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DUALIST POPULAR CONSTITUTIONALISM
A Reply to Michelman

Joseph Fishkin and William Forbath

We deeply appreciate Frank Michelman's thoughtful, nuanced, often profound essay about the arguments at the heart of *The Anti-Oligarchy Constitution*. It is the kind of reading that any writer of a book like ours hopes, but does not dare expect, to elicit. Michelman truly understands what the book is trying to do. His reconstruction encourages us to think more deeply about certain dimensions of the project, which is our task in this response.

The Anti-Oligarchy Constitution aims to reclaim for liberals and progressives the forgotten field of constitutional political economy. But it also aims to advance and deepen understanding of popular constitutionalism, offering what Michelman kindly calls a "richer development" of how popular constitutionalism has worked in the past and how it might work again in the future. Michelman asks whether we are "monists" or "dualists": monists believe that the only democratically legitimate force in politics is the "unbound rule by current majorities," whereas dualists believe that constitutions legitimately have some force that can conflict with the political preferences of current majorities.[1] As Michelman correctly discerns, we are dualists, but of a kind that is unconventional today. We do not view the Constitution as a force *outside politics*, constraining and setting the boundaries of politics—a view that fits well with the institutional vision that the Constitution must be implemented by a body that stands (purportedly) above politics: the courts. That court-centric version of dualism became the conventional liberal view in the middle of the twentieth century and has stayed that way. It is as familiar as the air we breathe. Researching and writing *The Anti-Oligarchy Constitution* led us to embrace a different, and older, view.

In an arresting metaphor, Michelman describes our approach as "splitting the atom" of constitutional imperatives.[2] We say there are such things as constitutional mandates or

1 Frank I. Michelman, *The Anti-Oligarchy Popular Constitution*, 2 Am. J.L. & Equal, no. 2, 2022, at 337, 344, 355.

2 He alludes here to Justice Kennedy's opinion in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty.").

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demands[3] that have real force, but often that imperative force operates *in politics*—by which we mean both the venue (the so-called political branches as well as the courts) and the practice (political persuasion)—rather than through judges who restrain and referee politics. Michelman's metaphor is apt today because of the present state of liberal, court-centered constitutional culture (although, to be clear: we are not the first to try to split the atom in this manner).[4] Part of what we are doing in the book is showing readers that the present state of liberal, court-centered constitutional culture is anomalous in American history. For the first two-thirds or so of the history of the republic, the idea that the Constitution is both a subject of politics and a framework for politics, and not merely an object of judicial interpretation, was commonplace.[5]

For most of U.S. history, voters, political movements, and politicians imagined and inhabited the constitutional order very differently from the way we do. For them, "the Constitution" was at once a text and tradition one interpreted and a system of government—whose powers, purposes, and precepts one implemented and pursued over time through political and legislative action. That is why, as we show in the book, legislative debates about classic nineteenth-century topics—bank charters, tariffs, the parceling out and sale of public lands—brimmed with constitutional arguments. Legislators on all sides believed that they were not only the nation's primary policy makers, they were also its most important constitutional interpreters or "expositors."

They made first-order arguments about the Constitution's meaning that were intertwined with policy arguments about the distributional effects of different policies. Many believed that they had a *constitutional duty* as legislators to enact measures that thwarted oligarchy and built a broad, open middle class. That was how the New Dealers saw the tasks of administrative state building and enacting social insurance; it was how Lincoln's Republicans saw their Homestead Acts, their creation of the Freedmen's Bureau, their distribution of abandoned plantations to the freed people. They were interpreting their constitutional obligations and working out and implementing them through policy making and institution building for their times. For most of our history, this was constitutional common sense.

3 Michelman, at times, calls them "rights," which does not capture all, or even most, of what we find these demands to contain; at other times, he calls them elements of the higher-law framework of politics, which suits us better.

4 Larry Sager's pioneering work on the underenforced Constitution is an essential starting point. *See* Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice (2006).

5 Larry Kramer's groundbreaking work in this field opened the way for this argument. *See* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004). We are offering a fuller account of this constitutional practice across much of U.S. history that we developed through our exploration of constitutional political economy.

Today, much of it seems foreign. The weighty constitutional significance assigned to (what we would now call) economic policy choices seems strange. Partly this is because, as Michelman ably distills, economics has supplanted political economy. And partly it is because the pervasive talk of affirmative legislative constitutional duties is foreign to today's highly judicialized constitutional culture: today we tend to think of the Supreme Court as the primary, if not the sole, expositor of the Constitution's meaning. This turns the Constitution into a set of court-enforced limits the political branches must not transgress. That is what sets up the apparent "paradox" Michelman finds lurking in the ideas we have sketched.[6] The Constitution, as higher law, is "necessarily conceived as distinct . . . from a politics it is there to instruct." Yet, at the same time, the Constitution "leaves to determination by politics the meaning of its instructions to politics."[7]

This is exactly right. And it is only a series of relatively recent changes that have led these ideas to seem striking and innovative, perhaps even paradoxical, in their dualist conception of politics—so that the idea of a constitutional imperative operating in politics can draw a plausible metaphorical comparison to nuclear fission. Generations of Americans found these ideas obvious. (And they didn't even have radio!)

Part of what Michelman's response prompts us to explore, more deeply than we do in the book, is the nature of dualism itself, as we conceive it. What exactly does dualism mean if constitutional debate and argument are part of politics? What force does constitutional argument have? Is it just a matter of rhetoric, a form of political persuasion to be judged against other rhetorical strategies? The next section of this response explores that question.

Michelman also prompts us to ask: what is the role of courts in a political culture where constitutional arguments are being made both in a more legalistic register inside the courtroom walls *and* in a more political register outside them? The third section turns to that question.

The final section turns to Michelman's challenge toward the end of his essay: why, he asks, do we commend the renewal of political economy as *constitutional* subject matter for the progressive side of national policy debates? Is this chiefly instrumental advice? Are we instructing progressives to talk about the Constitution in the way our book invites because it will be politically effective? Or are we championing this renewal "for its own sake," as a better way to run a constitutional democracy?[8]

6 Michelman, *supra* note 1, at 337, 354.

7 *Id.* at 337, 354.

8 *Id.* at 337, 355.

I. ACKERMANIAN DUALISM AND OUR DUALISM

Writing this book, we followed the trails of some important pioneers. One is Bruce Ackerman.[9] Ackerman opened the door to projects such as ours that explore the dynamics of American popular constitutionalism in theory and historical practice with his pathbreaking *We the People* series.[10] Ackerman's initial insight in these books is that our constitutional order has been repeatedly and dramatically altered by the American people in ways that do not comport with Article V of the Constitution (which provides the means of formal amendments). He convincingly demonstrates that the founding itself, and the massive constitutional changes of moments such as Reconstruction and the New Deal, have in common the fact that they do not follow the rules of formal amendment. Instead, through politics, Americans have changed our Constitution. Ackerman recognized that one way to understand this history, both positively and normatively, is what he called "monism": the idea that there is no such thing as a constitutional constraint, and that really, political majorities should and perhaps do have "plenary power" to enact their policy program. Ackerman rejects monism, as do we. But, of course, he also rejects (indeed, rather demolishes) the simplest modern form of dualism, which imagines that law is separate from politics and that the only way for the people to alter our Constitution is through Article V. Instead, Ackerman imagines a more modern and more political sort of dualism. Americans, he argues, engage in both "ordinary politics" and "higher lawmaking." Higher lawmaking, in his view, is a multistep process in which national majorities, under conditions of heightened political engagement and deliberation, repeatedly win popular support for their plan to move our higher law in the direction they advocate. Thus, for Ackerman,

9 We note some of the other pioneers at appropriate points below. No one can write about the history and theory of taking the Constitution away from the courts without guidance from the pathbreaking work of Mark Tushnet. *See especially* Mark Tushnet, Taking the Constitution Away from the Courts (1999); Mark Tushnet, Taking Back the Constitution: Activist Judges and the Next Age of Constitutional Law (2020). On the decades-long efforts of the labor movement and its allies on the fields of popular, legislative, and administrative constitutionalism, the theoretically inflected historical work of Sophia Lee, James Gray Pope, and Laura Weinrib was indispensable. *See* Sophia Z. Lee, The Workplace Constitution from the New Deal to the New Right (2014); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 Colum. L. Rev. 1 (2002); Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise (2016). Mark Graber's pioneering work on the legislative and party-based constitutionalism of Reconstruction Republicans was also crucial. *See* Mark Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 Tex. L. Rev. 1361 (2016). So too, Saul Cornell's and Gerald Leonard's joint and several work on the early republic. *See* Saul Cornell & Gerald Leonard, The Partisan Republic: Democracy, Exclusion and the Fall of the Founders' Constitution, 1780s–1830s (2019); Saul Cornell, The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828 (1999); Gerald Leonard, The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois (2002).

10 *See* 1 Bruce Ackerman, We the People: Foundations (1991); 2 Bruce Ackerman, We the People: Transformations (1998); 3 Bruce Ackerman, We the People: The Civil Rights Revolution (2014).

distinguishing ordinary politics from periods of higher lawmaking is a central intellectual preoccupation.

For us, it is not. We view ordinary politics and constitutional politics as different but essentially continuous with one another—there is no bright line between them. In our view, it is possible to engage in ordinary politics in a way that does not expressly or implicitly invoke constitutional ideas and arguments; or it is possible to invoke such constitutional ideas and arguments to varying degrees; or it is possible to engage in a highly self-conscious form of constitutional politics that emphasizes constitutional ideas and arguments. Sometimes these forms of politics change our constitutional order after something that looks like a moment of higher lawmaking in Ackerman's sense, and sometimes they change our constitutional order without ever even convincing a durable majority of Americans, simply through a gradual accretion of judicial appointments leading to court decisions that alter the trajectory of the law.[11]

Ackerman's interest in distinguishing higher from ordinary lawmaking is based on the premise that we need to know which is which to know which constitutional changes are legitimate and which are usurpations. Our reading of American historical practice is that such questions are rarely entirely settled. Even when they seem firmly settled, there is nearly always room to fight about the reach or meaning of that settlement years or decades or centuries later.[12] Surprisingly often, Americans continue to fight about the first-order question of whether the constitutional changes of the past are settled constitutional bedrock or serious errors to be revisited and corrected. Thus, we view constitutional politics as an ongoing struggle in which a central part of the subject matter of the struggle is how to view the legitimacy and force of past changes to the constitutional order: the recent

11 Jack Balkin and Sandy Levinson are the foremost advocates of this view. We think their joint and several work captures the relevant dynamics brilliantly. *See*, *e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1068 (2001); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L. Rev. 489 (2006). Balkin has lately integrated his conception of this process of constitutional change through Article III appointments with political science scholarship such as that of Stephen Skrownek, developing a way to theorize how constitutional "regimes" become entrenched and eventually dislodged. *See* Jack M. Balkin, The Cycles of Constitutional Time (2020). Their scholarship is also a foundation for our thinking about the political dynamics of constitutional fidelity as a contested ground of national identity, a topic to which we will return toward the end of this essay. *See* Sanford Levinson, Constitutional Faith (1989); Jack M. Balkin, Constitutional Redemption: Political Faith in an Unjust World (2011).

12 The closest thing to a permanently settled constitutional change in American history is the abolition of chattel slavery. One might also cite the abolition of de jure segregated schools in *Brown v. Board of Education*. And yet, the continuing fight over the reach and meaning of *Brown* has been a central battleground of American constitutional politics for almost seventy years. And indeed, Americans also continue to fight about the question of exactly what we abolished when we abolished slavery.

conservative counterrevolution; the civil rights revolution of the 1960s; the New Deal; Reconstruction itself.[13]

The Anti-Oligarchy Constitution traces a tradition of constitutional argument that operated for the most part through politics—as did its various opponents, from pro-slavery constitutionalism to pre–New Deal anti-redistributive Lochnerism to the modern forms of originalism-inflected neo-Lochnerism that are central to the popular-constitutional agitation on the contemporary American right. Sometimes the constitutional dimensions of the political arguments were more explicit, sometimes less. Sometimes, it was right-wing activism by the Supreme Court and other courts that prompted progressive political actors to take up a more explicitly constitutional set of arguments by way of response. That pattern is one we find encouraging, in a way. The present right-wing Supreme Court is doing great damage to the republic, but there is a potential silver lining if the Court inspires modern progressives to recover a sense of how to do constitutional politics.

The careful reader will quickly discern that from the perspective of avoiding the collapse of dualism into monism, we face a considerably harder road than Ackerman. Where he has a temporal distinction between ordinary politics and higher lawmaking, we see both happening all the time. Where he draws a bright-line rule that lends legitimacy to some forms of constitutional politics and denies it to others, we see the question of legitimacy as forever contested, recursively, through constitutional politics itself. This is part of why Michelman perceptively questions exactly what our version of dualism looks like or whether we are dualists at all.

In our view, political actors are bound by the higher law of the Constitution because Americans collectively believe that to be the case. For over two centuries, Americans have engaged in a practice of making claims on the Constitution and arguing that those claims have a force that goes beyond and cannot be immediately overridden by the political will of a present-day majority. Not only lawyers but also politicians and voters think this way.

This practice of constitutional politics has real value. It creates a kind of common ground—often hotly contested ground, but still common ground—on which Americans can stake out rival visions of our fundamental political commitments as we attempt to

13 This pattern of continued struggle over the meaning and outcome of past constitutional struggle is central to the dynamics Reva Siegel has identified in her important work on the politics of constitutional memory. *See*, *e.g.*, Reva B. Siegel, 2005–06 Brennan Center Symposium Lecture, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 Cal. L. Rev. 1323, 1350 (2006) [hereinafter Siegel, *Constitutional Culture*] ("Disputes about forging a common future are . . . expressed as claims about the meaning of a shared past."); Reva Siegel, *The Politics of Constitutional Memory,* Geo. J.L. & Pub. Pol'y (forthcoming 2022). For example, for one of the authors' reflections on the contemporary implications of the continuing political struggle over the meaning of the Civil War and Reconstruction, see Joseph Fishkin, *The Dignity of the South*, 123 Yale L.J. Online 175 (2013).

persuade one another.[14] Movements of the disenfranchised and dispossessed—members of an imagined, inclusive national political community they hoped to bring into being—have made great use of this practice.[15] The same goes for generations of radical left, as well as mainstream progressive, reformers in the democracy-of-opportunity tradition, who championed dramatic changes in the inherited constitutional scheme.[16] Many were radical democrats, yet they were not "democratic monists." They attacked plutocratic institutions like the Senate and the Court and called for structural reform to empower democratic majorities. But they did so in the name of the higher-law constitutional principles whose adventures we have chronicled: anti-oligarchy, wide-open opportunities for decent livelihoods and material well-being, and (sometimes, too rarely) racial inclusion. They were interpreting and making claims on the Constitution, and they said so—even as they tried to change the inherited text, and sometimes succeeded.

In sum, a form of dualism is baked into American politics itself.[17] Political actors make constitutional arguments not simply as a way of putting a rhetorical exclamation point on something they think very important, but instead because we share an understanding that part of our project of collective self-government is to be bound by certain commitments, whose meanings are therefore worth fighting about. Unusual among constitutions, the U.S. Constitution is a root signifier of national identity.[18] When we fight about constitutional principles and their meaning, we fight about who we are as a nation and what kind of national community the Constitution promises to promote and redeem.[19]

14 *See* Siegel, *Constitutional Culture, supra* note 13, at 1353 (explaining how this dimension of our constitutional culture "channels dispute by requiring advocates to express disagreement within a shared tradition, rather than by withdrawal from it"); *id.* at 1419 (describing constitutional contestation as "a practice of civic attachment. It allows citizens to experience law, with which they disagree, as emanating from a demos of which they are a part."); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* The Constitution in 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009).

15 A canonical account is Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. Am. Hist. 1013 (1987).

16 Aziz Rana explores this terrain in brilliant detail in his forthcoming The Rise of the Constitution, ch. 2 ("Constitutional Disillusionment") (forthcoming 2023).

17 Thus, our book offers an interpretation in the "constructivist" mode Michelman nicely distills, Michelman, *supra* note 1, at 337, 348, 351, 352. (quoting James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms 20–21 (2015)).

18 We are indebted here to John Fabian Witt, Patriots and Cosmopolitans: Hidden Histories of American Law 1–12 (2007).

19 For discussions of the role of this form of reasoning in constitutional argument that are central to our thinking, see Sanford Levinson, Constitutional Faith (1989); Jack M. Balkin, Constitutional Redemption: Political Faith in an Unjust World (2011); Jack M. Balkin, Living Originalism (2011). For reasons our book briefly explores, our Constitution is unusual in playing this particular role in our national identity. But let us be clear: the book has no truck with the notion that the United States is exceptionally liberal. U.S. constitutional culture has never lacked for accounts of "We, the People" as a nation constituted by and for white men. Not in the past; not today.

With the Constitution playing this role in the national story, it is not surprising that people with rival views about the direction of the nation's political economy and much else have worked to ground their views in arguments about the Constitution. This includes the advocates of the anti-redistributive, "laissez-faire" constitutional politics that crystallized into Lochnerism in the 1900s. That constitutional politics helped give shape to the modern conservative account of an America founded on rugged individualism and limited government, private property, guns, and godliness.

We see the power of this account to inspire a broad swath of citizens, lawmakers, and judges to act militantly on its behalf today. It not only resonates with conservative values but helps define them as a form of constitutional patriotism. Missing from our current constitutional politics is a comparably robust progressive account of the kind of community the Constitution promises to secure for all. Past generations of progressives, though, offered an account of national community grounded in the democracy-of-opportunity tradition. They argued that the Constitution promises—and obliges us to build—a nation with a democratic rather than oligarchic political economy: one in which all Americans enjoy a decent education, material security, and a genuine opportunity not only to earn a decent livelihood but to do something with value in their own eyes and to engage in the affairs of their community and the larger society. This account shows how the Constitution can undergird, rather than impede, core commitments to a broad distribution of power and opportunity that progressives see as essential to a democratic society.

Taking the measure of this forgotten account, Professor Michelman observes, quite accurately, that the "historical course of American Constitution-centered, political economy-focused debate," as we ourselves recount it, is *not* a history of "the democracy-of-opportunity side" prevailing over time, until it becomes "hegemonic."[20] Not at all. The democracy-of-opportunity side lost at least as many past battles as it won, and it should be clear by now that we offer no assurances about the future. No certainty of a "tidal resurgence."[21] We do, however, spy some contrasts between past and present worth noting.

Not since the Reconstruction era's Republicans has the U.S. seen a major party bring together all three strands of the democracy-of-opportunity tradition as it mounted major political-economic reform. The Democratic Party during the New Deal confronted the nation's mass economic pain and rising class inequality by bringing together the anti-oligarchy principle and the imperative to build a middle class open and broad enough to accommodate the nation's industrial workers—its *white* workers. That Democratic coalition included the champions of Jim Crow, a reactionary core that killed efforts to

20 Michelman, *supra* note 1, at 337, 352.

21 *Id.* at 337, 347.

re-enfranchise the Black South and weave racial inclusion into the New Deal's democracy of opportunity.

Today's crisis of mass economic pain and mounting class inequality is the first one in our history since Reconstruction in which there is a major party that might once again bring all three strands together at the center of its program: the Democratic Party, no longer anchored in the reactionary precincts of the white South. Whether or not it will do so is history not yet written. Nor is it yet possible to see clearly how the inevitable conflict will play out between a future Democratic majority and a hostile, and highly politically engaged, Supreme Court.

II. THE ROLE OF THE COURTS

In the two centuries and more of constitutional history canvassed in *The Anti-Oligarchy Constitution*, courts are usually on the reactionary or conservative side. This is a story we very much want our more progressive readers to understand. A century ago, the federal courts in particular were the locus of opposition to Progressive efforts to preserve the economic foundations of democracy in an age of rapacious accumulation of power by organized wealth. Their jurisprudence elevated property and contract rights to condemn unions, redistribution, and popular efforts to preserve the economic foundations of republican government. Today the courts, as ever the least democratic branch, are once again developing novel doctrines in a thinly veiled results-oriented jurisprudence aimed at vindicating the political aims of the Republican Party—including rebuilding a more deeply oligarchic political economy. This is not a random pattern of events. We argue that there are reasons, not only in practice but also in theory, why courts are likely, more often than not, to be the branch most opposed to the democracy-of-opportunity tradition. A reader who glanced through those chapters of the book might well be left with the expectation that its authors are likely done with the courts—that we are likely ready to argue for an end to constitutional judicial review. Many thoughtful people have taken that position, a century ago and today.[22]

Michelman perceptively notes that we are not among them. Once again, this raises important questions. How do we understand the role of the courts? Do we view them

22 For contemporary and theoretically sophisticated advocates of versions of this view, see Jeremy Waldron, Law and Disagreement (1999); Jeremy Waldron, The Dignity of Legislation (2009); Samuel Moyn, *On Human Rights and Majority Politics*, 52 Vand. J. Transnat'l L. 1135 (2021) (arguing for a Frankfurterian skepticism of judicial review and an appeal to pursue human rights through majoritarian politics); *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives, Public Meeting of the Presidential Commission on the Supreme Court of the United States* (June 30, 2021) (written statement of Nikolas Bowie), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf (arguing for an end to the "undemocratic" practice of judicial invalidation of *federal* legislation).

as having a potential role in implementing an anti-oligarchic constitutional vision? In the book we talk about judicial interventions in constitutional political economy in terms of a sword (striking down legislation), a shield (upholding it against challenge), and a guide (interpreting it). This way of mapping the terrain, which we developed in response to an earlier exchange with Michelman, is useful for a few reasons; one of them is that it helps illustrate why, even though our main general prescription for courts is that they should largely get out of the way of democratic legislation, their role is more complex than that. There is more for them to do.

The democracy-of-opportunity tradition we chronicle has always emphasized the primacy of legislation and administration in building a democratic political economy. This work involves much that courts cannot initiate: initial endowments, social insurance, public investment in job opportunities, and much else. But courts often need to interpret and implement legislation and administrative action of all these kinds. Courts can and should consider questions of constitutional political economy when they do. It is not simply a matter of upholding legislation against collateral constitutional challenges (the shield); it is also a matter of enforcing and implementing and interpreting the statutes and regulations in a way that gives force to their constitutionally important aims (the guide).

But what about the sword? Today some are once again calling for an end to constitutional judicial review—or at least an end to the Supreme Court's power to overturn federal statutes. As a matter of democratic principle, they argue, the voters and their representatives should have the final word in national lawmaking, not the courts. We see the future of judicial power in a more contingent and experimental light. Enacting a progressive agenda in the democracy-of-opportunity tradition would involve much legislation that clashes with the political-economic outlook animating today's Court. If and when progressives succeed, and conservatives attack this agenda with constitutional arguments in court, we hope progressives will respond with a resurgence of popular and legislative constitutionalism. Party leaders, candidates, and lawmakers should argue that reforms to labor law, election law, social insurance, and a wide variety of other fields are constitutional *necessities*. Courts must back off to give such popular constitutionalism room to breathe. If the present Supreme Court will not, Congress and the President should force the issue, turning to a wide array of statutory tools at hand, including what Sam Moyn nicely calls the "fine-tuning of jurisdiction," taking away from the Court as much power as the occasion demands.[23] Nonetheless, this may surprise some readers, but we see room for a distant future court, a court very differently constituted than the present court, to hold, with the dissenters in cases such as *Dandridge* or *Rodriguez*, that the Constitution cannot

23 *See The Court's Role in Our Constitutional System, Public Meeting of the Presidential Commission on the Supreme Court of the United States* (June 30, 2021) (written statement of Samuel Moyn).

tolerate laws that consign some citizens to a socioeconomic position so subordinate that they are excluded from any real opportunity to participate in our economic life.[24] State courts, nearly all of which have heard cases in this vein regarding school finance, have shown that it is possible for courts to use the sword in a tempered way to require and impel legislative responses, sometimes spurring reluctant legislatures to take up their constitutional duties in such spheres.

Moreover, we do not aspire to take the Constitution entirely away from the courts because courts at their best can do invaluable work of several kinds: the special work of protecting the most despised and politically untouchable minorities, such as prisoners; the Elysian work of protecting the political process from corruption and distortion; and at the forefront of our minds these days, the liberal work of blocking and checking the authoritarian and antidemocratic forces in our polity, doing what they can to help prevent the collapse of liberal democracy into some form of illiberal autocracy.

Sometimes, courts are contingently the best positioned to do each of these sorts of work, in part because of the unique forms of persuasive power that the courts have acquired over our long national romance with constitutional judicial review. When a court says something is required by the Constitution, a lot of people will tend to believe it. That can be quite useful. Indeed, the modern neo-Lochnerian right has made enormous use of it, bringing arguments from the courts into politics and from politics back into court, secure in the knowledge that the same words spoken by a Justice of the Supreme Court carry additional persuasive weight regarding what the Constitution really means.

Michelman reads us as endorsing a view that some constitutional principles are—as Larry Sager's important work in this field would put it—underenforced.[25] That is, some constitutional principles are enforced not in court but through politics. We agree. Some who share this view with us might aspire to build a principled taxonomy of distinct areas where courts should lean in or back off. ("[I]n a word, 'footnote 4.'"[26]) We, however, see a great deal of contingency and overlap in the possible future institutional roles.

Courts, like legislatures and executives, are engaged in constitutional politics. That is very often why courts contain the Justices they do; it is often why courts rule as they do; and it is why so many arguments migrate from politics into courts and from courts into politics as they frequently do. Courts, legislatures, and executives have different but overlapping forms of power and authority in constitutional politics; their roles have shifted throughout our history and will undoubtedly shift again.

Our view is that the federal courts need to take a giant step back from their present posture: a form of judicial supremacy so extreme that it is dangerously close to judicial

24 Dandridge v. Williams, 397 U.S. 471 (1970); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

25 *See* Sager, *supra* note 4.

26 Michelman, *supra* note 1, at 337, 353.

exclusivity over constitutional interpretation. We hope for this backing off, but we do not expect it in the near term. Instead, we expect pitched conflict in the coming years between the elected branches and the courts over the direction of the nation's political economy.[27] A progressive Congress would have a variety of tools at its disposal, including well-tuned jurisdiction-stripping, to force the courts out of the way if the situation demands it.

And yet in the end, we are situated differently from our Progressive forebears, who were (rightly) profoundly skeptical of the courts of their time, and of the entire institution of judicial review, to the point that some of them called for its outright abolition. Those Progressives were operating in an environment without the criminal procedure revolution, without structural reform injunctions by courts, and most fundamentally without the entire liberal-legalist legacy of important rights claims structured to be enforced by lawyers in court.

This court-centered, rights-based way of thinking has had a variety of profoundly bad consequences. It has helped erase from popular and legal memory the claims of constitutional duty and obligation that are at the heart of the democracy-of-opportunity tradition. It has narrowed, to the point of very nearly effacing, core constitutional claims about labor rights and social provision. But even now—even in their deeply compromised, flawed, self-aggrandizing, and politicized state—courts still can do too much good for us to give up on them entirely.

What is needed, in our estimation, is a shift in the balance of power that would teach the courts, and the American people, that courts do not have a monopoly over constitutional argument. After that, as part of a dialogue or, more realistically, an ongoing contest over constitutional meaning and interpretive authority, courts should (and certainly will) continue to play a role in constitutional politics.

We would judge such interventions on the strength of the substantive constitutional arguments more than the shifting boundaries of judicial and legislative roles. We are confident that reviving the democracy-of-opportunity tradition involves a vastly expanded role for legislative and popular constitutionalism. Courts must back off—and Congress and the White House must curb them if they refuse. But beyond that, there is a great deal of future history not yet written in which the Court might yet play a secondary but important, even perhaps complementary, role in cementing a future democracy of opportunity for all Americans.

III. CONSTITUTIONAL NARRATIVE IN POLITICS

Finally, let us briefly turn to the set of questions Michelman poses toward the end of his essay regarding the political effects of the choices progressive politicians might make to

27 For a discussion of this conflict, see Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Foundations of American Democracy ch. 9 (2022).

speak in a constitutional register about what is now conceptualized as social and economic policy. Is it fair to assume, and do we assume, Michelman asks, that engaging in more explicit constitution talk about things like labor and social insurance, antitrust and banking reform, on the campaign trail or in state houses or on the Senate floor, is going to redound to the net benefit of progressive politicians?

Here, we are unequivocal: we definitely do not know. We are not political consultants. That question is an interesting question, but it is not our question. We argue in the book that today's progressives should, over time, aim to rebuild something of the rich world of arguments and precedents outside of court that were central to their forebears' constitutional politics. But we urge this without any certainty about the short-run effect.

Over the long run, however, we do have a view about what this would do. It would gradually reshape the terrain of constitutional politics. Making such constitutional arguments in the political arena would, over time, rebuild a more decentralized world of constitutional debate in which a variety of political leaders and other institutional actors, many operating in normal politics, fight out the Constitution's meaning. In the long run this world would be more hospitable than the present one to the core arguments of the anti-oligarchy tradition, whose revival is important to the long-run survival of the United States as a democratic republic. Those arguments speak often in terms of legislative constitutional duty rather than judicially enforceable constitutional prohibition—a forgotten vocabulary that is essential to the constitutional case for the kind of major redistribution of wealth and power at the heart of much of the progressive agenda.

The same is not true for the constitutional case against such reforms. The neo-Lochnerian constitutional outlook now afoot in the courts and public debate can work quite comfortably within the confines of our current, court-centered constitutional thinking, in which the Constitution mainly operates to empower courts to strike laws down.

Conservative politicians and the conservative legal movement have done much over the past several generations to bring certain forms of constitutional political-economic argument into mass politics. They have convinced many ordinary voters to adopt some views (or at the very least, slogans) regarding constitutional interpretation, and they have convinced the same voters to care quite a lot about judicial appointments. What was originally an outsider challenge to the Warren Court through politics has gradually become a formalized channel through which our ruling coalition of Supreme Court Justices and other judges must demonstrate their right-wing political commitments in order to be considered for appointment. Liberals, by contrast, have retained a quaint and ultimately disastrous attachment to the supposed autonomy of constitutional law from politics.[28] It is time for this attachment to give way, and for progressives today to make their constitutional arguments openly in politics, as their forebears did.

28 *See, e.g.*, Stephen Breyer, The Authority of the Court and the Peril of Politics (2021).

Enacting a program of major redistribution, worker empowerment, and innovative administrative state building will require building a big, durable multiracial majority on the national scene. It will require a Democratic Party that can hold fast to a robust politics of race and sex equality while also embracing a politics of fighting economic and political oligarchy. That is an enormous political challenge, regardless of whether or how progressive politicians speak about the Constitution.

Any party that hopes to take on that challenge today faces a range of obstacles. One in particular is pertinent here: the profound skepticism and disillusionment about the capacity of government to improve anyone's lives that conservatives have successfully inculcated in Americans over the past several generations. They have done this in part by diminishing state capacity and deliberately making programs of economic regulation and social provision inaccessible or ineffective.[29] They have also done it in part through legal and constitutional narrative. They have sold Americans a story in which American individualism and limited government is our constitutional heritage, constitutive of us as a nation. On this view, key elements of the progressive program are foreign imports that our constitutional heritage condemns: modern administrative state building, promoting broad class-based unionism, major new social insurance programs, public banking and credit in the service of social and economic democracy, and more. If the popular constitutional narrative condemning such policies is unanswered, it can only deepen skepticism and despair about the progressive program.

The Anti-Oligarchy Constitution shows that every one of these ideas was born in the United States[30]—and that all of them were understood by broad swaths of Americans, often by large majorities of Americans and their leaders, to be exactly what the Constitution demanded of government. That claim was how generations of reform-minded politicians, movements, and opinion-makers met the constitutional claims of their foes. You can't beat a constitutional narrative without a counternarrative. Here that requires recovering a fuller account of our constitutional experience, one that prevailing popular-constitutional memory, cultivated by the right, has erased.

CONCLUSION

So, while we are not in the business of telling politicians what will win them elections tomorrow or next year, we are convinced that in the long run, this new (or newly recovered) constitutional narrative about the objects of government is essential. It is a narrative

29 For a view from political science, see Amy Fried & Douglas B. Harris, At War with Government: How Conservatives Weaponized Distrust from Goldwater to Trump (2021).

30 Of course, many ideas were born here *and* elsewhere. But the point is that these are not foreign imports brought over today from Western European social democracies.

grounded in a form of constitutional patriotism that contrasts sharply with the ethnonationalist appeals now resurgent in our polity. It is a narrative about what we can, and must, do collectively together under our Constitution to preserve the economic foundations of our republic.

We think a move toward a self-conscious constitutional politics on the progressive left will not only counter but also complement the constitutional politics already central to the libertarian right (and some other parts of the right). Mostly that is for the reasons we have just sketched. But we also believe that making arguments about constitutional political economy as part of politics—as Americans have done for most of our history, and as conservative Americans continue to do today—is valuable "for its own sake."

Constitutional democracy is a social practice. We can try to outsource the constitutional part of the practice to courts and lawyers. Liberals tried to do that for over half a century. But in the end, we don't think it can work. Judges and lawyers have important roles to play in any constitutional order. But if the people and their elected leaders abandon the practice of constitutional argument—and abandon their sense of constitutional duty and obligation, particularly with respect to political economy—the danger is too great that the constitutional system will be captured by some elite faction with its own views, unresponsive to the people.

We think there is one big thing that the libertarian right gets right. Constitutional politics must address political economy. We first began to think along these lines long ago, engaging with the work of a constitutional thinker who is also an actor in the present book's story line: Frank Michelman.[31]

Among many things we have learned from Michelman is this. A respect-worthy constitutional order must address what it takes to make each person a consenting member—a charter member—of the political community. Like Michelman in his decades-long engagement with John Rawls, we conclude that this means our practices of constitutional argument and debate cannot be indifferent to the social and economic conditions of democratic lawmaking.[32]

31 The authors have benefited not only from studying and working through Michelman's ideas but also from several prior rounds of written engagement with Michelman. *See* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999); William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 Fordham L. Rev. 1821 (2001); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 Fordham L. Rev. 1893 (2001); Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 Tex. L. Rev. 1403 (2016); Joseph Fishkin & William E. Forbath, *The Democracy of Opportunity and Constitutional Politics: A Response*, 94 Tex. L. Rev. 1469 (2016).

32 The latest result of this generative engagement with Rawls is Frank I. Michelman, Constitutional Essentials: On the Constitutional Theory of Political Liberalism (forthcoming 2022).

The libertarian right has its views about the constitutional essentials of a political economy that ensures such conditions. We have ours. We think that a political economy that measures up to the principles of the democracy-of-opportunity tradition is essential for renovating and preserving constitutional democracy in this country. We read Michelman as concurring: it would be better for constitutional democracy "for its own sake" if progressives attempt—with no guarantee of success—to persuade fellow Americans, on the plane of constitutional politics and lawmaking, that this is so.