The Atlantic

IDEAS

# How Progressives Can Take Back the Constitution

All Americans, not only the Supreme Court justices, have a role in deciding what the Constitution requires.

By Joseph Fishkin and William E. Forbath

Matt Chase

FEBRUARY 8, 2022, 7 AM ET

SHARE

***About the author:*** *Joseph Fishkin is a law professor at UCLA. William E. Forbath holds the Lloyd M. Bentsen Chair in law at the University of Texas, Austin. They are the authors of* The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy.

---

America's slow-burning crisis of economic and political inequality poses a profound challenge to our constitutional system. Today, as in the 1930s, an immediate crisis—then the Depression, now the economic devastation wrought by a pandemic—has laid bare the depth of the challenge. Too much economic and political power is concentrated in too few hands. It's still possible to change course, to disperse economic and political power more broadly among all the people and ensure that the United States remains a republic rather than an oligarchy. But whether our political system is capable of doing this will depend on the outcome of a massive, looming constitutional confrontation between the elected branches and a hostile Supreme Court.

Liberals and progressives in the elected branches of the federal government are setting out to do the necessary work, and have made a start. They hope to enact major redistributive reforms, providing more decent jobs, more social insurance, more political and economic clout for ordinary Americans, more taxing and breaking-up of concentrated wealth. But these important, overdue efforts are vulnerable to constitutional attack.

As in the 1930s, liberals and progressives confront a very conservative federal judiciary that is hostile to redistributive reforms. As in the 1930s, the judiciary was put in place by a political party with a weakening grip on political power but a fierce determination to maintain minority rule by translating much of its vision for our economy and society into constitutional law.

Conservatives know that the Constitution speaks to the distribution of wealth and economic power. Their forebears argued that the Constitution condemns

redistribution. Today's conservatives are reviving those arguments, and our right-wing Supreme Court is baking them into constitutional law. When today's Court declares that the property rights of agribusiness nullify farmworkers' right to organize, or that the federal government lacks the power to expand Medicaid across all states, or that campaign-finance rules violate the free-speech rights of the rich, the Court's conservative majority is building a bulwark against progressive campaigns to address America's extreme inequality.

This is hardly the first time courts have intervened to protect wealth from redistribution, business from regulation, and capital from organized labor. But liberals and progressives have forgotten how their forebears fought back. In the past, reform-minded presidents, lawmakers, and citizens argued: Oligarchy is not just an economic, social, or political problem; it is a *constitutional* problem.

From the October 2020 issue: The flawed genius of the Constitution

Modern liberals' retreat from the idea that the Constitution has something to say about economic life is an anomaly. For generations, a main current in American constitutional thought held that oligarchy threatens the "Republican Form of Government" at the heart of the Constitution. Presidents, lawmakers, judges, and citizens working in this tradition understood that the Constitution imposes a duty on government to promote a broad distribution of wealth and political power. When conservatives objected that redistribution was unconstitutional, reformers responded that the Constitution—its text and principles, its grants of legislative power and guarantees of equal rights—doesn't merely allow redistributive reforms; it *demands* them. The Constitution requires protecting the republic from becoming a "moneyed aristocracy" or "oligarchy."

## RECOMMENDED READING

What's So Great About a Written Constitution?

BRIAN CHRISTOPHER JONES

---

The Year That Changed Everything

AKHIL REED AMAR

---

The Framers Would Have Wanted Us to Change the Constitution

WILFRED CODRINGTON III

---

This was chiefly legislative work. Today, we tend to think of constitutional claims as political conversation-stoppers, enforced by courts. Not so in this tradition. Instead, the idea was that constitutional conflicts play out in the political branches. Far from being conversation-stoppers, in this tradition, constitutional claims are instead central to great national *political* debates over the relationship between the Constitution and the nation's economic and political life. The most important thing the courts can do when faced with constitutionally essential economic reform is to recognize the constitutional stakes, and get out of the way.

It is time to make these arguments again—not just in court, but in politics. Americans can build a fairer country with an old kind of constitutional politics in which all of us, not only the Supreme Court justices, have a role in deciding what the Constitution requires.

We call this the "democracy-of-opportunity tradition." It is as old as the republic itself. But we take the name from President Franklin D. Roosevelt, who argued that it was a constitutional necessity to overthrow the "economic royalists" and build a "democracy of opportunity" for all Americans in the economic and the political spheres. Arguments in the democracy-of-opportunity tradition hold that we cannot

keep our constitutional democracy—our "Republican Form of Government"—unless we restrain oligarchy, and build a robust middle class that is open and broad enough to accommodate everyone. And everyone includes everyone, across lines such as race and sex. When you see racial inclusion in the light of constitutional political economy, it takes in more than antidiscrimination laws and voting rights. It encompasses social insurance, job creation, and redressing the historic racial wealth gap.

Before the 20th-century rise of economics, thinkers as varied as Adam Smith and Karl Marx shared the basic idea that economics and politics are inseparable. These thinkers didn't write about "political science" and "economics"; they wrote about *political economy*. The concept is simple: Political choices and decisions give shape and content to market and property relations; in doing so, they shape the distribution of wealth and economic power. The distribution of wealth and economic power, in turn, inevitably shapes the distribution of *political* power, defining the boundaries of what is possible in politics.



As long as the idea of political economy flourished, Americans of all political stripes viewed and argued about the Constitution through a political-economy lens. The revolutionaries of 1776 disagreed about what kind of republic they hoped to create, but they agreed that if it was going to be a republic, its economic structure mattered. The new United States had to be filled with "middling sorts," as Thomas Jefferson and

Thomas Paine often wrote: citizens who had enough to be comfortably independent, but not so much as to be aristocratic. Noah Webster, hardly a revolutionary firebrand (his lasting fame would come from his dictionary), put it this way: "The basis of a democratic and a republican form of government is a fundamental law, favoring an equal or rather a general distribution of property." This "equality of property," he argued, "is the very *soul* of a *republic*—While this continues, the people will inevitably possess both *power* and *freedom*; when this is lost, power departs, liberty expires, and a commonwealth will inevitably assume some other form." Jefferson, translating these ideas into precepts for Virginia's state constitution, argued that it was essential to block the intergenerational transmission of large landed estates, to make sure that "every person" had at least "fifty acres" of land, and to build a system of public schools.

The politics of antebellum America were suffused with constitutional arguments about political economy. The Jacksonians argued for limited government, free trade, and money that could be exchanged for gold, on the ground that these ideas were the way to promote "the grand republican principle of Equal Rights … which lies at the bottom of our constitution," as the famous New York Jacksonian, William Leggett, wrote, and avoid an unconstitutional concentration of special privileges and power in the hands of a few. Their opponents, the Whigs, argued for a much more active national government, which they claimed had a constitutional duty to use its powers to enact their policy agenda, because of the opportunity-rich political economy it would help build. The powers of Congress enumerated in Article I, in their view, were "not only grants of powers but trusts to be executed" and "duties to be discharged," as John Quincy Adams wrote, after he became convinced that the Whigs were right.

This idea that the Constitution imposes affirmative duties on the legislature became indispensable to the democracy-of-opportunity tradition. It came into its own during the Civil War and Reconstruction. At the end of the Civil War, Republicans controlled the Congress. By 1866, they had conducted extensive hearings on conditions in the South and concluded that the old slaveholding, plantation-based elite remained a "ruling and dominant class," as the Joint Committee on Reconstruction declared. Animated by their old "spirit of oligarchy," these

unrepentant rebel leaders were hell-bent on making their ex-slaves into a dependent class of serfs. Abolishing slavery was not enough. As the House's leading Radical Republican, Thaddeus Stevens, put it: "The whole fabric of southern society *must* be changed … if the South is ever to be made a safe republic … How can republican institutions … exist in a mingled community of nabobs and serfs?"

George Thomas: What the Constitution doesn't say

Republicans concluded that Congress had a "duty" to enact "appropriate legislation" to safeguard the equal rights of the freed people, as Senator Lyman Trumbull declared in 1866. This meant not only the nation's first civil-rights statute, but also a series of interventions in political economy. Black freedom required a material basis. Serfs had no shot at being equal citizens. That meant Congress had what Trumbull called a "constitutional obligation" to purchase land and distribute it, along with the public lands and abandoned plantations of the South, to ex-slaves.

These Republicans brought together for the first time in the mainstream of American political life all three core principles of the democracy-of-opportunity tradition: anti-oligarchy, a broad and open middle class, and inclusion (at least in terms of race). These linked ideas were at the core of their understanding of the Thirteenth, Fourteenth, and Fifteenth Amendments.

But the Republican dream—freed people setting up households and independent farms of their own—was a nightmare to southern white men who still aspired to be masters. To restore Black dependency and subordination, they created the Ku Klux Klan and mounted terror campaigns of rape, castration, murder, and arson. In response, Republican lawmakers began to recognize that they would need to guarantee not only Black civil rights but also the Black political power that could help secure those civil rights. The South's political future was either a white oligarchy or a biracial republic. The white oligarchy spelled a Democratic majority in Congress. But "grant the right of suffrage to persons of color" and there always will "be Union men

enough in the South [to] secure perpetual ascendancy to the party of the Union," as Stevens explained.

Starting in 1867, southern whites watched in stupefaction as Union troops supervised voter registration, enrolling Black voters and excluding prominent white people. Roughly 800 Black men served in state legislatures. Black men filled more than 1,000 public offices in town and county governments; several dozen served in Congress. Black leaders formed state and local Republican coalitions with representatives of white yeomen and tenant farmers. White elites called them "Black Republicans" or sometimes the "poor man's party." In office, they used state taxing powers to dissolve large estates, and created new land commissions and loans for freedmen, doing important work to reshape the South's political economy, even with fewer and fewer federal troops backing them up.

Meanwhile, northern elites were growing alarmed by the emergence of mass strikes on railroads and in cities, and mounting demands for redistributive economic reforms. The war had turbocharged northern industrialization, and northern labor organizations began to argue that the Constitution obliged Congress and state lawmakers to enact laws to abolish what they called "wage slavery." Northern elites struggling to control immigrant labor became more sympathetic to southern planters yearning to control Black labor. A cynical deal over the contested presidential election of 1876 kept the White House in Republican hands in exchange for a promise to end the military occupation of the South.

By the turn of the 20th century, the U.S. Supreme Court refused to intervene to enforce constitutional guarantees of Black citizenship, even in the face of openly illegal mass disenfranchisement and white political violence. All three branches of the federal government had abandoned the promises of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Matt Chase

Reconstruction's rise and fall confirmed the lesson that politics and economics are inextricable. Political citizenship was inseparable from social and economic citizenship; neither could stand on its own; and both demanded a broad distribution of wealth and social and economic power. By the late 19th century, the central debates in American politics—not only Reconstruction but also taxes, monetary policy, labor, railroad transportation, corporate law, antitrust, and structural changes to the form of government itself—were all subjects of major constitutional arguments. In each, advocates of the democracy-of-opportunity tradition squared off against their anti-redistributive rivals in a dramatic constitutional class struggle. The Supreme Court began reading the Constitution to command violent repression of organized labor's strikes and boycotts, and to gut organized farmers' legislative victories aimed at regulating the rates railroads charged for shipping goods to market.

Reformers responded by challenging the courts' monopoly over constitutional interpretation. The whole progressive wing of U.S. politics, from mainstream Theodore Roosevelt to socialist Eugene Debs, pressed for structural reforms to make both state and federal constitutions more responsive to the people rather than the new corporate oligarchs. Reformers championed amendments to rein in the courts, make the Senate more democratic, and make the federal Constitution itself easier to amend.

Such democratizing changes, they declared, were essential to enacting the economic reforms the nation needed if it was to remain a republic. In many cases, they succeeded. This is how Americans got the direct election of senators, and state ballot initiatives and referenda, along with substantive reforms such as the constitutional amendment overruling the conservative Supreme Court and granting Congress the power to enact a progressive income tax.

But the Supreme Court remained in the grip of its resolutely anti-redistributive vision of constitutional political economy into the 1930s, when the Great Depression made plain that this vision, still shared among the nation's financial, business, and legal elites, was wholly inadequate for repairing a broken economy.

Adam Serwer: The lie about the Supreme Court everyone pretends to believe

During Franklin Roosevelt's first term, the federal judiciary continued repressing strikes and invalidating reforms, including major New Deal legislation. But in this round of the constitutional class struggle, two of the three branches of national government stood on the side of the democracy-of-opportunity tradition. The White House and New Deal lawmakers declared that the 1935 Social Security Act and National Labor Relations Act (NLRA) were constitutional essentials. Social insurance for unemployment and old age, FDR said, was the federal government's "plain duty" under the general welfare clause and "a right which belongs to every individual and every family." Workers' rights to strike and organize, to join unions and bargain collectively, were grounded in the First, Thirteenth, and Fourteenth Amendments, along with the Constitution's guarantee of a "Republican Form of Government." Senator Robert Wagner, sponsor of the NLRA, called these rights fundamental to "democratic self-government" in an industrial society.

Business, big and small, was unified in opposition to these two landmark laws and pronounced both flatly unconstitutional. Employers openly defied the labor act, and defended themselves in court by arguing that the law turned the Constitution upside

down: Far from obliging government to protect workers' rights to strike and form unions, the Constitution safeguarded employers' rights to fire union workers—and the national government had no power to legislate industrial relations. Many courts agreed. But this clash between rival visions of constitutional political economy was not one the courts would resolve. Amid an unprecedented wave of industrial strikes, this clash flooded into the national political debate.

As FDR campaigned for reelection, Republicans and their business allies argued that the New Deal was utterly "contrary to the Constitution." Roosevelt responded in kind, arguing that the New Deal was a constitutional necessity. A new oligarchy of "economic royalists" were using "corporations, banks and securities, new machinery of industry and agriculture, of labor and capital" to construct "a new despotism wrapped in the robes of legal sanction." "Political equality," the president argued, was "meaningless in the face of economic inequality … freedom is no half-and-half affair." Roosevelt was articulating and building, through politics, a constitutional order centered on affirmative governmental obligations to ensure economic security for all and "the establishment of a democracy of opportunity."

Roosevelt won a crushing victory that year, which New Dealers viewed as a sweeping vindication of their constitutional vision. FDR followed up with his famous, controversial threat to pack the court. Today, many pundits assume that the plan was a costly failure. But most observers at the time saw it more clearly for what it was: a threat that succeeded.

The Court backed off, upholding the NLRA and the Social Security Act in an about-face that the leading constitutional commentator of the day, Princeton's Edwin Corwin, promptly described as a "constitutional revolution." The revolution was not the one we remember today, the expansion of congressional power to regulate commerce. That expansion was hugely important, and it was the path the Court took in retreat from its anti-redistributive laissez-faire Constitution. But the "revolution" Corwin identified was an even deeper shift in constitutional political economy: a reframing of liberty itself, along New Dealers' lines, as "something that may be

infringed by other forces as well as by those of government." The Court began to acknowledge workers' new labor rights as "fundamental" and "constitutional."

The New Deal's vision of constitutional political economy had a fundamental weakness: its abandonment of racial inclusion. And it turned out, once more, that the other two central ideas of the democracy-of-opportunity tradition—anti-oligarchy, and a broad and open middle class—could not prevail without inclusion. Politically, the early New Deal bought the support of the white oligarchs of the old South by agreeing to exclude from core New Deal statutes most Black southern labor, such as agriculture and domestic service. By the 1940s, a new conservative coalition of southern Democratic oligarchs and northern Republican business interests revived in Congress the fight that the Court had abandoned. These counterrevolutionaries defeated efforts to "complete the New Deal," blocking policies such as federal job guarantees and national health insurance; they also clawed back a considerable part of the labor protections the New Deal had won. The nation's betrayal of Reconstruction had ultimately laid the groundwork for the conservative counterrevolution.

But this was not a counterrevolution led by the Supreme Court. The Court in the middle of the 20th century seemed to have abandoned its old project of imposing an anti-redistributive, laissez-faire vision of constitutional political economy. Instead, the Court refashioned itself as a guardian of civil liberties, and later, civil rights.

In response, both conservatives and liberals sharply revised their views of the Court and the law. Conservative southern whites embarked on a campaign of massive resistance to *Brown v. Board of Education* that would cement a politics of opposition to the Court (really, the Warren Court) that continued for more than half a century. Liberals, reacting to this campaign, adopted a posture of defense of the Court, and a new court-centered view of constitutionalism itself that would have shocked their progressive forebears.

According to this new liberal view, the Court was the one truly legitimate expositor of the meaning of the Constitution. Everyone else had to follow the justices' lead. Liberal reformers and their allies fighting for racial minorities, women, consumers, and the environment soon embraced individual-rights claims aimed at courts; strong

judicial oversight of public authorities and private companies; and legalistic, procedural conceptions of fairness and equality—all views that earlier generations of progressives had shunned.

This new court-centered way of thinking eclipsed the democracy-of-opportunity tradition. Key constitutional arguments in that tradition had been aimed at lawmakers, not courts. To create social insurance, for example, you need legislation, not litigation.

Even worse, in the postwar boom years of the mid-20th century, the very concept of political economy itself went into eclipse. In the shadow of the Cold War, American elites set aside political economy in favor of the new technocratic discipline of economics, which sidelined old questions about the distribution of wealth and power. The new liberal constitutionalism aspired to take constitutionalism out of the political arena and assign it to the special expertise of judges; so too, the new liberal thinking about economics took political economy and moved it outside of politics, assigning it to the special expertise of economists. Together, these changes meant that late-20th-century liberals forgot, or abandoned, the democracy-of-opportunity tradition.

Conservatives, by contrast, never forgot about constitutional political economy. Through the Reagan years and into the 21st century, they have fought vigorously in the courts and outside them to destroy unions, weaken antitrust rules, and dismantle regulations of business and of campaign finance, in order to build a new political economy more hospitable to large concentrations of economic power. They have succeeded. In law schools and in courts, a new conservative legal movement marching under a banner of "originalism" has proceeded to develop novel doctrines that justify reviving pre–New Deal understandings of the Constitution, elevating their notions of the property and contract rights of the corporate and financial elites over the claims of democracy and the public good.

Today, America is deep into a second Gilded Age. Inequality has reached levels not seen for a century. Many of the core ways of thinking about economics, politics, and constitutional law that today's liberals continue to embrace no longer make sense. It is no longer tenable for liberals to presume that the

economy will largely police itself, with the role of government confined to policing the margins. After a financial crash and a pandemic, it's obvious that economics and politics are intricately bound together; and, as in the first Gilded Age, economic elites, with help from courts, are capturing enormous political power.

It has become untenable as well for liberals to pretend that the Constitution and the Supreme Court sit somehow above politics, setting the boundaries of politics. That old idea was common among liberals (but not conservatives) in the late 20th century. Today, however, the Court is openly engaged in a struggle in partisan constitutional politics. Just as it was a century ago, the plutocratic, anti-redistributive vision of political economy central to the conservative side of that struggle is now squarely in view.

Jeffrey Rosen: What if we wrote the Constitution today?

These changes are so wrenching that they have led some liberals and progressives today to yearn for a mythic liberal constitutional golden age. Some hope, in particular, to restore an imagined past in which the Court was a nonpartisan body, sitting outside of politics and setting the boundaries of politics.

This is the wrong way to think about court reform. A better model is FDR's confrontation with a hostile Court in the 1930s. The goal is not to build a better Court of nonpartisan, neutral experts. Court-curbing measures may well be necessary. But talking about ideals of nonpartisanship—or for that matter, righting partisan wrongs—won't convince voters of the need for dramatic institutional change. Instead, progressives today should make the substantive case, through politics, for why the Court's vision of constitutional political economy is wrong, and how it has strayed much too far from the substantive views of the majority of the American people about the kind of national community the Constitution promises to promote and redeem.

This means making constitutional arguments outside of court. It means expanding our current unduly cramped view of what a constitutional argument sounds like.

Instead of a claim that a court must strike down a law, constitutional arguments in the democracy-of-opportunity tradition are more often arguments for why legislation is constitutionally necessary—the Constitution as shield, not sword.

If and when today's Democratic Party enacts substantial, redistributive legislation aimed at reversing our slide into oligarchy and building a multiracial democracy of opportunity, it will face a judiciary as hostile to such legislation as any the nation has seen since 1933. This tough fact will encourage some liberals and progressives to disdain the constitutional struggle—to view all talk of the Constitution as essentially deradicalizing, demobilizing talk that cedes power to the courts.

But just the opposite is true. It is the failure to speak about the Constitution in politics—an insistence on treating it as a thing outside of politics, merely setting the boundaries of politics—that cedes power to the courts. And more often than not, over the long arc of American history, courts have used their power to foster and protect economic and political oligarchy.

What progressives must do instead is expose that we are all engaged in constitutional politics: progressives and conservatives, judges and legislators, commentators and protesters, those deeply knowledgeable about legal doctrine and those completely unschooled in it. When we make arguments about the Constitution, we do not cede authority to courts. Instead, by making claims on the Constitution, we show that all branches of the government, and the people themselves, have the authority and the duty to debate about what our fundamental constitutional principles require. As in the past, that will mean major redistributive reforms that reshape American society, along with structural changes to our political institutions that are needed to enact those reforms and rebuild our democracy.

---

*Portions of this piece are adapted from Fishkin and Forbath's recent book,* The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy.

*When you buy a book using a link on this page, we receive a commission. Thank you for supporting The Atlantic.*

---

## The Anti-Oligarchy Constitution - Reconstructing The Economic Foundations Of American Democracy

JOSEPH FISHKIN AND WILLIAM E. FORBATH, HARVARD UNIVERSITY PRESS

BUY BOOK

---