giant industry-wide strikes, as labor sought to support President Truman’s efforts to sustain

103 NELSON LICHTENSTEIN, WALther REUther: THE MOST DANGEROUS MAN IN DETROIT ____ (1997).
price controls and working-class living standards during demobilization. As voters went to the polls, millions of workers were on picket lines, cities shut down and inflation at __%, a state of affairs which brought Republican majorities in both houses for the first time since the 1920s, and emboldened the champions of repealing the Labor Act.

Taft-Hartley proved to be a constitutional battle royale, and the battle on which the fate of the New Deal order turned. As the bill took shape, its pragmatic Republican sponsors put aside talk of outright repeal. Instead, however, key provisions outlawed industry-wide bargaining, reinstated stern legal restrictions on strikes and boycotts, condemned “supervisory” workers’ unions, imposed anti-communist oaths, banned the union shop and made provision for states to enact even harsher “right to work” laws, which no longer would violate or be preempted by national labor law. Both House and Senate Reports deemed these provisions constitutional essentials and defended the bill in ringing constitutional terms. The Reports are a study in what Jack Balkin calls the trope of restoration: justify change as a return to the old and true constitutional order.

Labor responded in kind, staging mass demonstrations against the “Slave Labor Law.” Taft-Hartley, labor agreed, was a restoration, but what it restored was a legal order that long had violated labor’s fundamental rights. In radio addresses and Congressional testimony, AFL and CIO leaders invoked the old Brandeis dissents, likening the labor injunction and the old rights of capital against labor – now being resurrected - to involuntary servitude. President Truman’s Veto Message echoed labor’s objections. The President condemned Taft-Hartley as a severe blow to labor’s hard-won freedom of collective action and a reinstatement of the discredited old regime. But Dixiecrats joined with Republicans to override Truman’s veto and drive home the lynchpin of the counter-reformation.

The upshot was a tamed labor movement and a turning back of the New Deal on the plane of legislative constitutionalism. Labor would remain a great political and economic force in the post-war era. But with the purging of the labor left and the sharp new restraints on organizing and collective action, labor lost the clout and even the ambition it would have needed to take another shot at organizing
the South and “completing the New Deal.” The first casualty on the constitutional front was the revolutionary conception of constitutional-economic liberty that the Wagner Act had briefly enshrined: a short-lived clear break with classical legal liberalism. Gone was the idea we saw the first chairman of the NRLB expound and some lower federal courts begin to elaborate: that labor had fundamental “civil liberties” that condemned private employers’ efforts to suppress union activism and trumped state laws limiting secondary strikes and boycotts. Taft-Hartley hardly repealed the NLRA, but it tore down the design of the Act as a framework statute – or what, following Balkin, we can call a constitutional construction - that came down squarely on the side of labor, with the political-economic goal of promoting not only collective bargaining but also a redistribution of bargaining power sufficient to underwrite robust economic democracy. After Taft-Hartley, there would be no more revolutionary talk of collective constitutional liberties whose main purpose and proper construction was rectifying asymmetries of economic power by legally entrenching for workers a wide open space for collective action and broad immunities from employer (or state) interference or reprisals.

Indeed, after Taft-Hartley settled in, and most of the constitutional challenges to it came to naught in the courts, there gradually ceased to be any more talk of collective constitutional rights on labor’s side. The Board, purged of left-leaning New Deal liberals, gradually ceased talking about concerted action in a constitutional register; the Court shut down its short-lived recognition of first amendment picketing rights. And much as Truman’s Veto Message had predicted, the labor movement once more found itself enmeshed in coils of legal restraints. Taft-Hartley brought back the old common law bars on every kind of secondary boycott, dealing a severe blow to inter-union solidarity. Union workers in one firm again were banned from boycotting the products of another in support fellow workers’ strike or organizing drive. The strong could not come to the aid of the weak. Just when, where or how unions could picket – let alone strike – became increasingly baroque legal questions.

Even before Taft-Hartley, the Court had proved hostile to the New Deal Labor Board’s robust conceptions of workplace democracy and the right to strike. Thus, already in the late ‘30s and early ‘40s, the Court cut back sharply on the Board’s view of what counted as protected strikes or anti-union
discrimination on employers’ part. A union activist could be “permanently replaced” during a lawful strike without violating the Wagner Act. Nor could unions bargain to impasse or strike over matters the Court deemed “managerial prerogatives”; and particularly after Taft-Hartley, “managerial prerogatives” came to encompass a host of issues at the heart of workers’ aspirations for a voice in the organization of production and the governance of the firm. Old common law notions of the rights of property and the obedience and loyalty due to employers would not die.

Much as business had dreamed, the “right to manage” was resurrected, and the Court’s interpretations of workers’ rights leaned ever more strongly in favor of industrial peace and “private ordering” through increasingly court-like grievance and arbitration procedures. The Warren Court in its salad days, under the guidance of former management-side attorney William Brennan, took the final step, exhuming the despised anti-strike injunction to enforce industrial peace and formal arbitration. Thus did the counter-reformation bring in its train a densely legalistic and highly decentralized regime of firm-based collective bargaining and hemmed-in unions like none other in the industrial world.

Meanwhile, Taft-Hartley’s “right to work” provision enabled the cotton South and entrepreneurial Southwest to ban union shops and enact “right to work” statutes. Such laws helped keep unions fragile; and in the courts and employer-dominated public spheres of these states, the rights of anti-union workers enjoyed greater politico-constitutional weight than the collective rights of those loyal to what briefly had been New Deal America’s union ideal. In this context, hopes of organizing the South, building up the nascent union-based civil rights movement and realigning the party system by ousting reactionary, racist Democrats faded.

Still, for a season, in the mid-late ‘40s, as we noted, the CIO persevered in its efforts to “complete” the New Deal’s unfinished program of social provision, to expand old-age and unemployment insurance and to enact national health insurance and a national budget and planning agency to preside over a

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105 Indeed, the old, Lochnerian “right to work” constitutional outlook proved longer-lived in our constitutional politics than the New Deal conception of labor’s collective constitutional liberties. The latter vanished into what labor law scholars call a “constitutional black hole,” as anti-strike, anti-boycott and anti-picketing decrees were subsumed into what the courts chose to call a statutory scheme of social and economic regulation in the service of “private ordering” and insulated from meaningful constitutional scrutiny.
national commitment to full employment, along the lines of the post-war welfare states under construction in Western Europe. This was not to be. An increasingly strong conservative coalition defeated all these ambitions; and with them, the New Deal liberals’ and CIO leadership’s dream of a social democratic corporatist style of post-war governance.

Blocked at every legislative crossroad, the CIO, the second Bill of Rights’ only powerful, organized constituency gradually abandoned its agenda of expanding Americans’ social and economic rights. By the early ‘50s, the industrial unions began instead to fashion with employers a private system of social provision and job security through collective bargaining in core sectors of the economy.106 This private welfare state was a good deal for millions of industrial workers, and it meshed with the turn toward a more defensive, inward-turning, lawyered-up style of contract unionism. Labor rights discourse – amazingly, from the perspective of previous decades - followed the vocabulary of banking and antitrust in becoming technocratic.

With that, the language of constitutional political economy all but vanished on what was left of the left side of public debate. Claims of constitutional duty to provide and maintain an “American standard” of life for all, to safeguard against the return of a business oligarchy, and to watch over a rough equality in the “actual conditions” of Americans fell silent for the first time in more than a century, as the rigid, anti-communist, pro-business “consensus politics” of the Cold War eclipsed the confident liberalism of New Deal America.