Joseph Fishkin & William E. Forbath. *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy.* Harvard University Press, 2022. Pp. 64XX, US$39.95. ISBN: 978-0-674-98062-4.

In *The Anti-Oligarchy Constitution,* Joseph Fishkin and William E. Forbath offer a road map for modern-day progressives concerned with ever-increasing economic inequality. The US Constitution does not simply permit wealth redistribution, they argue, it demands it. Fishkin and Forbath seek to revive long-forgotten constitutional discourse that views constraining concentrations of wealth as necessary for the preservation of a democratic republic, which should inform how every provision of the Constitution is interpreted. This is what Fishkin and Forbath describe as the "democracy of opportunity" tradition.

Seamlessly weaved throughout their work is the idea that economic and political power are inseparable. "Capitalist wealth," they argue, "has an inevitable tendency to convert economic into political domination" (at 230). In a vastly unequal society, the wealthy dominate the political process and make it responsive to their needs and interests, rather than those of the public at large. Considerable empirical data suggests that this has already transpired in the United States.[1] Under such conditions, a constitutional democracy cannot rightly describe itself as such. Chapter by chapter, Fishkin and Forbath trace the democracy of opportunity tradition in American history, demonstrating that immense, concentrated wealth—or oligarchy—was often perceived to be a constitutional problem, not simply a political or economic one. In the founding era, the Anti-Federalists, they argue, feared the concentration of power in central government, in part because it threatened to undermine the egalitarianism of the American Revolution and allow the new republic to be dominated by a new political elite, out of touch with the common man. In the *Federalist Papers,* James Madison famously warned of the dangers of majoritarianism. But to the Anti-Federalists tyranny of a wealthy minority was as troubling as tyranny of the majority.

While the conflicts of the nineteenth century are often rightly characterized as state power versus federal power, or the immorality of slavery, Fishkin and Forbath add that, "entwined with that battle was a constitutional debate about the nation's distribution of opportunity, wealth, and power and what kind of political economy would best serve the equal rights and standing of the white workingman" (at 71). An early example of this clash of constitutional ideals occurred in *McCulloch v. Maryland,* which upheld the constitutionality of the Second Bank of the United States, an institution that had been chartered to pay off war debts and to bring stability to the shaky dollar. President Jackson opposed the continuation of the bank, arguing that it favored

[1] *See, e.g.*, Larry M. Bartels, Unequal Democracy: The Political Economy of a New Gilded Age (2008); Kay Lehman Scholzman et al., The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy (2012); Nicholas Carnes, White-Collar Government: The Hidden Role of Class in Economic Policy Making (2013).

Northern speculators and served the interests of its wealthy private shareholders. This was characterized not merely as a political, but a constitutional, crisis, which demonstrated the "corrosive effects of inequalities of wealth" that posed a direct threat to republican democracy (at 75). It was the Whigs, the authors note, who first highlighted the irony of the Jacksonian egalitarian vision for the white laboring classes, which depended on violent enslavement of the black population (at 77). But what the Jacksonians appreciated was that "a nexus of elite wealth and political power threatened the political and economic equality of white male farmers," which in their eyes constituted the gravest threat to the underpinnings of the constitutional order (at 77–8).

Upon the abolition of slavery in the wake of the Civil War, working conditions in the United States became more challenging to defend (at 105). This era of the Second Founding was, Fishkin and Forbath argue, the golden era for the tradition of democracy of opportunity (at 109). The Reconstruction Republicans believed not only in the formal rights of equality for ex-slaves through the Fourteenth Amendment, but understood that they would mean little if they were not accompanied by profound changes to the economic policies of the Southern states—which would change the material conditions of ex-slaves and grant them some measure of financial independence from their slave owners (at 110). The Radical Republicans followed in the footsteps of Jacksonian democracy, but recognized, as the early thinkers of the movement had never done, "that racial hierarchy thwarts the possibility of a democracy of opportunity" (at 115). The 1866 Civil Rights Act safeguarded the entitlement of the black population to own and convey property and enforce contracts. Yet, history is not a linear path of progress: the most ambitious advances of the Reconstruction era were curtailed as the Freedman's Bureau, which provided legal and material assistance to former slaves, was eventually discontinued (at 121) and plans to break up massive slave plantations for redistribution to former slaves were also abandoned. A huge wave of public education followed, with the formal introduction of black schools, although their budgets were eventually gutted by the Southern states. In the wake of Lincoln's assassination, Andrew Johnson exerted a lenient attitude to those Southern states that introduced black codes (precursors of the Jim Crow laws) restricting black ownership of property and encouraging the criminalization of former slaves with new vagrancy laws.

By the late nineteenth century, the myth of the classless society—that aristocracy, elitism, and class-based disadvantage had been left behind in the Old World—was beginning to dissipate. The frontier had been settled, capitalism was booming, and "it was no longer possible to contend that the industrial hireling was on a path to owning his own workshop, or the agricultural tenant or laborer his own farm" (at 138). Vast corporate monopolies, such as in railways, were beginning to dominate. This precipitated constitutional, not just a political and economic, crisis. Two clashing schools of thought emerged, the authors write. One was a commitment to *laissez-faire* economic liberalism, which viewed any form of state intervention or redistribution as a breach of individual property and contractual rights. The sympathies of abolitionists and Radical Republicans to the plight of the working classes ebbed away in the face

of increased labor agitation and strikes (the successful demand for an eight-hour-day working limit in New York was, to many, a step too far), and instead fully embraced the politics of anti-redistribution: free market capitalism (at 142–3). The main opponents of the *laissez-faire* liberals during this period were the working-class labor activists and, for a brief spell, the Populist Party, a broad-based coalition of working-class farmers and agricultural laborers that surged to popularity in the 1890s. They rejected the vision of the marketplace as the site of freedom and contractual and property rights as the baseline of human autonomy. This bled into constitutional debates: the courts favored the individual liberty to sell one's labor under any circumstances, while the labor movement, external to the courts, argued that such a premise not only ignored the unequal positions of the bargaining parties but also denied the laborer's status as a citizen and undermined their ability to participate in the republic (at 153).

With the advent of the Great Depression, it became quickly apparent that the unfettered dominance of the business and financial tycoons had been catastrophic. Yet, the logic of the judicially created Lochnerism severely curtailed the government's ability to regulate the private financial sector (at 251). To Roosevelt and the New Dealers, the most effective means of tackling oligarchy was a powerful federal government with robust powers to regulate the private sector and redistribute its gains. New Dealers advanced their legislative agenda by relying on the democracy of opportunity tradition, but have aided the modern-day collective memory loss because, while they used that language in public and political argument, they themselves failed to frame their arguments as constitutional ones before the courts (at 254). The switch in time may have saved the New Deal, as the Supreme Court justices did a reluctant about-turn on legal Lochnerism, but this did not compel the judiciary to adopt or embrace a progressive political economy embedded in the Constitution. Instead, it requested that the courts refrain from striking down measures fashioned by legislators and regulators.

Fishkin and Forbath argue that today's progressives remain on the back foot by failing to frame issues of economic justice as constitutional imperatives. When legislators seek to constrain the power of oligarchy and economic dominance, the Constitution is often presented as the stumbling block. The constitutional narrative is, the authors argue, dominated and owned by conservatives, while liberals merely seek to make the case that redistributive action—such as the Affordable Care Act, as in *National Federation of Independent Business v. Sebelius*—is permitted, rather than constitutionally mandated. Liberals, they write, continue to feel aggrieved that conservatives employ a variety of legalistic logical jumps to attempt to undermine measures such as the ACA—by relying on the commerce clause or federalism—but liberals are playing by rules and constraints that are self-imposed. It is perfectly apparent, write Fishkin and Forbath, that the US Supreme Court is "openly engaged in a branch-transcending struggle in partisan constitutional politics" (at 422). The liberal yearning for a golden era of the apolitical fails to appreciate that law, and constitutional law in particular, is infused with normative preferences that can be used by competing factions to protect and advance their own aims.

Fishkin and Forbath make a compelling case that decades of American thinkers, including at least some of the Founding Fathers, were troubled by the prospect of elite dominance, and believed in wealth redistribution and the curbing of concentrated economic power as a facet of a healthy democracy. Fishkin and Forbath are, in effect, employing an originalist argument: claims of economic justice should be framed as constitutional duties, they argue, because in the American constitutional tradition they always have been so. This is understandable in a context where originalism remains a dominant mode of constitutional interpretation, and there is no realistic prospect of constitutional amendments within the American system. Yet, the authors run a risk that *The Anti-Oligarchy Constitution* is another addition to the great tug-of-war over the original meaning of the US Constitution that has absorbed American academics, who seem to be continuously trapped in debating ownership of their constitutional past. Even progressives such as Fishkin and Forbath continue to base their claims on what the Founding Fathers believed, rather than what justice demands today, in the United States of the twenty-first century. Situating their claim as a demand of substantive justice, rather than simply historical originalism, would not only have strengthened their claim, but it would also have made Fishkin and Forbath's argument more relevant to a broader audience outside the United States. Most progressives will not, of course, be able to successfully construct an argument based on the historical basis of their constitutions. Given that this is Fishkin and Forbath's primary justification for the constitutionalization of progressive values, it demonstrates the limitations of an approach that is situated squarely within the paradigm of the United States. Moreover, the space occupied by the US Constitution in the minds of the American public, and the reverence offered to it as an actor in public discourse, does not easily translate to other jurisdictions.[2] Nonetheless, international comparative constitutional scholars can at least draw on the heart of Fishkin and Forbath's vision—namely, to view constitutions as a core vehicle to combat the concentration of wealth and to advance economic justice through redistribution. This could mean interpreting a pre-existing constitution with a progressive lens, or adopting a constitution that is infused with progressive values and has an array of socioeconomic commitments. Thus, the constitution would not only facilitate a more just society but require it.

While there might be broad agreement that constitutions should aim to improve economic justice, it is not clear whether any domestic constitution, no matter how progressive, will be able to pose a genuine threat to economic liberalism. Without state intervention, the natural product of capitalist systems is major income inequality.[3] The architecture of capitalism has been entrenched in the global order: through mechanisms such as trade agreements overseen by the WTO, international investor agreements, and international institutions such as the IMF and the World Bank that are openly committed to promoting and implementing a particular economic

[2] *See, e.g.*, Aziz Rana, *Constitutionalism and the Foundations of the Security State*, Calif. L. Rev. 355 (2015); Aziz Rana, Romance of the Constitution: Veneration and Resistance in the American Century (forthcoming).

[3] Or exogenous events, such as world wars. *See* Thomas Piketty, Capital in the 21st Century (2014).

worldview. Nation states belonging to the European Union will similarly be bound by the obligations of membership, such as stringent limits on fiscal spending and debt, state aid, or the entitlements of free movement of capital and establishment. While the constitutionalization of socioeconomic rights has grown increasingly popular, there remain serious questions about their effectiveness and the limits of their ambition.[4] Textual constitutional commitments can carry symbolic weight, but detract much-needed political capital from the heavy lifting required to constrain dominant economic actors (through higher taxation and regulation, for example) and restore vital egalitarian institutions such as the welfare state and labor unions. Of course, a constitution infused with progressive values can complement political action. But why should progressives—once the experts in broad-based, popular movements—turn to countermajoritarian institutions to achieve their aims? Progressives were able to triumph at the ballot box because, in brass tacks, the working class far outnumbered the wealthy elites, who were forced to turn to counter-majoritarian institutions to preserve their own status.[5] The enthusiasm for constitutions, and courts more broadly, hints at a hankering for the golden age of legal liberalism. The gutting of *Roe v Wade* highlights the fragility of a model that relies predominantly on courts, rather than legislatures, as the primary vehicle for advancing progressive causes.

Fishkin and Forbath challenge the dominant preoccupation with the tyranny of the majority, which, remarkably, some continue to diagnose as the United States' most pressing problem. In fact, it is the Anti-Federalist's nightmare that has come to pass: in a country starved of social solidarity, oligarchy rules. The authors have produced a magisterial contribution to American constitutional thought, guiding the reader through centuries of meticulously researched and detailed history, peppered with engaging examples to illustrate their central argument—namely, that the containment of oligarchy has been a feature of American constitutional discourse, even if it is entirely absent today. America's progressives will doubtless welcome a guide to reclaiming that facet of their history. But for those outside the United States, perhaps it is time to refocus energies on progressive change outside the parameters of a constitution.

Hilary Hogan
Worcester College, University of Oxford, UK;
European University Institute, Florence, Italy
Email: Hilary.Hogan@worc.ox.ac.uk
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[4] Samuel Moyn, Not Enough: Human Rights in an Unequal World (2018).
[5] Michael Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything So That Everything Would Remain the Same"*, 32 Isr. L. Rev. 250 (1998); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2007).