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!
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.¹ 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

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

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.
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).
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. But this distinction is anachronistic, 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.

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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.

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5 The idea that Americans have reasoned in the past about our Constitution in ways that speak to problems of economic inequality and power—and that we might do so again—is the starting point for a nascent wave of scholarship. See, e.g., SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017); Aziz Rana, The Rise of the Constitution (book manuscript); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION (2016). Many of the participants in this conversation participated in a symposium organized by the Texas Law Review, part of which focused on an early draft of the manuscript of this book, in January 2016. See Texas Law Review, Symposium on the Constitution and Economic Inequality, available at http://www.texaslrev.com/category/tlr-vol-94-7/. Our own initial exploration of these themes can be found at Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution, 94 Boston Univ. L. Rev. 669 (2014).
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.6 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. 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.

6 See Fishkin & Forbath, Antı-Oligarchy Constitution, 94 Boston Univ. L. Rev. at 672 n.9 (2014).
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 *Lochnerism*—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 *Lochnerism* 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 encountered the first intimations of the Great Forgetting of progressive constitutional political economy in the first decades of the twentieth century, as political economy began to give way to economics. Thus, we saw how the political career of the dollar and the constitutional salience of money ended with the rise of neo-classical expertise on monetary management housed in the Federal Reserve. In some branches of the field, including labor economics and the economic study of the corporation, the institutional economists pushed back against the neo-classicals’ resolute bracketing of distributional and power-political issues, the political-economic heart of the democracy of opportunity tradition. Thus, the great New Deal classic, Berle & Means’ *The Modern Corporation and Private Property* (1932), both deconstructed the efficiency claims neo-classical economists made on behalf of big corporations in contemporary markets, and argued, in a modern idiom, the old constitutional political-economic case that unregulated corporate capitalism had devolved into an oligarchy, and was subverting the social and political conditions of constitutional democracy.

Likewise, with antitrust, constitutional political economy remained vibrant in Congress and some quarters of public-political discourse; while in legal discourse, it grew more subdued, not expelled so much as sublimated. We glimpsed how under the great Legal Realist Thurman Arnold, the New Deal DOJ’s Antitrust Division would argue, in good neo-classical fashion, that a given merger embodied an illegal measure of market concentration which tended toward administered prices and inefficiency. Yet, Arnold’s and other New Dealers’ public rhetoric (and even some argumentation in court and no small amount of judicial reasoning) about such mergers still sounded in the key of anti-oligarchy. The merged firm, they declared, would enjoy too much political sway; its creation threatened the well-being of a broad (old-fashioned) middle class of independent entrepreneurs; and the latter, in turn, were socially and
politically desirable - cost efficiencies aside. All this to an extent that many commentators suggested that the more old-fashioned anti-oligarchy precepts were what was motivating the neo-classical arguments about prices.

New Deal banking reform was a similar story of sublimation. On one hand, champions of Glass-Steagall promoted the separation of commercial and investment banking in the old anti-oligarchy constitutional key. At the same time, the reform was also defended in a more technocratic spirit. “Economic experts” gained the upper hand more than in past rounds of the bank reform, when constitutional political economy predominated – and the irreducibly political and distributional choices, the constitutional stakes, involved in how we design and run our banking system were kept in plain view.

Meanwhile, the constitutional stakes and distributional choices remained vivid in the heartland of New Deal reform – in the precincts of labor rights and social provision. Even after the Court had stepped down, there remained social and economic rights yet to be fully realized and safeguarded and others yet to be enacted. The Court was content now to regard this work as simply social and economic regulation, about which the (Court’s) Constitution had nothing to say. With cases like Carolene Products and its not-yet-canonized footnote 4, there commenced the judicial codification of the view that there simply weren’t any constitutional stakes in distributional questions, but only the play of rival interests in the open field of interest group politics.

But how did it happen that by mid-century this perspective came to prevail outside the courts, as well? What happened to the New Deal language of social and economic rights in the arena of politics, executive action and public debate? Why did 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 recurring, and to secure industrial democracy, decent livelihoods and a middle class standard of economic security for all Americans “regardless of race, station or creed”? 
We have seen that New Dealers like Wagner were sorely aware of the partial, patchwork and deeply racialized character of what they had accomplished circa 1938; and they carried on with many efforts to “complete the New Deal,” to enact the missing social and economic rights and make the ones they had enacted inclusive. It would be a tidier tale, if the reason we have forgotten FDR’s robust second Bill of Rights and the social democratic constitutional political economy it evoked, is that, at some point, it had all been accomplished – and then, over time, routinized and bureaucratized. That is not what happened. The partial, patchwork and racialized character of the New Deal reforms remained. The New Dealers failed in their quest to “complete the New Deal” and bring their constitutional political economy down to earth. Nonetheless, for the first time in half a century, the language of progressive constitutional political economy vanished from mainstream public discourse and debate.

The explanation for this sudden silence largely lies in a dramatic set of political and constitutional confrontations that unfolded almost entirely outside the courts, after the standard accounts tell us the New Dealers had won their constitutional revolution. Every serious reformation produces a counter-reformation, every revolution, 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 many of 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.
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. 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

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7 See V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1949).
that "would demoralize the region" until the southern committee heads rewrote them. 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."\(^8\)

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."\(^9\)

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,


\(^9\) Wright, supra note __, at 219.

dependent children, and blind programs.\textsuperscript{11} Only the old-age benefits program would be purely federal.\textsuperscript{12}

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 Southern African-Americans, who worked in these two sectors.\textsuperscript{13}

The AAA, the NRA, the National Labor Relations and Fair Labor Standards Acts, were all 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{14} This "gentleman's agreement' that held the party . . . together appeared unshakable. The White House and the Dixie courthouse seemed solidly allied.\textsuperscript{15} 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

\textsuperscript{11}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.


\textsuperscript{13}See generally KATZNELSON, FEAR ITSELF, supra note XX; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE, 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.


\textsuperscript{15}SITKOFF, supra note XX, at 103.
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."16 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.”17

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 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.18

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16 Id. at 106.
17 Id. at 109-110; see also WEISS, supra note XX, at 186.
Just as FDR had cemented his alliance with industrial labor and redoubled his attacks on corporate “tyrants,” and just as 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.¹⁹ 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,”²⁰ 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.²¹ The attempt at forming a new conservative party foundered, but the coalition and its role as bulwark for 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 dignifying work, 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.”²²

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²¹ Id. at 1936-38.
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 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

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21 See Forbath, New Deal Constitution, supra note ___, at 207.
23 CONG. REC. Al379 (D38) (statement of Sen. Bridges) (opposing Roosevelt’s executive reorganization plan).
24 Forbath, New Deal Constitution, supra note ___, at 207.
Employment Bill, along with scores of other labor, health and housing measures, and abolish the NRPB, all in the name of limited government, individual liberty, private property and states’ rights.27

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.

1946 was the year that the conservative coalition succeeded in gutting (and renaming) the administration’s Full Employment bill, with its guarantee of FDR’s “all-important right to work”; that same year the Republicans would take back both houses of Congress. A year later, Congress would enact the Taft Hartley Act, which, as we shall soon see, marked a return of some key features of the old pre-Wagner Act regime - among them, a partial reinstatement of the old Lochnerian conception of the “right to work.” It would soon eclipse the social “right to work” in mainstream politics and public discourse. Broad social and economic rights talk, we’ll see, would fall 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

27 See KATZNELSON, FEAR ITSELF, supra note ____; 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 [they] considered to be dangerous federal commitments and assurances, including the words 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.
Meanwhile, however, while their agenda was still afloat, Roosevelt and the New Dealers could not forever ignore and repress the contradiction between 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 forgotten, efforts of the late ‘30s and early ‘40s to “complete the New Deal.” 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. The movement’s 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

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29 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.
need 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 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 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.\textsuperscript{30}

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 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 \textit{Shelly v. Kramer}.\textsuperscript{31}

Seldom relied on, \textit{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.”\textsuperscript{32} 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

\textsuperscript{30} The key work on these developments is Risa Goluboff’s great book, \textit{THE LOST PROMISE OF CIVIL RIGHTS} (2010).

\textsuperscript{31} 334 U.S. 1, 18 (1948) (holding that court enforcement of restrictive covenants constitutes state action); \textit{MARK TUSHNET, MAKING CIVIL RIGHTS LAW} 308-10 (1994); on Robert Hale’s contributions, see \textit{BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT --- --- (2001)}

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. Friend and foe alike agreed that the new industrial unions would not have prevailed without the militant support they won from black workers. One canny observer of New Deal politics concluded that the CIO's battle for black rights 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.

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 racial inferiors 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,

34 CAYTON & MITCHELL, supra note XX; LICHTENSTEIN, supra note XX; REUTHER, supra note XX; NORTHUP, supra note XX; ZIEGER, supra note XX.
the 1930s-40s generation of working-class "ethnics" often proved ready to elect black shop 
stewards and union presidents.36

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."37 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 . . .";38 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."39

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.40 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


38 Memorandum of Conferences of Alexander, Johnson, and Embree on the Rosenwald Fund's Program in Race Relations (June 27, 1942), (on file with Race Relations folder, Rosenwald Fund Papers, Fisk University), quoted in Richard M. Dalfiume, The "Forgotten Years" of the Negro Revolution, 55 J. AM. HIST. 100 (1968).

39 Harold Preece, The South Stirs, 48 THE CRISIS 318 (1941).

40 See Korstad & Lichtenstein, supra note XX.
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.

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41 See JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW 45-56 (1974); SJTKOFF, supra note XX, at 52.
42 See Korstad & Lichenstein, supra note XX, at 787.
46 See generally id.
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."47

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.48 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.”49

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 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."50 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

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47 Daniel Bell, A. Phillip Randolph Leads Drive for Permanent FEPC, NEW LEADER, Sept. 18, 1943, at 1.
48 See REED, supra note XX, at 321–43 (discussing the plans for reconversion of the Fair Employment Practices Committee).
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.\footnote{Id.}

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."\footnote{See HENRY LEE MOON, BALANCE OF POWER: THE NEGRO VOTE 198 (1948); SITKOFF, supra note XX; WEISS, supra note XX.} But even more ominously, the Northern Democrats seemed to yearned for the unthinkable spectacle of southern blacks voting \textit{en masse}, as one leading Dixiecrat put it, "[i]n order . . . that I will not have an opportunity to fill this seat again."\footnote{81 CONG. REC. 7882 (1937) (statement of Sen. Smith).} 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?"\footnote{94 CONG. REC. A4281 (extension of remarks of Rep. Williams).} The 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 \textit{Slaughter-House Cases}\footnote{16 U.S. (1 Wall.) 36, 82 (1873) (holding that the states should have the power to regulate "civil rights – the rights of person and of property").} clear account of the scope of that clause.

What was more, the FEPC bills' drafters were ignoring the state action requirement of the \textit{Civil Rights Cases},\footnote{109 U.S. 3, 24 (1883).} 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.\footnote{91 \textsc{Cong. Rec.} 3680 (1945) (statement of Rep. Hays).} 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."\footnote{94 \textsc{Cong. Rec.} A4282 (1948) (extension of remarks of Rep. Williams).}

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 would soon be sent by FDR to join Robert Jackson as deputy chief counsel at Nurenberg)
was a different creature from what we have been taught 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, “affirmative” 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.”\footnote{91 \textsc{Cong. Rec.} 3673-74 (1945) (extension of remarks of Rep. LaFollette).}
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.\footnote{\textit{Id.}}
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. 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. In “upholding the provisions of the…Act,” the Court had taken “a step forward” toward recognizing this “new concept of property.”

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 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 the New Republic 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.”

61 Id. at A3032.  
62 Id.  
63 See CORWIN, supra note XX
Other FEPC proponents reached the same result via Justice Harlan’s *Civil Rights Cases* dissent.\(^{64}\) 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.\(^ {65}\) Congress, too, in statutes like the Wagner Act, had underscored the publicly constructed character of the corporation and its power over employees.\(^ {66}\) 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.\(^ {67}\) 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."\(^ {68}\)

Introduced again and again from 1945 onward, the administration’s bills to create a permanent FEPC either died at the hands of Dixiecrat committee chairmen or were vanquished by Dixiecrat filibusters.\(^ {69}\) Dixiecrats also killed the social right to work by gutting the administration's Full Employment Bill in committee.\(^ {70}\) These defeats hardly shocked sober-minded New Dealers. Eight years had passed since the

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\(^{64}\) The *Civil Rights Cases*, 109 U.S. 3, 42-43 (1883) (Harlan, J., dissenting).

\(^{65}\) Id. at 58-59.

\(^{66}\) 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.


\(^{68}\) S. 101, 92\(^{nd}\) Cong. § 2 (1946).

\(^{69}\) See REED, supra note XX, at ___

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.71 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.72 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."73

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.74 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.75 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.76

““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

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71 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).
72 Id. at 65.
73 “Fireside Chat” on Party Primaries, in 7 PUBLIC PAPERS, supra note XX, at 399.
74 Quoted in SULLIVAN, supra note XX, at 66.
76 See generally, THOMAS Krieger, 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”).
Congress, in their state legislatures or in the press.” This South, he claimed, was the great majority of the region's population. Were it mobilized and enabled to vote, the South would become “the most liberal region in the Nation.”

In 1944, the Supreme Court decided *Smith v. Allwright*, declaring the all-white primary unconstitutional; 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. 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. 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.”

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, half a century on, 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

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78 Id.
79 Id.
80 321 U.S. 649 (1944).
81 Id. at 653-66
82 SULLIVAN, supra note XX, at 188-89.
83 Id. at 212, 216.
84 Id. at 191 (quoting Osceola McKaine)
justice. But states’ rights and 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; 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 many leaders of Roosevelt’s NLRB, WLB, NRPB, OPA and 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.

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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,
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.”更多 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

88 LICHENSTEIN, TAFT-HARTLEY, supra note ___ at 773.
90 Id.
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 industrial ladder. 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. 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.

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

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93 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 __.
auto and steel. By the war’s end, the WLB’s wage policy was explicitly egalitarian. 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.

Meanwhile, 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

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97 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).
98 HARRIS, supra note ___; FONES-WOLF, supra note ___.
99 Id.
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 protection, 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 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.”

President Sloan was not exaggerating. The G.M. strike of ’45-’46 aimed for a wage hike; but not only that. The United Auto Workers’ savvy social democratic chief, Walter Reuther and his union really were demanding a voice in the company’s “affairs.” “Open the books!” Reuther insisted. The UAW aimed to show the public that the company’s profit margins were such that it could hike auto workers’ wages without raising car prices and passing the costs on to consumers. And that combination of pay boost with price restraint was what the G.M. strikers demanded, hoping to consolidate for peace time the kind of broad-gauged, redistributive social bargaining, which had gestated during the war.

All this Sloan and his fellow captains of industry laid at the feet of the Wagner Act and the Labor Board. The Court had upheld the Act with its “switch in time” in 1937; and by the mid-‘40s, the Court was dominated by New Deal justices. These were the facts on the ground; but they did not amount to a constitutional settlement. 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 business leaders and conservatives in Congress were concerned: Not as long as the constitutionally outrageous new rights of labor and new powers of the National Labor Relations Board, and many other features of New Deal and war-time state regulatory

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100 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 ___.
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, but constitutionally counterfeit, 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 political and 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 price controls and working-class living standards during demobilization. As voters went to the polls, roughly a million 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 Republican sponsors put aside talk of outright repeal of the Wagner Act. Instead, key provisions of the Taft-Hartley legislation outlawed industry-wide bargaining, reinstated many harsh, old common law restrictions on strikes and boycotts, including a ban on all so-called secondary boycotts, condemned “supervisory” workers’ unions, and imposed anti-communist oaths. The Act also abolished the closed or union shop (wherein employers agreed to make union

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membership a condition of employment). It still allowed agreements that made dues payment, as opposed to union membership, a requirement of employment; but it provided for states to enact even harsher “right to work” laws, forbidding unions from negotiating for such mandatory dues payments or so-called agency fees. Such state laws would no longer would violate or be preempted by national labor law.

Taft-Hartley’s champions deemed all these provisions – both the resurrected restraints on collective action and the stern right-to-work provisions - constitutional essentials, and defended the bill in ringing constitutional terms. Thus, the House sponsor, Republican Congressman Fred Hartley, taking a swipe at the 1944 G.I. Bill of Rights, declared “I am not asking you to give money for the ex-serviceman from a paternalistic government. I am asking for something that is not only guaranteed by the Constitution but given to him by his Creator – the right to work where and when he pleases – just plain freedom.”

The old Lochnerian definition of labor’s liberty was not dead—it was not even past. It was present and active in the legislative constitutionalism of the mid-'40s. A few years after the Court had seemingly rung down the constitutional curtains on this fiercely individualistic, anti-union conception of economic liberty in West Coast Hotel and Jones and Laughlin, Cecil B. DeMille, the famous filmmaker and founder of Paramount Pictures, joined forces with veteran anti-union attorneys and employers’ associations and launched the “right to work” movement to restore as much as possible of the old libertarian-conservative outlook on unions.

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103 93 Cong. Rec. 3572-3634 (daily ed. April 16, 1947)
104 See Sophia Lee, The Workplace Constitution: From the New Deal to the New Right 56-78 (2014). The “right to work” movement has remained a vigorous player in our constitutional politics ever since. No wonder: The relationship amongst the state, unions, and individual workers was bound to remain devilishly complicated in a constitutional culture that prizes individual liberty as much as ours. Beyond Taft-Hartley itself, the “right to work” movement scored other important gains over the next decades, including passage of “right to work” statutes in about two dozen states, and this term the Supreme Court is likely to hand the movement another signal victory. In Janus v. American Federation of State, County, and Municipal Employees, Council 31, the Court is likely to find in the First Amendment a new/old constitutional norm in the public employment context that would nationalize the “right to work” regime in the public sector. From there, it may be only a matter of time before the Court extends the new/old doctrine to the private sector, as well. From his resting place in the Hollywood Forever Memorial Park, Cecil B. DeMille will have reason to applaud. And so too, today’s Lochner revivalists and proponents of the new libertarian constitutionalism. Janus is likely to prove a major blow to what is left of the New Deal labor regime, and one that shatters a longstanding constitutional accommodation between the individual liberty to shun unions and the collective freedom of workers to choose them. Two rival visions of work, opportunity and the role of government in economic life and of labor in government—and the Court has all but decided to come down squarely, again, on one side. In Chapter Seven, we discuss Janus, as well as the constitutional accommodation that the Court constructed in the 1960s-'70s, which Janus is likely to upend. We also consider the contemporary bearing of the forgotten constitutional political-economic work that the democracy of opportunity tradition assigned to unions, when that tradition was still an active rival to the libertarian constitutional political
Taft Hartley was the new movement’s Waterloo. And in the Congressional hearings and reports surrounding it, the law’s champions took up the “right to work,” repurposing for the mid-twentieth-century “right to work” campaign much of the anti-monopoly rhetoric which had imbued Populist constitutional political economy:

[T]he American working man has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated and on many occasions beaten up...His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will ... In short, his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country.105

The right to join with fellow workers in a union might be fundamental, but no less so was what Republican lawmakers dubbed “the unrestricted right of Americans to work”:

I can well understand the attitude of a national labor leader who wants to control in a monopolistic way all employees, to have them under his control, his dominion, to be to them a dictator. I can understand the attitude of the employer in a great industry who has hundreds of thousands of men working for him and who wants to bargain with the labor leaders. The first will be in a position to sell, the second in a position to buy human labor. The individual employee is ground in between those two men when they get together and is at the mercy of those two men who have control over his future... Is this Congress, the first Republican Congress in 14 years, going to deny to employees...the right to work, the unrestricted right to work?106

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The answer was a qualified No. Remember: from the 1880s onward, judge-made common law and constitutional doctrine had condemned strikes or boycotts demanding the closed or union shop. Norris LaGuardia brought a halt to harsh judicial enforcement of that bar via the labor injunction; and the Wagner Act, once the Court upheld it, had ushered in a brief era in which unions legally could demand and negotiate for employment of solely union members. The “first Republican Congress in 14 years” handed anti-union forces a major victory by outlawing the closed or union shop once more. A more truly “unrestricted right to work” would also have prohibited mandatory dues or agency fees, as a matter of federal law. Labor’s political clout was sufficient to prevent that outcome; but it could not forestall the Taft Hartley provision for state enactments of just such a “right to work” regime. And this, in turn, enabled conservative state lawmakers to make the South and Southwest “right to work” regions.

Such laws helped keep unions fragile; they helped animate what was practically a rival, regional constitutional political economy in which the rights of anti-union workers and employers enjoyed preponderant weight. 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.

However, the conservative coalition’s Constitution demanded more repair work than simply restoration of the anti-union employee’s “right to work”:

Too long have we ignored the termite process on America's Constitution, on her Bill of Rights, on the basic liberties of our people in the field of labor…For more than a decade, we have seen the termiting of the very foundations of the Republic and the inherent rights of the individual man…We are confronted with a situation in which the American Garden of Eden has been invaded by the serpent of [labor] racketeering, which threatens to make of this earthly paradise a European-like scene of chaos and class conflict. This

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107 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.
legislation will vitalize once more the constitutional freedoms and liberties of every American worker, not only the 15,000,000 organized workers, but the 45,000,000 of unorganized workers, and the rights and liberties of one hundred-and-forty-odd million Americans as a whole... [And that means] not only establish[ing] a firm bargaining position for unions. For we in Congress have neglected the rights of the public, of management and of the individual, and we must restore the right of the individual citizen to work without toll or tribute, and the rights of management to manage on behalf of the investors, and the public to a working economy without the senseless interference of secondary boycotts and other abuses this Bill addresses.108

Organized labor was no less riveted by the constitutional stakes of Taft Hartley. From the venerable old craft organizations to the militant new industrial unions, workers in the hundreds of thousands staged mass rallies and demonstrations against the “Slave Labor Law.”109 Taft-Hartley, the unions agreed, was a restoration, but what it restored were key elements of an old, discredited constitutional political economy built on a legal order that violated basic rights. Like his predecessors, American Federation of Labor leader George Meany was steeped in constitutional political economy. The AFL, he observed, “has been accused of going to unnecessary extremes in describing the Taft Hartley Law as a ‘slave labor law.’”110 Not so, Meany insisted, unpacking case law and statutes for mass audiences and Congressional hearings alike: labor’s protests found support from a sober look at the old restraints Taft Hartley reinstated and the condemnations they had earned over the past half century from the nation’s best jurists, as well as a majority of the current Court.

In principle, Meany noted, the rights of workers “to strike and organize and choose representatives of their own” had been recognized “long before [the Wagner Act’s passage in] 1935” as “fundamental rights that inhere in our very system of government...beyond the power of Congress to grant or withdraw.”111 But for decades, courts hedged these rights with such overbearing restrictions and restraints in the name of property, that “in too many instances these rights proved to be abstract, meaningless phrases.”

111 Id.
Several times, Congress sought to repeal repressive swaths of judge-made law; several times, the courts undid Congress’s work. Consider “the right to refuse to work on materials produced under substandard, non-union conditions”\textsuperscript{112}:

Supporters of the Taft-Hartley Law make much of the fact that all so-called secondary boycotts are now outlawed…[O]ne look behind the convenient phrase into the concrete reality discloses the wrong and damage done. The truth is that the boycott is a vital necessity in any competitive society that pretends to offer opportunity for advancement to its working citizens. In the earliest beginnings of trade unionism in this country, it was soon realized that a gain in wages and working conditions meant only bankruptcy for the employer and loss of jobs for his employees if the product produced by the employer and his employees had to compete on the same market with the products of cheap labor and substandard working conditions. The operation of a competing plant under substandard labor conditions means that the fair and humane employer, desirous of maintaining decent working standards must, out of pressure of competition, either be forced out of business or abandon his fair and humane practices.

Acknowledging this truth, Congress enacted provisions of the 1914 Clayton Act aimed at insulating such boycotts from judicial repression. But “the views of the Supreme Court were still too deeply entrenched on the side of big business and big profits”:

In the Bedford [Stone Company] Case, members of a small union refused to work on stone which had been produced at quarries where their fellow members were on strike. A majority of the Court in plain defiance of the express and specific language of the Clayton Act, held that this refusal constituted an unlawful secondary boycott. Justices Holmes and Brandeis wrote a stirring and provocative dissent.

They said: “Members of the Journeymen Stone Cutters' Association could not work anywhere on stone which had been cut at the quarries by 'men working in opposition' to it, without aiding and abetting the enemy. Observance by each member of the provision of their constitution which forbids such action was essential to his own self-protection. It was demanded of each by loyalty to the organization and to his fellows. If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude.”\textsuperscript{113}

\textsuperscript{112} Id. at 121.
\textsuperscript{113} Id.
Meany led his audiences through other anti-labor decisions and other Brandeis and Holmes dissents, culminating in Congress’s response with Norris-LaGuardia, “which completely adopted the language, the reasoning, and the philosophy of the Holmes-Brandeis dissents…No longer did the Court have difficulty…recognizing…the fundamental rights of workers…[Its] reversal of the old doctrine of unlawful boycotts was complete.”

Indeed, Meany noted, the present Court had not only upended old antitrust doctrines and recognized the economic liberty of workers to engage in boycotts against “unfair” employers in their industry or region. It had gone further, and begun to enshrine that freedom in the First and Fourteenth Amendments. A state’s common law or statutes, the 1940s Court had declared, “cannot prevent working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace.” So, was it “unnecessarily extreme” to dub Taft Hartley a “slave labor act”? Well, Meany wrapped up, “in the language of some of our outstanding Supreme Court Justices”:

by outlawing all boycotts and subjecting those who engage in them to immediate injunctions…and…extensive damage suits [Taft Hartley]… has destroyed the normal and natural “objective of any national labor organization,” and “created an instrument for imposing restraints upon labor which reminds one of 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

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114 Id.  
115 Id. Meany is quoting from AFL v. Swing, 312 U.S. 321, 326 (1941). The Court continues: “The right of free communication cannot, therefore, be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion.” Id.  
116 Id. at 124.  
117 Radio Address to the American People on the Veto of the Taft-Hartley Bill, PUB. PAPERS 121 (June 20, 1947).
discredited old regime. But Dixiecrats joined with Republicans to override Truman’s veto and drive home the lynchpin of the conservative counter-reformation.

The upshot was a tamed labor movement and a rolling back of the New Deal on the plane of legislative, administrative and judicial constitutionalism. At war’s end, organized labor was growing by leaps and bounds, and poised to expand. Taft Hartley halted that. It did not undo existing union strongholds; that came later. Until the 1970s, unions would continue to prosper in core industries like auto and steel, and labor would remain a great force in national politics. But with the revival of sharp restraints on organizing and collective action and the purging of labor’s left wing, labor lost the clout and even the ambition it would have needed to take another shot at organizing across the national economy - particularly, in the South - and “completing the New Deal.” Not organizing the unorganized, but “contract administration” and “mature collective bargaining” would become the business of “business unionism.”

Taft-Hartley hardly repealed the Wagner Act (NLRA), but it dramatically altered the design of the Act as a framework statute – what, with Balkin, we can call a constitutional construction - that came down squarely on the side of organized labor, with the goal of promoting a redistribution of bargaining power sufficient to underwrite “industrial democracy” across the economic landscape. Instead, Taft Hartley was framed by its champions as restoring “balance” between the rights of pro-union and anti-union workers, between the rights of workers to organize and managers to manage.

The first casualty on the constitutional front was the startling idea of constitutional-economic liberty the Wagner Act briefly enshrined – and the early Labor Board had begun to elaborate and even the courts had begun to explore: that labor had “fundamental rights” and constitutionally grounded “civil liberties”

118 Id.
that condemned the whole gamut of private employers’ efforts to suppress union activism, and trumped state laws limiting secondary strikes and boycotts. After Taft Hartley, there would be no more talk by the Board or the courts about constitutional liberties aimed at rectifying asymmetries of power and entrenching a wide space for peaceful collective action and broad immunities from state interference or employer reprisals. Indeed, after Taft Hartley, the Board simply stopped talking about concerted action in a constitutional register; and the Court shut down its short-lived recognition of labor’s constitutional rights.

Much as Truman’s Veto Message had predicted, the labor movement once more found itself enmeshed in coils of legal restraints. By bringing back the old common law bars on every kind of secondary boycott, Taft Hartley dealt a severe blow to inter-union solidarity. Union workers in one firm again were banned from boycotting the products of another in support of fellow workers’ strike or organizing drive. The strong could not come to the aid of the weak, and just when, where or how unions could picket or strike became increasingly baroque legal questions.

It was the Warren Court that filled out Taft Hartley’s initial meaning. Elsewhere, the Warren Court grew fond of quoting Justice Brandeis’s famous dissents, but Brandeis’s views of workers’ rights and industrial democracy found no purchase in its labor jurisprudence. The Warren Court wanted no part of Brandeis’s notions that peaceful labor protest and collective action warranted constitutional protection, and that there were constitutional worries about judicial suppression of strikes.

In the early ‘40s, we noted, the Hughes and Stone Courts had gingerly embraced something of the constitutional political economy that animated the Wagner Act, and began to etch a right of peaceful labor protest with both a public-political-communicative and a redistribution-of-economic-clout dimension.\textsuperscript{119}

\textsuperscript{119}Wages, labor standards and union efforts to boost them were “not matters of mere local or private concern,” the Court noted in \textit{Thornhill v. Alabama}, but part and parcel of how workers were using “the processes of popular government…to shape the destiny of modern industrial society.” Peaceful picketing of a non-union shop, therefore, warranted First Amendment protection. 310 U.S. 88, (1940). And that protection was not restricted by old common law conceptions of “direct” disputes between individual employers and their employees. The “interdependence” of workers in the same industry or region was now a “commonplace.” \textit{AFL v. Swing}, 312 U.S. 321, 326 (1941).
Under Chief Justice Warren, the Court would take up a dramatically different set of precepts about the constitutional dimensions of labor disputes. This new outlook was no revival of *Lochner*ism and was not the handiwork of conservatives. It went under the banner of “industrial pluralism” and was the work of a high-profile cadre of *liberal* legal academics – Harvard’s Archibald Cox, John Dunlop and Derek Bok, Yale’s Harry Shulman and Harry Wellington, and others – who fashioned the basic conceptual and ideological framework of U.S. labor law in the mid-twentieth century decades of post-war prosperity and “mature collective bargaining.”

For the industrial pluralists, and the Warren Court that largely took up their ideas, the answer to the question of the constitutional dimensions of labor disputes was that labor disputes had no constitutional dimensions. Somewhat heedlessly, in hindsight, this liberal legal outlook assumed that American corporations had made their peace with unions and collective bargaining, and interred the vocabulary of fundamental rights and constitutional political economy. Instead, Cox, Dunlop, Bok and company, and the liberal justices who tracked their thinking, cast industrial relations as a technocratic domain of expert administration, partly under the Board’s supervision, but chiefly under the aegis of seasoned labor arbitrators, like themselves and their students, and the private labor bar. Theirs was a process-based or proceduralist interpretation of the NLRA as what Cox called a “bare legal framework” to facilitate “private ordering.” It was no part of government’s role to monitor the balance of bargaining power in the service of broad distributional ends, as Wagner envisioned, and there was no space for constitutional doctrine in this sphere of “continuous, pragmatic and flexible regulation” by labor experts. When courts resumed issuing anti-strike and anti-picketing decrees in the context of this new technocratic regime, unions’ constitutional objections found no traction. Labor relations were no longer a sphere of

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121 Quoted in Stone, supra __, at __.
“popular government” and public political engagement that demanded constitutional protection; looking back, scholars would observe that labor rights had vanished into a “constitutio- nal black hole.”

This was hardly a burning issue at the time, as far as most labor leaders were concerned. As we noted, “contract administration” became the business of business unionism. The big industrial unions had established unprecedented collective bargaining relations with the largest corporations in key industries. Their working-class members were enjoying middle-class living standards and material security.

So, labor rights gradually lost their public, political and constitutional dimensions in high-brow and popular discourse, and their domain began to seem largely one of administration, expertise and “private ordering.” At the same time, during the same prosperous decades, the same thing happened to what had been understood social rights. To a striking extent, they too went private. Rights talk, which had been mainstream, was pushed to the margins.

For a season, as we noted, in the mid-’40s, New Deal liberals, with the CIO’s unwavering support, persevered in efforts to “complete” the New Deal’s unfinished legislative program of social provision, to expand and “universalize” old-age and unemployment insurance, to enact national health insurance and to create a national budget and planning agency to preside over a national commitment to full employment, along the lines of the post-war welfare states under construction in Western Europe. They aimed to bring Roosevelt’s second Bill of Rights down to earth. Like their counterparts abroad, they insisted that liberal democracy needed social democracy, civil and political rights needed “social rights,” “equal citizenship” needed “social citizenship,” in order for constitutional democracy to deliver on its promises, and to hold its own against the continuing perils of totalitarianism on the left and the

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right. But an increasingly strong conservative coalition handily defeated the New Deal liberals’ and CIO leadership’s dream of a social democratic style of post-war governance in America.

Instead, in the early ‘50s, the industrial unions began to fashion with big corporate employers a private system of social provision through collective bargaining in core sectors of the economy. The industrial unions bargained for private entitlements to job security, pensions, and health insurance for their members. Beyond the unionized sectors of the economy, industrial prosperity, liberal tax incentives, and the hope of thwarting unionization prompted large firms to adopt the main features of this generous, publicly subsidized, private welfare system. This private welfare state was a good deal for millions of industrial workers; in tandem with social security and federally guaranteed housing loans, it brought about the new mass middle class. In the process, though, the domain of social provision and “social rights” largely lost its public-political and constitutional dimensions and became, like labor relations, an arena of administration and private ordering.

“New Deal liberalism,” with its distinctive social democratic constitutional political economy, unraveled. What began to emerge was a system of constitutional and public law grounded in an up-to-date version of classical liberalism. The court-centered Constitution would be a charter of “neutral principles,” “negative liberties,” and minority rights; and so too, the nation’s labor law was “neutral” in regard to the bargaining power of labor and management. Gone and forgotten were the efforts to link constitutional liberty with working people’s economic security and workers’ freedom of collective action; gone too, the notion that the first amendment had anything to do with safeguarding labor protest and boosting workers’ collective clout.

Thus did the language of progressive constitutional political economy vanish from mainstream public discourse and debate. Claims of constitutional governmental 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.