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CASTE, CLASS, AND EQUAL CITIZENSHIP

William E. Forbath*

INTRODUCTION

There is a familiar egalitarian constitutional tradition and another we have largely forgotten. The familiar one springs from *Brown v. Board of Education*,¹ its roots lie in the Reconstruction era. Court-centered and countermajoritarian, it takes aim at caste and racial subordination. The forgotten one also originated with Reconstruction, but it was a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts. Aimed against harsh class inequalities, it centered on decent work and livelihoods, social provision, and a measure of economic independence and democracy. Borrowing a phrase from its Progressive Era proponents, I will call it the social citizenship tradition.²

My thesis is that the seemingly separate fates and flaws of these two egalitarian constitutional outlooks are joined. By retrieving the history of the social citizenship tradition and its buried links to the court-

* Angus Wynne, Sr. Professor of Civil Jurisprudence, Professor of History, University of Texas at Austin. — Ed. This Article is for Joel Handler and Kenneth Karst, for their friendship and inspiration. Thanks also go to David Abraham, Bruce Ackerman, Alex Aleinikoff, Joyce Appleby, Craig Becker, Gyora Binder, Eileen Boris, David Brody, Josh Cohen, Nancy Cott, Micheal Kent Curtis, Ellen DuBois, Cindy Estlund, Eric Foner, Jack Getman, Robert Goldstein, Dirk Hartog, Sam Issacharoff, Linda Kerber, Sandy Levinson, Gillian Lester, Doug Laycock, Nelson Lichtenstein, Frank Michelman, Neil Netanel, Gunther Peck, Jim Pope, Robert Post, David Rabban, Jim Sidbury, Reva Siegel, Amy Stanley, Christopher Tomlins, Gerald Torres, and to participants at the American University, Washington College of Law Faculty Colloquium; University of Chicago Legal History Workshop; the NYU Legal History Colloquium; the Ohio State University College of Law Faculty Colloquium; the University of Pennsylvania Law School Faculty Workshop; the UT-Austin School of Law Faculty Colloquium; the UT-Austin History Department Brown Bag Lunch; and the Yale Law School Legal History Workshop. Nate Blakeslee, Leilah Danielson, Bill Niemi, Lee Thompson and Todd Vogel provided outstanding research assistance. The Michigan Law Review provided outstanding editorial assistance. Finally, I am grateful to the many new colleagues and friends who have made UT-Austin School of Law a wonderfully supportive and engaging place.

1. 347 U.S. 483 (1954).

2. See, e.g., FLORENCE KELLEY, *SOME ETHICAL GAINS THROUGH LEGISLATION* (1905). Today, we associate the term “social citizenship” most readily with the English sociologist T.H. Marshall and his classic lectures on the rise of the welfare state as a new “stage” in the development of citizenship. See T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1949). Thoughtful recent assessments of Marshall from a U.S. perspective include Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 AM. HIST. REV. 1440, 1448-50 (1998); Nancy Fraser & Linda Gordon, *Contract Versus Charity: Why Is There No Social Citizenship in the United States?*, 22 SOCIALIST REV. 45 (1992). This Article approaches Fraser and Gordon's question quite differently.

centered ideal of the Constitution as safeguard of "discrete and insular minorities," I hope to deepen and change our understanding of liberal constitutionalism and its discontents today.

I begin with a present impasse in liberal constitutional theory and practice. Since the late 1960s and early '70s, leading liberal constitutional law scholars have held that the Fourteenth Amendment embodies an anticaste or equal citizenship principle, which requires more than mere legal equality. It allows and in many circumstances demands broad-gauged affirmative action for blacks and other minorities and it requires constitutional welfare rights for the very poor, again conceived as a racially stigmatized minority. The scholars have produced a program of constitutionally compelled changes no constitutional court could enact, but they point out that the reach of constitutional norms like equal protection may extend well beyond the capacities of the courts. Still, these norms must bind the nation's lawmakers and citizenry. The liberal theorists turn to history, and remind us that our understanding of the Constitution will always be partial if we attend only to case law; we must study with equal care what the Constitution has meant in democratic arenas. But, as we'll see, when they shifted their particular program of rights and remedies to the democratic arena, these theorists did not consider how deeply its substance was molded by the institutional ideal of the Court as the countermajoritarian guardian of "discrete and insular minorities." Today, in Congress and other arenas, broad-gauged affirmative action and nationally guaranteed welfare rights are being assailed and abandoned, and the liberal scholars seem increasingly ambivalent about defending them as constitutional imperatives. Even to their constitutional champions, affirmative action and welfare rights have come to seem partial, inadequate embodiments of the equal citizenship principle they are meant to secure. Yet the scholars have no better view of what it requires.

When one arrives at such an impasse, it is useful to reconsider one's point of departure. The starting point in this case was constitutional common sense: it was the outlook of *Brown*. The solution to racial subordination in the United States lies in extending equal citizenship to those excluded from it because of skin color. The road remains strewn with obstacles, but the direction is clear: it runs through our creed of equal rights. But consider a different starting point; instead of a solution, it points to another problem. America, according to this second perspective, will never overcome racial subordination until the nation confronts its deep class divisions; and it cannot redress its class divisions effectively without addressing its racial cleavages.

Call this idea the historical knot of race and class. Historians and political analysts have understood much of our past in these terms, from the Revolution of 1776 to the revolt of the Reagan Democrats. Black slavery, in this view, not only financed the American Revolution; by keeping the propertyless laboring class in chains, it also enabled the co-

lonial gentry to forge a revolutionary "equal rights" outlook and republican political culture among all ranks of white colonists, freed from the threat of social revolution.³ Thereafter, black subordination remained a potent element of American national identity, binding white Americans together as "equals" across the unacknowledged breaches of class.

Of course, the Reconstruction amendments extended equal rights to blacks. This prompted Gunnar Myrdal, on the eve of *Brown v. Board*, to observe that "in principle, the Negro problem was solved long ago."⁴ It only remained to put the solution into practice. But if black subordination has been more than an aberration from the equal rights creed, if it also has proved part of the cultural and socioeconomic groundwork of that creed, then matters might be even more intractable than Myrdal anticipated. In that case, attaining equal citizenship for black America would require altering the meaning of that principle for white America. The equal rights creed could go only so far in undoing the subordination of black Americans, unless it also contends with the ways that severe class inequalities mock equal citizenship for all. Yet, contemporary liberal "rights talk" addresses the injuries of caste for black and other nonwhite Americans but not the overlapping injuries of class many of them share with many whites.

That may be so, colleagues in the liberal precincts of constitutional scholarship may respond, but class inequalities lie outside our jurisdiction. True, the meaning of our constitutional tradition is forever debated, but everyone seems to agree that redressing class inequalities has not been part of the debate. Insights about race and class have approached this terrain from without. They have informed important critiques of our constitutional norms and culture.⁵ But they have not guided interpretations, because all our stories tell us that the Constitution's promise of equal citizenship addresses racial and caste inequalities but leaves class inequalities alone. No widely shared reading of the Constitution has ever run to the contrary.

Here the liberal constitutionalists are mistaken. They overlook the social citizenship tradition and its distinguished career in the constitutional history they claim to describe. By applying their own new precept — looking carefully at how the Constitution has been interpreted outside the courts in more democratic arenas — Part II shows that ours is not the first era in which reform-minded

3. See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

4. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 11 (1944).

5. See especially DERRICK BELL, *AND WE ARE NOT SAVED* (1987); Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); and Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

constitutional thinkers have discerned a notable "gap between the reach of constitutional case law and the reach of the Constitution" in respect of "economic justice."⁶ But when one actually examines what reformers thought the Constitution meant in respect of economic justice during the late nineteenth and early twentieth century, one finds a conception of the affirmative dimensions of equal citizenship very different from that of today's constitutional liberals.

The social citizenship tradition was neither uniform nor unchanging. Over time and across social groups, its exponents differed widely about how government ought to vouchsafe social and economic citizenship, and about who belonged to the community of full citizens. But all these reform-minded constitutional actors — agrarian Populists, labor and trade union advocates, middle-class Progressives, as well as the professionals, politicians, and lawmakers who embraced and sought to harness these social movements — agreed that the guarantee of equal citizenship entailed decent work, a measure of economic autonomy and democracy, and social provision for "all Americans."

We remember the restraints these generations of reformers demanded of the judiciary and forget the affirmative obligations their constitutional outlook laid on the other branches of government.⁷ Constitutional law scholars and historians alike have assumed that late nineteenth- and early twentieth-century reformers shared Justice Holmes's view that the Fourteenth Amendment, rightly understood, enacted no "economic theory" — as far as possible, constitutional discourse ought to be divorced from political economy.⁸ In fact, as I will show in Part II, the great reform movements of those decades sought no such divorce. Rather, they sought to replace the Court with elected lawmakers in the role of the nation's "authoritative" constitutional po-

6. Lawrence Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U.L. REV. 410, 419 (1993).

7. Perhaps our leading legal historian, Morton Horwitz, recently has made the important point that "democracy" appeared "suddenly" as a "foundational concept" in constitutional discourse during the later New Deal. But the New Deal concept of constitutional democracy was a lamentably "narrow" and impoverished one in Horwitz's view; its core meaning was merely judicial restraint and majority rule. A bludgeon for beating *Lochnerism*, it induced "paralysis" and hostility toward Warren Court activism among many leading jurists and legal academics. See Morton Horwitz, *The Supreme Court, 1992 Term — Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 61-63 (1993). New to doctrine, the concept of constitutional democracy Horwitz describes was not new to constitutional discourse outside the courts, and its central meaning was neither majority rule nor judicial restraint. For New Dealers, as for their forebears in this tradition of discourse, this Article shows, the key idea was that constitutional democracy in an industrial society entailed a redefinition of the rights of citizenship, and a corollary expansion of the domain and duties of national government. Judicial restraint was a means to this end, and majority rule was not constitutionally sufficient without these new rights and duties.

8. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory . . .").

litical economist.⁹ While Holmes held that the Constitution allowed broad reforms, the reform movements claimed that it required them, or that it ought to do so. The *Lochner* majority found an antiredistributive norm in the Constitution; the reformers identified a distributive one. From Reconstruction through the New Deal, they insisted that the political economy was shot through with constitutional infirmities that the nation was obliged to mend.

Until the 1930s, this was chiefly an oppositionist tradition. It had scored some important but limited victories in state legislatures, state judiciaries, and even Congress. But the official constitutional order condemned many of the rights and remedies that the reformers' Constitution demanded. With the New Deal, this protracted crisis came to a head. Part III shows how the social citizenship tradition provided FDR and the New Dealers with not only a rights rhetoric but a constitutional narrative, arguments, modes of interpretation, and conceptions of the allocation of interpretive authority that supported their "constitutional revolution." But then, of course, Part III must answer the question: If the constitutional principles of social citizenship prevailed, why have we forgotten them?

Answering this question requires joining forces, but also taking issue with, Bruce Ackerman's famous account of the New Deal "revolution."¹⁰ Part III outlines a more complex and more deeply historical understanding of the New Deal "constitutional moment" — and its relationship to the Reconstruction "moment" — than that found in Ackerman's important work. Like Ackerman, I am centrally interested in the ways that citizens, social movements, politicians, lawmakers, Presidents, and other nonjudicial state actors have tried to validate understandings of the rights of citizens and the powers and duties of government divergent from or opposed to the courts'. But on my reading, the history of these "moments" is too jagged and contradictory to support Ackerman's narrative of non-Article V amendments.

The recently enacted Personal Responsibility and Work Opportunity Reconciliation Act, ending the federal guarantee of welfare to eligible parents and children,¹¹ provides a case in point. Did the New Deal enact a non-Article V amendment guaranteeing a federal constitutional right to welfare? If so, one might question the constitutionality of the

9. JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 7 (1924).

10. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105-130 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255-278 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63 (Sanford Levinson ed., 1995) [hereinafter Ackerman, *Higher Lawmaking*].

11. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 1996 U.S.C.A.N. (110 Stat) 2105.

recent law. The Court may not be interested, but the conscientious legislator and citizen might like to know.¹²

Ackerman is unable to tell them. He defines constitutional moments as occasions for revising our "fundamental commitments,"¹³ and arriving anew at considered popular judgments on "the rights of citizens and the permanent interests of the community."¹⁴ How, then, did the New Deal moment redefine these rights and commitments? It gained "constitutional legitimation" for the national welfare state.¹⁵ But did it require it — by producing a redefinition of national citizenship? Throughout his long and detailed discussions of the New Deal moment, Ackerman studiously avoids the question, remaining silent and seemingly uncertain about this central issue.

The New Dealers' robust conception of social citizenship goes unmentioned and unanalyzed by Ackerman, although by his own method, it defined the New Deal's "constitutional mandate." The reason, I think, lies in the gulf that separates this new conception of citizenship rights and the more partial patchwork of entitlements that constituted the New Deal's actual legacy. The mandate embraced a universal right to decent work and social provision; the enactments included neither. There is a gap between the "mandate" and the outcome of the New Deal "moment" which Ackerman's narrative cannot explain.

A more sober look at our constitutional moments supplies an explanation. Between the constitutional mandate and its enactment fell the shadow of Jim Crow and the betrayal of Reconstruction. Bills instituting social citizenship enjoyed broad support in Congress. Southern Dixiecrats held the balance of power, however, and thwarted the measures. As a consequence, the New Deal constitutional legacy that is under attack today is a partial one. We have enshrined the vast expansion of national governmental power, but not what it was expanded for. White America's and the federal government's ongoing abandonment of Reconstruction did more than deprive black Americans of civil and political rights for almost another century. By allowing the emergence and consolidation of the Solid South, this same constitutional bad faith also operated in the New Deal era to prevent all Americans from securing the boon of social citizenship. Waged to secure those social and economic rights, the New Deal constitutional revolution was left incomplete because of white America's betrayal of an earlier revolution and its promise of equal citizenship for blacks.

12. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

13. Ackerman, *Higher Lawmaking*, *supra* note 10, at 64.

14. ACKERMAN, FOUNDATIONS, *supra* note 10, at 231, 235.

15. *Id.* at 43.

Part IV concludes the Article by examining the civil rights era from this perspective. It shows that civil rights leaders and Great Society policymakers foresaw the dilemmas bedeviling today's liberals. The equal rights creed could go but so far in undoing the subordination of black Americans, unless it also contended with the ways that severe class inequalities mock equal citizenship for all. Without social citizenship for all Americans, the leaders and policy makers recognized, neither antidiscrimination laws nor affirmative action would enable a great many black Americans to escape second-class citizenship. Essential but insufficient by itself, affirmative action would prompt racial backlash, black leaders like King and Rustin prophesied, and still not bring equality for many poor blacks. This drove black leaders and their allies in the Johnson administration to try to rekindle Roosevelt's "second Bill of Rights" and the New Deal reform vision of decent work and livelihoods for all Americans, but the institutional inheritances of the New Deal itself, in its successes and its failures, prevented them.

In constitutional history, as in great Southern novels, the past is never past. The tangled knot of race and class lies unexamined at the heart of this history. This has prevented scholars from fully understanding the embattled constitutional legacies of the New Deal and civil rights eras. Retrieving this history reveals no truer twentieth-century constitutional "moment" for courts to preserve against ordinary politics, but instead a recurrent constitutional conflict that was concluded by force and fraud, and deserves to be reopened.

I. CASTE, CLASS, AND THE CONTOURS OF CONSTITUTIONAL THEORY

A. *The "Substance of Equal Protection"*

The leading liberal constitutional scholars of the 1970s sought to determine the "substance of equal protection," as they set out to unfold the full implications of the "egalitarian revolution" launched by the Warren Court.¹⁶ Here is a ruthlessly condensed account of their thinking, what William James might have called their shared way of "feeling the whole push" of constitutional development.¹⁷

The heart of the Court's "egalitarian revolution" was the determination to give *social* meaning to the simpler and narrower idea of citizenship as a formal legal and political status. The substantive core of the Fourteenth Amendment had become, in Kenneth Karst's words, a "principle of equal citizenship," guaranteeing "the right to be treated by the organized society as a respected, responsible participating mem-

16. See Kenneth Karst, *The Supreme Court 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

17. WILLIAM JAMES, *A PLURALISTIC UNIVERSE* 14 (1977).

ber.”¹⁸ Stated negatively, the principle forbade “the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant.”¹⁹ Or, as Owen Fiss argued, the Equal Protection Clause embodied a “group-disadvantaging principle” entailing a “redistributive strategy” aimed “against caste” or the existence of any “perpetual underclass.”²⁰ Frank Michelman, too, emphasized the distributive dimensions of the guarantee of equal citizenship. As Rawls did, he cast these in terms of “equal respect” and “self-respect” — as necessarily social goods, which required “minimum welfare” to shield against the “stigma” and “social debilitation” of poverty.²¹

The “prototype” but “not the only group” which bore the stigma and burdens of caste was black America.²² The remedial agenda lay in upholding, and often requiring, broad-gauged, race-based affirmative action in employment and education, and mandating minimum welfare rights for the very poor, conceived as a racially identified and stigmatized minority.²³ We will return to the toils of affirmative action. Now

18. Karst, *supra* note 16, at 4.

19. *Id.*, at 6.

20. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-170 (1976).

21. See Frank I. Michelman, *The Supreme Court 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *On Protecting the Poor*]; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights*, 121 U. PA. L. REV. 962 (1973).

Other works similarly calling for constitutional welfare entitlements include: Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990); Charles Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Thomas Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); Kenneth Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988) [hereinafter Karst, *Citizenship, Race, and Marginality*]; Laurence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); and Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991).

22. See Fiss, *supra* note 20, at 155.

23. The text may be ambiguous. I do not mean that these theorists assumed that most of the nation’s poor were black; to the contrary, they all note that the majority were (and are) white. Yet, they contended (and, as must be apparent, I agree), the stigma afflicting the poor in the U.S. remains bound up with the legacy of racial slavery. Not only poor blacks but poor whites suffer degradation and exclusion — and a lack of adequate social provision — not only by dint of the work ethic and their supposed flaunting of it, but also because of the dominant culture’s historical and ongoing associations of dependency and unworthiness with the black minority.

That seems a fair rendering of arguments running through such works as Fiss, *supra* note 20; Karst, *Citizenship, Race, and Marginality*, *supra* note 21; Karst, *supra* note 16; and Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 [hereinafter Michelman, *Welfare Rights*]. Also running through these works, especially Michelman’s essays influenced by Rawls, is the more general claim that minimum welfare entitlements are essential to equal respect independently of America’s racial history. See Michelman, *On Protecting the Poor*, *supra* note 21.

let's consider the constitutional right to welfare.

As they championed this right, the scholars were greeted by a hail of criticism over the limits of judicial competence and the danger of squandering the courts' institutional legitimacy.²⁴ In varying measures, they conceded some ground to the conservative critics. By 1979, for example, Michelman acknowledged that defining the constitutional right to welfare was an "inappropriate" task for the judiciary and tapered the courts' role to one of monitoring and safeguarding legislatively enacted programs through statutory interpretation and "constitutional doctrines such as irrational classification."²⁵ Then the liberals hitched their redistributive rights and remedies to Section 5 of the Fourteenth Amendment and to Lawrence Sager's simple but powerful notion of "underenforced" constitutional norms.²⁶ Writing in 1978, Sager lent a theoretical gloss to the liberals' necessary rejection of the commonplace view that the legal scope of a constitutional norm is "coterminous with the scope of its federal judicial enforcement."²⁷ Often, he pointed out, courts decline to uphold constitutional claims because of "institutional" concerns such as federalism and judicial competence.²⁸ In such instances, Sager argued, the norms are nevertheless valid and enforceable "to their full conceptual limits" in the hands of other governmental actors.²⁹ "The most direct consequence of adopting this revised view is the perception that government officials have a legal obligation to obey" such norms to their "full dimensions," and a corresponding obligation to "fashion their own conceptions of these norms and measure their conduct" accordingly.³⁰ Thus, Sager lamented that after *Maher v. Roe*,³¹ Congress ceased its discussion of the constitutionality of federal legislation to

24. A sampling of conservative criticism would have to include Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. L. Q. 695, and Ralph Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

25. Michelman, *Welfare Rights*, *supra* note 23, at 660-65, 679-80.

26. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

27. *Id.* at 1213.

28. *Id.* at 1217-18.

29. *Id.* at 1221. Even if it were "unconventional today," Sager observed, the idea enjoyed "a venerable provenance." Sager pointed out that in James Bradley Thayer's celebrated essay, *The Origin and Scope of the American Doctrine of Constitutional Law*, Thayer "saw the Constitution as broad and binding in its breadth on governmental actors and saw the reasons for restraint in the application of constitutional principles as speaking only to the question of judicial enforcement." Sager, *supra* note 6, at 413 (citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)). For a revealing historical treatment of Thayer's essay, see SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 189-94 (1990).

30. Sager, *supra* note 26, at 1227.

31. 432 U.S. 464 (1977) (holding that state regulations denying Medicaid funds for non-therapeutic abortions did not violate the Fourteenth Amendment).

deny Medicaid benefits for most abortions.³² The Court's conception of the reach of the relevant norms ought not to have concluded the matter for "conscientious legislators."³³ Over the next several years, other scholars joined Sager in concentrating scholarly attention on the "gap between the reach of constitutional case law and the reach of the Constitution" — above all, with respect to "adequate food, shelter, health care, and education."³⁴

Most prominent is Cass Sunstein, whose *Partial Constitution* relies chiefly on Madison and the Framers' generation to remind readers that the Constitution was neither designed only for the courts to interpret, nor does it "mean only what the judges say it means."³⁵ Ours is a "partial" understanding of the Constitution because we enshrine the Court's interpretations and slight — or even fail to develop — others. Yet, other governmental actors, legislators in particular, are far better equipped in terms of both democratic legitimacy and institutional capacities to interpret and apply the positive entitlements entailed by the Fourteenth Amendment.

Sunstein enthusiastically hands over the task of interpreting and applying the "positive rights" embodied in the "anticaste" and "freedom from desperate conditions" principles to the legislative and executive branches. Judicial recognition of these rights would only "preempt" "deliberative democracy" and "democratic efforts" to secure them.³⁶ Sunstein's is among the boldest calls for a shift of constitutional theorizing away from the courts toward other actors, institutions, and "democratic arenas generally."³⁷ Firmly opposed to judicial recognition of these rights, he never reflects on how deeply his welfare entitlements view of constitutional equality was shaped by an understanding that the judiciary would be its guarantor. Yet, those who originally fashioned this view, like Michelman and Karst, tailored it to comport with a doctrinal vision of the constitutional court as countermajoritarian guardian

32. See Sager, *supra* note 26, at 1227-28 n.48.

33. The phrase is Paul Brest's who reaches conclusions similar to Sager's. See Brest, *supra* note 12.

34. Sager, *supra* note 6, at 419. For example, Robin West, like Sager, addresses the distinction between the "adjudicated" and the "full Constitution," *id.* at 435, or what she calls the "aspirational Constitution." See Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241 (1993). But whereas Sager and the others prize some creative or prophetic role for the courts, West's model of adjudicative versus legislative justice casts the judiciary, rather as Ackerman does, in a conservative part. Adjudicative justice, she claims, is purely preservationist. Courts "look to the past" for authoritative guidance, and this disables them from changing the status quo; Congress can (somehow) interpret the Constitution with a purely forward looking gaze. See *id.* at 261-64.

35. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* at v-vi (1993).

36. See *id.* at v-vi, 9-10, 138-40, 147-49, 338-46.

37. See *id.* at 10; see also Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (arguing that a conception of both legislative politics and constitutional adjudications in dialogue with each other may lead to a greater judicial protection of individual rights).

of the rights of "discrete and insular minorities."³⁸

In the name of democracy, Sunstein argues for stripping this still-unrecognized minority right of any claim to judicial recognition. Although the original architects have joined him, reluctantly, in relegating the right to the tender mercies of majoritarian politics, none of them save Karst has reconsidered the contours of the right itself.³⁹ They continue to link it with discrete and insular minorities. Unconstrained by the problems of judicial competence or the countermajoritarian difficulty, they might consider viewing it as but part of a broader understanding of the distributive and enabling dimensions of the equal citizenship principle.

Again, the recently enacted Personal Responsibility and Work Opportunity Reconciliation Act,⁴⁰ ending the federal guarantee of welfare to eligible parents and children, is relevant. Racial animus contributed to passage of this legislation. But the Act carried other cultural freight as well. The very title of the new law encapsulates a widely shared, if largely misplaced, moral criticism of the idea of a right to welfare.⁴¹ The liberals must address this claim on its merits, not least because their *own* arguments on behalf of the constitutional status of the right to welfare point to the idea of "Personal Responsibility" and through it to a right to "Work Opportunity" and a decent livelihood.⁴²

38. See Karst, *supra* note 16, at 19-24; Michelman, *On Protecting the Poor*, *supra* note 21.

39. See *infra* note 42 (discussing Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997) [hereafter Karst, *The Coming Crisis of Work*]).

40. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 1996 U.S.C.A.N. (110 Stat) 2105.

41. The criticism is misplaced insofar as all the empirical studies suggest that a significant number of welfare recipients are also working for pay to make ends meet. See JOEL HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* 11-12 (1997); Kathryn Edin & Christopher Jencks, *Welfare*, in CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY* 204 (Harper Collins 1993) (1992) (describing in-depth study of welfare recipients in Chicago).

42. I briefly set out the central normative and policy arguments for congressional recognition of a constitutional right to decent work in William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1790-1804 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)).

In a powerful recent essay, Kenneth Karst arrives at similar conclusions, bringing his great insight and wisdom to the case. See Karst, *The Coming Crisis of Work*, *supra* note 39. Already in his pioneering *Equal Citizenship Under the Fourteenth Amendment*, *supra* note 16, Karst suggested that chronic unemployment in the black inner city trenched on the equal citizenship principle, and he returned briefly to this theme in later work, see KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); Karst, *Citizenship, Race, and Marginality*, *supra* note 21. In this essay, he directly addresses the many-sided constitutional significance of decent work opportunities for all. What he calls "the coming crisis of work" the mounting "shortage of decent jobs in America" and the increasingly "split society" it has produced prompt Karst to conclude that Congressional recognition of a constitutional "right of access to work" is essen-

Recall Michelman's lodestone of "equal respect" and Karst's definition of the equal citizenship principle — "the right to be treated by the organized society as a respected, responsible, and participating member."⁴³ "To be a citizen," Karst wrote in 1977, "is not merely to be a consumer of rights, but to be responsible to other members of the community."⁴⁴ Among these responsibilities, the citizen must "take[] care of himself and his family."⁴⁵ This view of responsibility, in turn, "implies a claim to respect, which the individual can legitimately make against the society."⁴⁶ Michelman, for his part, rests the right to welfare on the ground that that right secures for each of us the "marks of minimum social respect" upon which one's equal standing in the life of the community depends.⁴⁷

Yet only with difficulty can one picture a constitutional right to welfare doing the social work assigned to it. Only in a truncated sense can a welfare check, however generous, enable one to "take care of" — in the sense of assuming "responsibility" for — oneself and one's family.⁴⁸ To receive a welfare check even as of right is to remain "a consumer of rights." To be enabled to "make a claim to respect" by dint of meeting one's common responsibilities demands an enabling right to decent work. The theorists' own reasoning, no less than the welfare reform rhetoric, suggests that the "substance of equal protection" and the social meaning of equal citizenship must include the opportunity to earn a livelihood that enables one to contribute to supporting oneself and one's family in a minimally decent fashion.

The more the liberal theorists have turned to history to support constitutional welfare rights, the more apparent this gap between rights and reasoning has become. In 1987, in the thick of the republican revival, Michelman brilliantly seized hold of the "Founders" venerable republican conviction that "security of property holdings" was not just a matter of private self-interest; it was of general political concern. Material in-

tial.

43. See *supra* text accompanying notes 18-21.

44. Karst, *supra* note 16, at 9.

45. *Id.* at 10.

46. *Id.*

47. See Michelman, *Welfare Rights*, *supra* note 23, at 680.

48. Aid for Families with Dependent Children, the federal entitlement program which the recent welfare reforms eliminated, was conceived as enabling single mothers of small children to take care of those children. But the Aid was never viewed as earned compensation which organized society paid such mothers in exchange for assuming this socially necessary responsibility. It was seen as substitute state largesse for the earnings of the absent male breadwinner, until it became viewed as state largesse that freed welfare mothers from the responsibility of supporting themselves and their children like "the rest of us." See generally JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* (1995); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

dependence and security, "a secure base of material support," was viewed as indispensable if one's "independence and competence as a participant in public affairs was to be guaranteed."⁴⁹ On one reading, this republican maxim simply joins the related liberal individualist rationales for the antiredistributive, property-protecting provisions and designs in the founders' Constitution. On another reading, however, the republican maxim holds out a "*distributive*" as well as an *antiredistributive* imperative, and this second reading finds support in the "inclusory messages in the Founders' republican rhetoric."⁵⁰ Where, then, are the distributive provisions and architecture in the founders' Constitution? They were deferred. The "prospect of westward territorial expansion" meant that as long as there would be "land to appropriate, one could imagine a freehold beneath every household . . . supporting the freeholder's independence."⁵¹ As long as this state of affairs continued, the Constitution's protection of private property — i.e., its possessive or antiredistributive regard for property — was sufficient; the democratic-republican "problem of property distribution" could be "postpone[d]."⁵² Today, the problem can be postponed no longer, and our centuries-old democratic-republican "commitments . . . argue for the recognition of a constitutional status for distributive concerns about property." That is, they demand "constitutional legalization of welfare claims."⁵³

Sunstein also enlists the Founders behind constitutional welfare claims. Unlike Michelman, his argument involves no intricate dialectic. Indeed, the point is barely argued. Citing some of Madison's and Jefferson's best-known expressions of concern for maintaining a broad distribution of productive property among white male citizens, Sunstein simply states that the two "enthusiastically endorsed" the idea of constitutional welfare rights.⁵⁴

Let us put to one side the oft-noted normative problems with efforts to revive the republicanism of a Jefferson or Madison as a guide for contemporary questions of distributive justice — in particular, the second- and third-class status in their republican political-economic vision of women, slaves, servants, hirelings: the majority of adults in the new nation.⁵⁵ Michelman might respond that mining this recessive radical vein of the Founders' thought as a "visionary [constitutional] resource" to-

49. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987).

50. *Id.* at 1331 (emphasis added).

51. *Id.* at 1332.

52. *Id.*

53. *Id.* at 1323-24.

54. See SUNSTEIN, *supra* note 35, at 138-39.

55. See generally LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 119-20, 139, 159 (1980); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663 (1988).

day does not commit us to maintaining their "exclusionary membership doctrines."⁵⁶ I agree. Still, if one tries imaginatively to transport this recessive vein of Jefferson's and Madison's thinking across two centuries of social and political change and tap it as a normative resource today, welfare rights are not what one most readily finds. True, both men thought the new republic could ill afford a large and permanent class of poor and propertyless, yet unenslaved, white men. Their solution was not enhancing poor relief, however. Poor relief left "paupers" dependent and, therefore, unqualified for citizenship. They favored ample material opportunities for all white men willing and able to exploit them, and charity or coercion for the rest.⁵⁷

To a Madison or Jefferson, the socioeconomic key to individual freedom and citizenly independence was ownership of productive property, and at various times both men said citizens had a *right* to sufficient property upon which to work to support themselves and their families and championed broad distributive policies on that basis.⁵⁸ Sunstein's and Michelman's own citations and quotations of the two men seem to run in this direction — toward a "fundamental right [to the wherewithal] to labor" freely and with decent recompense⁵⁹ — rather than in the direction that Sunstein and Michelman point them. Why then do they look the other way? Why neglect the fundamental role of work and a decent livelihood in defining "equal respect"? Several factors probably played a part. First, the idea of a constitutional right to welfare is a product of the late 60s – early 70s, a moment in the career of American liberalism when "race and poverty" supplanted "employment" as the nation's central "social problem" in the mainstream liberal lexicon. For reasons we will explore, New Deal job creation and full employment policies had not gained an en-

56. See Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 20, 40-41, 43-47 (1986).

57. Both Madison and Jefferson insisted that the principle solution to poverty and dependency lay in a broad distribution of property. See DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 126-27 (1980). Madison and Jefferson also emphasized education and, for those lacking initiative, the workhouse. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 133 (Univ. N.C. Press 1955) (1787) (favoring public charity for the poor lacking "strength to labor" and the workhouse for "vagabonds, without visible property or vocation"); DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 201-04 (1989).

58. Thus, in his Draft Constitution for Virginia, Jefferson included under "Rights Private and Public," a provision that "Every person of full age . . . shall be entitled to an appropriation of 50 acres . . . in full and absolute dominion." THOMAS JEFFERSON, *DRAFT CONSTITUTION FOR VIRGINIA*, § 4 (June, 1776) (1806), reprinted in *THE PORTABLE THOMAS JEFFERSON* 244, 248 (Merrill D. Peterson ed., 1975). Jefferson also wrote that the "fundamental right to labour," as it belongs to the unemployed poor, may trump the property rights of large landholders. Letter from Thomas Jefferson to James Madison (Oct 28, 1785), in 8 *THE PAPERS OF THOMAS JEFFERSON*, 25 FEBRUARY TO 31 OCTOBER 1785, at 682 (Julian P. Boyd ed., 1953).

59. *Id.*

during institutional base, and most civil rights liberals saw generous welfare entitlements as the more attainable and the more progressive bulwark against black poverty. Welfare, unlike work, already stood as a federal entitlement, however paltry and limited; welfare belonged to the language and administration of rights as spoken and practiced by post-War liberals. Ironically, the very ways in which "welfare" had been severed from other forms of social provision and had come to be associated especially with poor black ghetto-dwellers appeared to render it a right claimed on a "discrete and insular" minority's behalf, and this had come to seem essential. For the vast majority of Americans, it seemed, New Deal labor reforms combined with responsible fiscal management by liberal economists had solved the problems of unemployment and underemployment, starvation wages, and workplace exploitation and powerlessness. At any rate, these had been class-wide problems, and if they recurred, presumably, a political majority like Roosevelt's, or at least a formidable class-based bloc of voters, would demand redress. The constituents of such reform would not be a politically powerless minority, nor discrete and insular. Their injuries, then, would not be caste-like, and, therefore, not constitutional. "Caste and not class inequalities" are the "evils against which the promise of equal citizenship is aimed."⁶⁰

B. Constitutional Sociology

Of course, this sharp dichotomy between the injuries of caste and class is one I mean to undo. Let us define class in the usual way. Class speaks to one's position in the labor and other markets and in the great enterprise of social production and reproduction. Class pertains to the kind of work and resources one contributes to that enterprise and the fruits one reaps from it. Thus defined, class continues to be set off against caste in constitutional scholarship. Consider Jack Balkin's important recent article about the kind of social theory we need for understanding constitutional equality.⁶¹ Balkin builds, as I do, on "the tradition of legal academic writing beginning with Karst and Fiss" "that looks to sociological realities to understand the Constitution's commitments to social equality." Balkin usefully links this tradition to Max Weber's notion of "status." Thus, for Balkin, constitutional equality is equality of "status" or "standing"; and following Weber, Balkin defines status as a group attribute, which speaks to the

60. Karst, *Citizenship, Race, and Marginality*, *supra* note 21. Similarly, Sunstein tells us that egalitarianism "defined as an effort to ensure against great disparities" in economic resources and power is "foreign" to American constitutional culture. SUNSTEIN, *supra* note 35, at 138.

61. See Jack Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

"different degrees of respect and esteem" groups command.⁶² Status groups exist in hierarchies; "their identities are not free standing," but defined in relationship to one another, in a system of social meanings in which one group enjoys "positive associations and another correspondingly negative associations."⁶³

Thus "unjust status hierarchy" is Balkin's term for "caste" as the older liberal thinkers we've canvassed have used that word: groups treated as unworthy of equal respect or participation. Race was the paradigm case of caste in Karst's, Michelman's, and Fiss's early essays; race, gender, and homosexuality are Balkin's paradigm cases of unjust status hierarchies.⁶⁴ Like the older scholars, Balkin juxtaposes the salience of status groups with the irrelevance of the "idea of economic class." He contrasts status groups to "interest groups," which he treats as equivalent to classes, joined by material interests and instrumental considerations, common positions in labor and other markets — not matters of identity and respect.⁶⁵

Here is where Balkin slips. Analytically separable, class and status hierarchies are not distinct social phenomena. They overlap and shape one another.⁶⁶ Work, the nature of a person's contribution to the social enterprise and how that contribution is socially valued, goes a long way toward determining her status or standing. Work has much to do with defining the person. Not only cash but respect, honor, and recognition — the currencies of status — circulate here. Complex patterns of respect, deference, and degradation form around occupational and class hierarchies, but all the empirical literature suggests that the most salient border between minimum respect and degradation in today's class structure falls along the line between those who are recognized by organized society as working and providing a decent living for themselves and their families (or those housewives who "belong" to households with husbands fulfilling that role), and those men and women at the bottom of the class hierarchy who are not. The majority of this group are neither "unemployed" nor supported by "welfare"; they belong to the category denoted "working

62. *Id.* at 2322.

63. *Id.* at 2322-23.

64. Karst's recent scholarship offers compelling sociological and constitutional analyses of the status degradation of women and gay Americans. See KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993).

65. See Balkin, *supra* note 61, at 2321-22.

66. Balkin observes that "[t]here can be and often are significant overlaps between status identity and economic class," *id.* at 2322, but he does not pursue the point, which is not simply one of conceptual refinement. It bears directly on Balkin's question: What are the salient forms of group subordination for a constitutional outlook committed to social equality?

poor" by government statistics.⁶⁷ That is, they are working full-time for wages but don't earn enough to secure a minimally decent livelihood for themselves and those for whom we, and they, believe they ought to provide. The social citizenship tradition, as we'll see, always highlighted the constitutional salience not only of joblessness but also of such degraded toil and its consequences in second-class citizenship; economists and sociologists document the persistence, and even marked growth, of this category of work over the past two decades, and the stigma and debilitation it still inflicts.⁶⁸

For many scholars, caste (but not necessarily status and not class) degradation denotes membership in a group that is seen as physically different and inferior, and identifying groups as other and inferior continues to justify the harshest subjugation. In this respect, caste and class have always diverged. Work is where, from the nation's beginnings, they have met in constitutionally salient ways. Following the 1970s fault lines, however, Balkin tends to view class in splendid isolation. Class and interest groups do not need constitutional protection. Their economic commonalities do not implicate constitutional values; moreover, they are preeminently capable of looking after their common interests in the political marketplace. Wage earners, after all, constitute a *majority* of the voting population. That much the *Lochner* outlook got right. But if the Constitution ought not to have prevented majoritarian meddling with the market or political economy in the name of some good that working people want, it surely does not *compel* such meddling. The boundaries of our constitutional tradition on this question are defined by the laissez-faire Constitution on the conservative side, and the Holmesian view⁶⁹ on the liberal or "Progressive" side. The latter prevailed. Constitutionally compelling any redistributive allocation of our nation's "wealth and resources" in this fashion is "foreign" to the whole conversation.⁷⁰ Moreover, it would "congest" what are properly pragmatic "political choice[s]" in an intolerable manner.⁷¹

That seems to me roughly what all these thinkers assume. And their assumptions are not wrong as far as the conversation of constitutional *courts* is concerned. But more and more, they have chosen to speak to lawmakers and "democratic arenas" in the knowledge that the Constitu-

67. See Monica Castillo, *A Profile of the Working Poor*, 1993 (U.S. Dept. of Labor, Bureau of Labor Statistics, Report 896, 1995).

68. See JOEL F. HANDLER & YEHESKEL HASENFELD, *WE, THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* 38-53 (1997); CATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (1999).

69. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory . . .").

70. SUNSTEIN, *supra* note 35, at 138.

71. Sager, *supra* note 6, at 417.

tion “does not only mean what the judges say it means.”⁷² Like Sunstein, Balkin has assailed the court-centeredness of our “constitutional canon” and our “willful ignorance of nonjudicial interpreters” of the Constitution — above all, our ignorance of the constitutional thinking of the leaders of the “social movements” engaged in “mass political action” that have done the real work of seeking and bringing about “constitutional changes.”⁷³ When one actually studies what has been thought and said about the Constitution in “democratic arenas” by “social movements,” however, one finds a long and pragmatic tradition of constitutional discourse about class inequality and equal citizenship. In this tradition are many antecedents to Karst’s and Michelman’s great essays on the caste-like debilitation and indignities of poverty and the social meaning of equal citizenship. But, to borrow a popular slogan, the antecedents are about work, not welfare. Or rather, they are about work, livelihoods, and social provision writ large, not welfare for the very poor alone. Contrary to standard learning, “great disparities” of economic resources have been a central concern — not only for social movements, but for mainstream politicians and national leaders — in a constitutional past that our continuing confinement to court-centered history has led us to forget.

C. Caste versus Class? Work, Citizenship, and the Law of the Master’s Household

Work is indispensable to equal status or standing, perhaps more so in the U.S. than in most nations.⁷⁴ As far back as the beginning of the republic, Americans spoke of the dignity of work.⁷⁵ And as our brief discussion of Madison and Jefferson suggested, the Founders saw a link between work and citizenship. But it was not work in general that they dignified, and not all kinds of labor qualified one for citizenship — certainly not slave labor nor the uncompensated toil of women in their husbands’ households.⁷⁶ Nor did the servant’s or hireling’s labor equip him for citizenship in the eyes of Jefferson, Madison, or most other eighteenth-century political thinkers. Unlike the wife, slave, or indentured servant, the hireling was, in theory, free and self-owning; still, his

72. SUNSTEIN, *supra* note 35, at vi, 10.

73. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1016, 1022-23 (1998).

74. See Forbath, *supra* note 42, at 1791 (“Countless sociologists and historians have told us that in the United States, perhaps more than in most other nations, work is essential to a person’s standing as an equal member of the community and polity.”).

75. See JONATHAN A. GLICKSTEIN, CONCEPTS OF FREE LABOR IN ANTEBELLUM AMERICA 1-49 (1991); DANIEL T. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920, at 5-17 (1978).

76. See KERBER, *supra* note 55; MORGAN, *supra* note 3; Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989).

hireling status meant he had forfeited not simply his property in his own labor, but his economic independence, and with it, the franchise. Like the pauper, the slave, or the wife, the hireling was deemed a "dependent." Through most of the nineteenth century, employment law remained lodged in the master's household, in treatises on "domestic relations." Like the other members of the master's household, the servant's relation to his master was one of dependence and subjection, of discipline, governance, and control.

The political theories of the Framers confirmed that the hireling's status of dependence and submission disqualified him for citizenship.⁷⁷ Indeed, most states at first restricted suffrage to the independent freeholder. By the 1820s, however, there were too many propertyless white tenants, journeymen, and hirelings demanding the ballot — and protesting the lack of it as an affront to their dignity and interests.⁷⁸ With the enfranchisement of male wage earners and the growing ranks of white males occupying that propertyless status, white America increasingly defined freedom in stark contrast to slavery.⁷⁹ A slave was a "marketable commodity" owned and exchanged by masters; he had no right to his own body and was "robbed of all the just rewards of his labor." Speaking of the slave's misery, one abolitionist simply asked, "Can a chattel make a contract?"⁸⁰ The industrializing North had begun to redefine the dominant view of freedom. Ownership of productive property, long understood as a necessary basis of economic "independence," was being erased, in favor of a narrower definition of freedom as simply self-ownership and the right to sell one's labor power.

Even as they assailed "wage slavery," white male wage earners in the North defended their "dignity" and "independence" as workingmen, asserting thereby their proper economic standing and rightful place in the political community. Employers and employees, Republican politicians, and middle-class antislavery tribunes like Garrison all had their reasons to invoke certain broad, idealized and ambiguous formulations. A slave was dependent, bound by law to work for a master's profit and under his control; a free citizen was independent, with

77. Some hewed to a more fully caste-bound construction of the lower ranks of the white laboring classes, which saw them and their offspring as fit only for drudge work. Beginning with the antebellum Irish in America, generations of new immigrants occupying the lowest ranks of the industrial order continued to be treated as racially inferior drudges. See GLICKSTEIN, *supra* note 75, at 99-104.

78. See DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 14-20* (1993); Steinfeld, *supra* note 76.

79. See ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF CIVIL WAR 61-72* (1980); William E. Forbath, *Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WISC. L. REV. 767, 779-86. On the English side, see DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823*, at 346-501 (1973).

80. William Goodell, *Goodell's Anti-Slavery Lectures*, reprinted in *THE LIBERATOR* 1, 3 (Apr. 5, 1839).

the liberty to work for his own and his family's benefit. They all dignified remunerative work freely pursued and the autonomy it signified and seemingly enabled. By the mid-nineteenth century, this had become the material touchstone of suffrage and full citizenship in the new republic. To lack these incidents of free labor was to be dependent and, therefore, inferior, unable to assume responsibility for oneself and one's family and unworthy of the standing and responsibilities of full membership in community life.⁸¹

All the great movements of disenfranchised social groups in nineteenth-century America, therefore, had this in common. They confronted the legal order with challenges to "systems of dependency . . . centered on control over work and its rewards."⁸² This was so of the antislavery and later black freedom movements; it was so of the tenant farmers' organizations, black and white, which produced Populism; it was so of women's rights movements; and, paradoxically, it was also so of white workingmen's movements.

Throughout this long period, white workingmen often defined their identity as citizens in terms of being not black and not women. But this drive to discriminate was fueled partly by a dread sense of commonality. White workingmen had the ballot and the legal status of masters in relation to wives and daughters. Still, in important ways that centered (again) around work, they were dependent, subordinated, and unfree like women and blacks.

They were simply hirelings, "free labor" not in Abraham Lincoln's but in Adam Smith's sense; no legal bonds tied them to particular tasks or masters. They were free to sell their own labor. The contrast with slavery showed this was no mean freedom. At the same time, the growing social and economic power of employers in a new era of industrial capitalism reminded them of the republican axiom: that productive property was the basis of true freedom and citizenly independence. Without that kind of property, dependency and subordination loomed.⁸³

The language and institutions of the law confirmed the unfree and subjugated character of wage labor; for as nineteenth-century treatise writers freely conceded, the common law of employment bore many of the "marks of social caste."⁸⁴ The common law "presupposes two parties who stand on an unequal footing in their mutual dealings," and "[t]his relation" admittedly is "hostile to the genius of free institu-

81. See Karst, *The Coming Crisis of Work*, *supra* note 39, at 531.

82. *Id.* at 537.

83. On the contrast and links between Smith's classical liberal and Lincoln's republican definitions of "free labor," see Forbath, *supra* note 79, at 773-82.

84. JAMES SCHOUER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS* 599 (1874), *quoted in* CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 292 (1993).

tions.”⁸⁵ Contrary to standard accounts of “laissez-faire” capitalism, the law of the employment relationship in nineteenth- and early twentieth-century America remained one of hierarchy and subordination, of status as much as of free contract.⁸⁶ As the nation industrialized, employment law remained lodged in the master’s household — in treatises on “domestic relations” — and the servant’s relation to his master was one of discipline and control. “The title of *master and servant* . . . does not sound very harmoniously to republican ears,” acknowledged another treatise writer. But “the legal relation of master and servant *must* exist . . . wherever civilization furnishes work to be done,” and so that doctrine remained the core of the republic’s law of employment.⁸⁷

The felt necessity of governing the industrial workplace, of disciplining an unruly work force, often recently immigrated from rural settings overseas, and of controlling a trade union movement intent on challenging employers’ authority and setting work rules of its own — all made the old common law of master and servant resonate with modern times.⁸⁸ Through the late nineteenth and early twentieth centuries, courts melded centuries-old master-servant law with modern contract doctrine, and continued to recognize an employer’s property interests in his employee/servants’ labor, his right to their loyalty and obedience, his right to enjoin and unleash state violence against their organizing efforts, and his virtually unbounded sway over their wages, hours, and conditions.⁸⁹ “The relation of employer and employee,” the Court

85. *Id.*

86. See KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); TOMLINS, *supra* note 84.

87. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* 243 (1837); see also HORACE WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* 3-4 (1877). See generally TOMLINS, *supra* note 84, at 232-93 (arguing that the law of master and servant actually grew more pervasive in American courts during the nineteenth century compared to the preceding century).

88. See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 11-16 (1983); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT*, 59-97 (1991); MARC LINDER, *THE EMPLOYMENT RELATION IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* (1989). Thus, for example, the old common law action against enticing away another’s servants continued to thrive in the nineteenth century, transmuted into tortious interference with contract but most often employing the old language of enticement. See TOMLINS, *supra* note 84, at 278-84. Even in the 1910s and ‘20s, it helped provide precedent and a judicial habit of mind that made it seem natural to enjoin union organizing among contract-bound miners, as a new incarnation of an ancient wrong. See FORBATH, *supra*, at 115-18.

89. See FORBATH, *supra* note 88; ORREN, *supra* note 86; ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1992); TOMLINS, *supra* note 84.

Drawing on Reva Siegel’s work, Balkin’s essay on status notes that in pre-modern eras “[l]egal categories like ‘slave’ or ‘master and servant’ were not only legal distinctions but helped support a system of social hierarchy.” Balkin, *supra* note 61, at 2326 n.36 (citing Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117 (1996)). Thus, Balkin recognizes that in premodern societies, class and status categories often were identical, and law helped define both; but for him, class as a status category

could still proclaim in 1935, is "one of the domestic relations."⁹⁰

When unemployed, white male members of the industrial working class continued to feel the sting of caste. The tens of thousands of wandering unemployed turned loose from the factories by the nation's first industrial depression in 1877 brought forth one of the country's first campaigns for uniform state laws — the "tramp acts." By the 1890s, forty-four states had enacted such measures, which recast the crime of vagrancy from an emphasis on begging to one on wandering without work.⁹¹ "Harsh as it may seem," declared Yale Law School's influential dean, Francis Wayland, the law must treat "those who honestly desire employment, but can find nothing to do" in the same manner that it deals with "those who are unwilling to labor."⁹² Regarding the latter, Joel Bishop's great criminal law treatise made the point clearly: "there is, in just principle, nothing which a government has more clearly the right to do than to compel the lazy to work; and there is nothing more absolutely beyond its jurisdiction than to fix the price of labor."⁹³

This separate political world of employment seemed to be as the legal commentators described it, devoid of citizenship. This rule of the courts over the core social relations of work and livelihood invested with the permanence of fundamental law and constitutionally walled off from the changeability of democracy, was a caste-ridden regime. And this meant that organized white male workers had a certain vision and vocabulary of reform in common with the other inhabitants of the mas-

seems to drop away with "modernization." Siegel, by contrast, has focused on the preservation of status hierarchies through "modernizing" liberal legal reforms — a process she notes in class as well as in racial and gender relations. Along with race and gender, propertylessness, hiring status, and unemployment, the lack of waged labor — class indicia — endured well into modern times as a basis for denying equal standing, social recognition, and ordinary civil and political rights. Indeed, it's been in the area of employment law history that the most detailed research has been done, tracing how the categories, constraints, and outlook of pre-modern (master-servant) law continued to shape modern (employment) law into the early 20th century and beyond. As with the modern legal forms of racial and gender subordination that Siegel analyzes, so with employment. Courts drew upon the language of private rights — private contract, property, and managerial prerogative — to reconstruct and fortify remnants of older traditions of subordination. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1115 (1997); see also ATLESON, *supra* note 88; FORBATH, *supra* note 88; ORREN, *supra* note 86; ROBERT STEINFELD, *THE COERCIONS OF CONTRACT* (forthcoming 2000); TOMLINS, *supra* note 84.

90. *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936).

91. See MONTGOMERY, *supra* note 78, at 87; PAUL T. RINGENBACH, *TRAMPS AND REFORMERS, 1873-1916: THE DISCOVERY OF UNEMPLOYMENT IN NEW YORK* 22-24 (1973); Sidney L. Harring, *Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894*, 11 LAW & SOC'Y REV. 873, 879 (1977).

92. Francis Wayland, *The Tramp Question*, in PROCEEDINGS OF THE FOURTH ANNUAL CONFERENCE OF CHARITIES 118 (1877), quoted in Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1277 (1992).

93. 1 JOEL BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* 273-74 (1892).

ter's old legal household: a vision of autonomy and respect based on dignifying, socially recognized work, with relations of mutuality, cooperation, and exchange based on equality with erstwhile "masters," and a rights rhetoric aimed against caste and legalized subordination. They would have refused the opposition between caste and class; their constitutional advocacy occupied the site where the two were inextricably joined.

II. THE SOCIAL CITIZENSHIP TRADITION BEFORE THE NEW DEAL

A. *Expounding the Constitution Outside the Courts?*

Shaped as we are by the legacy of *Brown*, we find it hard to imagine a reform-minded constitutionalism that is not countermajoritarian. We assume that rights talk not linked to claims on behalf of minorities cannot really be constitutional. Yet, for the most prominent exponents of the social citizenship tradition, the intuitive link we feel between constitutional rights deprivation and minority status simply did not exist. If anything, most Populist, Progressive, and labor movement advocates saw that linkage as part of the enemy's conceptual artillery — the refuge of grasping employers and trusts. Still, we're inclined to think: Litigation is costly, rights talk is cheap.

And rights claims are ubiquitous. In speaking of alternative and oppositionist constitutional outlooks, I refer to more sustained systems of thought and expression. These tethered claims of right to conceptions of citizenship and the powers and duties of state and national government, they addressed the meaning of popular sovereignty and the interpretive authority and substantive powers of courts versus legislatures; and they linked these to narratives of the Founding, the Civil War and Reconstruction, and to theories of constitutional change and continuity in the context of an industrializing society.

The notion of a Constitution changing over time to meet new social needs and popular aspirations was not born among reformers or radicals.⁹⁴ Conservative Whig jurists like Justice Story developed the idea of the Constitution as an evolving institution in response to the populist challenges of antebellum America. Warning that an unchanging Constitution would only fuel the popular conviction that a republican polity must be "revolutionized at every critical period, and remodeled in every generation," Story insisted on rules of constitutional interpretation responsive to the changing "manners, habits, and institutions of society."⁹⁵ But for Story, this interpretive task belonged

94. *But see* Horwitz, *supra* note 7, at 51-57 (attributing idea of changing Constitution to Progressives).

95. PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 41 (1992) (quoting J. STORY, *COMMENTARIES ON THE*

to the legal elite. It was Lincoln and other antislavery politicians of the new Republican Party who knitted the conservative language of a changing, evolving Constitution to the much older idea of constitutional interpretation as a popular political project, and fashioned an evolving antislavery Constitution whose egalitarian meanings must unfold in time.

The Framers, in Lincoln's phrase, made the egalitarian principles of the Declaration of Independence the "apple of gold" of which the Constitution and the Union were merely a "silver picture . . . framed around it."⁹⁶ They lacked, however, both the opportunity and the will to get the right fit between the Declaration and the Constitution; the constitutional frame was flawed and imperfect, but unfinished and reinterpretable. Getting the two texts to fit properly together, in Lincoln's account, was a task the Framers left to future generations, and he called on his generation of citizen-interpreters to spurn the proslavery Constitution of the Court and instead to complete the Founders' "unfinished work" of "Liberty for All."⁹⁷ The hermeneutics of an evolving antislavery Constitution, renewed and realized over time by citizens and legislators and often opposed by the courts, would find many later practitioners who called on succeeding generations to complete the "unfinished work" both of the Founders, and of Lincoln and the antislavery amendments.

How did these reformers respond when courts struck down as unconstitutional the kinds of measures their Constitution demanded? Just as Lincoln attributed *Dred Scott* to the Court's complicity in a "Slave Power Conspiracy,"⁹⁸ many Gilded Age agrarian and labor reformers laid labor injunctions and decisions voiding rate regulation and hours laws at the feet of the "Money Power" and the "Trusts." On this theory, the courts were corrupt, their constitutional interpretations counterfeit, and the reformers' true. But, as we will see, corruption and conspiracy were not the reformers' only explanatory key. Populists and Progressives alike often held that the courts were not so much corrupt as anachronistic. Judges woodenly applied inherited common law understandings of constitutional rights in ways that stymied social reforms designed to further the very values of citizenly independence and dignity the rights were meant to secure.

CONSTITUTION OF THE UNITED STATES 143 (3d ed. 1858)).

96. GARY JACOBSON, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 3 (1993); GYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (forthcoming, 2000) (manuscript at 28, on file with author).

97. HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 315-16 (1982); Abraham Lincoln, Speech at Chicago (July 10, 1858), in THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 445-51 (Philip Van Doren ed., 1940).

98. Abraham Lincoln, Speech at Springfield (June 16, 1858), in CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 1-7 (Paul M. Angle ed., 1958).

This was the social citizenship rendition of the changing, evolving Constitution. It was coupled with a longstanding debate over the allocation of interpretive authority. Again invoking Lincoln, these advocates assailed judicial supremacy and insisted on the coequal authority of the other branches. Antimonopolists in political economy, they attacked the courts' presumed "Monopoly of Power to interpret the Constitution."⁹⁹ But they also often took leave of Lincoln and joined Jefferson, the Kentucky Resolution, and the states' rights tradition, declaring that state lawmakers, as the most direct representatives of the sovereign people, were better equipped than federal courts to determine the Constitution's metes and bounds. In either case, they invoked a long tradition, as old as the Constitution itself, attacking as usurpation the courts' sway over political economy, their walling off of key issues of economic development from popular government. Jefferson and Jackson were marshaled behind the Populist and, later, the New Deal cause of authorizing legislators to secure the economic rights and liberties of citizens.

But whose rights and liberties, whose citizenship, was being championed? For the most part, the social citizenship tradition's spokesmen and their constituents were white men. Their tendency to define citizenship in racialized and gendered terms had bleak consequences, I will argue, for the fortunes of their own constitutional visions as well as other more inclusive ones. However, they forged a democratic-majoritarian style of constitutional interpretation and politicking that we have forgotten. In reconstructing this tradition of constitutional politics, I do not commend it as preferable to the court-inspired ideal of the Constitution as countermajoritarian safeguard of "discrete and insular minorities." Morally, I think, the insights of each reveal much of the other's blindness. Historically, I will argue, their fates have been tied in ways we have ignored.

B. *Social Citizenship from Reconstruction through Populism, 1865-1896*

The language of equal citizenship did not loom large in the Constitution prior to the Civil War and the adoption of the Reconstruction amendments.¹⁰⁰ Since then, however, subordinated groups have laid claim to the status of citizens and rights bearers in language rooted in those amendments. As Hendrik Hartog observes, "[t]he long contest over slavery did more than any other cause to stimulate the development of an alternate, rights conscious, interpretation of the federal con-

99. See *infra* text accompanying note 205.

100. See Stanley N. Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. HIST. 747, 747 (1988).

stitution.”¹⁰¹ The varying meanings that have been drawn from the phrase “equal protection of the laws” are “rooted in contending visions of what it was that was overthrown by the end of slavery.”¹⁰²

1. *Post-Bellum Republicans, Labor Reformers, and the Origins of Social Citizenship*

By dint of the Reconstruction amendments, “We the People” had become in 1867 “[a]ll persons born or naturalized in the United States,” irrespective of “race, color, or previous condition of servitude.” The nation broke this promise of equality, but not before those who led the battles for the Thirteenth, Fourteenth, and Fifteenth Amendments outlined an understanding of equal citizenship that spoke to the social and economic circumstances not only of former slaves, but also of white free laborers. Even the most conservative Republicans agreed on the core rights of contract, property, and personal liberty. Now these rights were “universal.”¹⁰³ But to the Radical Republicans, they were hardly sufficient to underpin the freedmen’s new status as citizens. Citizenship demanded suffrage; and the independence of the freedmen’s ballots required material foundations. That entailed not only equal rights to contract and own property, but also to public education and training. Some agreed with Thaddeus Stevens that equal citizenship for the freedmen also demanded land redistribution — “forty acres and a mule,” in the famous phrase.¹⁰⁴ The idea was not limited to former slaves. Stevens and other Republicans pressed for generous homestead laws and land grant colleges for white hirelings in the North. They thought, in Akhil Amar’s apt phrase, that property was “so essential for both individual and collective self-governance” that “every citizen should have some.”¹⁰⁵

As the Labor Question eclipsed the Slavery Question in the politics of the rapidly industrializing postbellum North, it too had a constitutional cast. Invoking constitutional provisions aimed at protecting the rights of black ex-slaves in the South to support rights for white workers

101. Hendrik Hartog, *The Constitution of Aspiration and the “Rights That Belong to Us All,”* 74 J. AM. HIST. 1013, 1017 (1987).

102. *Id.*

103. Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 474-75 (1988).

104. “In a speech to Pennsylvania’s Republican convention in September 1965, Stevens called for the seizure of the 400 million acres belonging to the wealthiest 10 percent of Southerners. Forty acres would be granted to each adult freedman and the remainder — some 90 percent of the total — sold ‘to the highest bidder’ in plots, he later added, no larger than 500 acres.” Even among radicals, there was no unanimity on the land question; many proved reluctant to support a program that seemed to run so far afield of the sanctity of private property. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 235-36 (1988).

105. Amar, *supra* note 21, at 37.

in the North was not farfetched. As Eric Foner has shown, defending white free labor had always loomed large in the Republicans' antislavery outlook,¹⁰⁶ and the party's leadership repeatedly declared that the Reconstruction amendments embodied a promise of universal freedom, limited to "neither black nor white."¹⁰⁷

The Black Codes, passed by the southern states in 1865-66 reinstated a race-based caste system, keeping blacks as an inferior and dependent class by disabling them from owning, renting, or transferring property, pursuing skilled callings, or seeking access to courts. The Civil Rights Act of 1866 was Congress's response. At a minimum, all Republicans meant to outlaw those legal disabilities, but many thought the new amendments went further. Beyond the unique harshness of this form of racial subjugation, law and state power could be used to hem resourceless white working people into a dependent and degraded — caste-like — condition. It could invest groups or classes of the propertied with "peculiar privileges and powers,"¹⁰⁸ and enshrine, in Thaddeus Stevens's words, "the recognized degradation of the poor, and the superior caste of the rich."¹⁰⁹ This too the new Amendments should forbid. Republicans also celebrated the Thirteenth Amendment as a charter of free labor, aimed at ending the degradation of labor, "both black and white,"¹¹⁰ "subduing that spirit" which "makes the laborer the mere tool of the capitalist."¹¹¹

Concern for the laborer's freedom found eloquent expression in the Supreme Court's first important encounter with the Reconstruction amendments. The plaintiff butchers in the *Slaughter-House Cases*¹¹² were exemplars of Lincoln's "Free Labor System." They were shop-owning artisans, and in the new monopoly created by the Louisiana legislature these "Free Laborers" saw a serious threat that they would be reduced to the condition of mere hirelings. Their petition for a preliminary injunction alleged that the challenged statute would "subject the labor of all existing butchers to the control" of the new corpora-

106. See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

107. CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (remarks of Sen. Wilson), quoted in Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 446 (1989); see also HERMAN BELZ, *EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA* 108-40 (1978); CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88, PART ONE*, at 1117-49 (HISTORY OF THE SUPREME COURT OF THE UNITED STATES SERIES Vol. VI, 1971).

108. CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866) (proposal by Sen. Sumner), quoted in ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 252 n.27 (1992).

109. CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1867) (remarks of Rep. Stevens), quoted in FONER, *supra* note 104, at 254.

110. VanderVelde, *supra* note 107, at 453.

111. *Id.* at 471.

112. 83 U.S. (16 Wall.) 36 (1873).

tion.¹¹³ Yet, as Justices Field and Bradley declared in their famous *Slaughter-House* dissents, the Reconstruction amendments had promised to secure “every one’s” right freely to “pursue certain callings” and enjoy the “fruits of his labor.”¹¹⁴ Indeed, this “equality of right” in the pursuits of life was “the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name.”¹¹⁵ Arguing that the Louisiana monopoly violated this “equality of right” and with it “the right of free labor,” Field and Bradley seemed to enshrine the venerable republican definition of freedom as economic independence, which animated the Free Labor ideology of the 1850s and ‘60s.¹¹⁶ However, the *Slaughter-House Cases* would remain virtually the only cases in which the right to pursue a calling and the right of free labor were invoked on behalf of working men or women who owned productive property. The scores of subsequent decisions in which the *Slaughter-House* dissents figure as leading precedents say nothing about the free laborer’s right to the “fruits of his own labor.” The working men and women in this prodigious line of cases were all wage-earners.¹¹⁷ What they produced belonged to their employers; their constitutional liberty lay in selling their labor to those disposed to employ them. So, *Slaughter-House*’s pristine Free Labor reading of the Fourteenth Amendment unfolded in strikingly different directions: toward *Lochner* and liberty of contract in the nation’s courts, and toward an egalitarian and anticorporate radicalism in the hands of the Gilded Age labor movement.

Industrialization had changed the social meaning of constitutional equality, Reconstruction and Gilded Age labor reformers argued. For Lincoln, the hireling’s lot was almost as unfree as the slave’s, but it was a brief way-station on the road to owning productive property. With the rise of large-scale production, however, and the increasing concentration of ownership of resources and capital, today’s hireling was no longer — what Lincoln’s “Free Labor System” promised — tomorrow’s proprietor. Artisans and skilled factory workers found themselves competing against new machines and new unskilled and underpaid workers. The big capitalists — who bought the machines and hired dispossessed artisans and new immigrants and their families, bringing millions of working-class women and children into the factories — seemed a new aristocracy, whose wealth and power were built on

113. M. Dudziak, *The Social History of the Slaughter-House Cases* 28 (1983) (unpublished manuscript), quoted in Forbath, *supra* note 79, at 776.

114. 83 U.S. at 90 (Field, J., dissenting).

115. *Id.* at 109, 110.

116. *Id.* at 109, 110 (Field, J., dissenting).

117. I canvass the cases and offer a more detailed reading of *Slaughter-House* in Forbath, *supra* note 79.

oppression.¹¹⁸

Just as the capitalist strove to grind down wages, so he abused the new technologies and "labor-saving devices" by "cheapening labor" and demanding longer and longer hours of "mindless toil," that deprived workingmen of the time to educate themselves and participate in public affairs. Under the "wages system," "progress" seemed to have the ironic consequence of producing its opposite, more "dependence," more "ignorance," and more "grinding poverty" among each succeeding generation of workers. The capitalists' wealth was being purchased at the price of making the working class unfit for citizenship.¹¹⁹

This irony animated George McNeill as he wrote on behalf of the International Labor Union in 1873, the same year Field and Bradley authored their *Slaughter-House* dissents. "There is an inevitable and irresistible conflict," McNeill declared, "between the wage-system of labor and the republican system of government."¹²⁰ A similar declaration appeared in the preamble to the constitution of the Gilded Age's largest and most prominent labor organization, the Knights of Labor.¹²¹ Just as the courts began to enshrine as a constitutional right the worker's liberty to sell his labor, the labor movement was forging an opposing outlook, which held that being forced to sell his labor contradicted the worker's status as a citizen. Every 1880s labor leader, from the most stolid iron puddler to the most radical miner, agreed that the "present industrial order" or the "wage system" had to give way, or the republic would perish.¹²² In 1889, Florence Kelley declared that "[u]nder the guise of republican freedom we have degenerated into a nation of mock citizens." Genuine citizenship required that the "social structure" conform to the egalitarian principles of the Declaration of Independence and the

118. Generations of social historians have reconstructed this process in painstaking detail. I distill much of their work in Forbath, *supra* note 79. For other recent syntheses, see HERBERT G. GUTMAN, AMERICAN SOCIAL HISTORY PROJECT, CITY UNIVERSITY OF NEW YORK, WHO BUILT AMERICA? WORKING PEOPLE AND THE NATION'S ECONOMY, POLITICS, CULTURE, AND SOCIETY (1992), and DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925 (1987).

119. See RODGERS, *supra* note 75, at 153-60; George E. McNeill, *The Problem of Today*, in THE LABOR MOVEMENT: THE PROBLEM OF TODAY 454, 462 (George E. McNeill ed., New York, The M.W. Hazen Co., 1886); Ira Steward, *The Power of the Cheaper over the Dearer*, in 1 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 306-29 (John R. Commons et al. eds., 1910).

120. McNeill, *supra* note 119, at 459.

121. See George E. McNeill, *Declaration of Principles of the Knights of Labor*, in THE LABOR MOVEMENT: THE PROBLEM OF TODAY, *supra* note 119, at 483-86.

122. See Forbath, *supra* note 79, at 808. Almost all invoked the general ideal of a "Co-operative Commonwealth" in which workers "will eventually be the only capitalists," or ownership and control of industry will be broadly shared. *Id.* at 808 n.142, 809. Most favored industrial co-ops, combined with public ownership of transportation and communication industries; most also envisioned strong unions, combined with many statutory labor market reforms, as avenues for ending "wage slavery." *Id.* at 809.

new Reconstruction amendments.¹²³

Thus, the work of antislavery remained “unfinished.” Uprooting “this subtler form of slavery” demanded laws repealing the harsh judge-made restraints on collective action and other common law rules that helped underpin “wage slavery.” It required statutory reconstruction of the labor market, including legal limits to the working day; for many labor reformers, it also entailed financial and banking reform and recasting corporation law — along lines similar to those demanded by the agrarian reformers we are about to examine — by using national power to create a framework for a more decentralized and democratic industrial economy.¹²⁴ In short, “legislative bodies [were] bound to interfere” to preserve the Constitution’s promises of “equality” and “a republican form of government.”¹²⁵ Lincoln’s apple of gold — a republic of free labor and equal citizens — once more demanded reinterpreting and revising the silver frame, and spurning an oppressive, counterfeit Constitution being forged by the courts.

2. *The Women’s Rights Movement in the Age of Emancipation*

Alongside the rights of contract and free labor, the right to marry and have a family was the other fundamental freedom every Republican agreed was enshrined by the Civil Rights Act of 1866 and the Fourteenth Amendment.¹²⁶ This account of core citizenship rights was all of a piece for the freedman, but not the freedwoman nor women generally. Married women lacked not only the right to vote, but also the right to contract; their labor and its fruits belonged to their husbands.¹²⁷

Far from “universal,” the “new birth of freedom,” as Congress conceived it, was deeply gendered. But women’s advocates famously seized on the mainstream constitutional language of freedom as self-ownership and equal rights. In addition to women’s suffrage, the organizations that led women’s struggles for equal citizenship held that ending women’s status as a “dependent and despised class” also demanded that women “enjoy the fruits of their own labor.” Equal rights meant legal autonomy in market and property relations, and economic independence within the marriage relation. Yet the common law denied all these rights in favor of the husband. Law and social usage “oppressed [her] with such limitation and degradation of labor and avocation as clearly and cruelly mark the condition of a disabled caste.” So, women’s rights

123. See ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 124 (1998).

124. See Forbath, *supra* note 79, which documents and analyzes the constitutional visions and reform outlooks of the spectrum of local, state, and national labor leaders of the period.

125. McNeill, *supra* note 119, at 462.

126. See Stanley, *supra* note 103, at 480.

127. See *id.* at 479-81.

organizations campaigned for statutes that would overturn the husband's common law rights to his wife's labor, both within the household and outside it.¹²⁸

Passage of Married Women's Property and Earnings statutes accomplished part of this project. However, the property statutes generally covered only such property as wives brought with them to, or received as gifts during, the marriage relation, which in most marriages was none. The hard-fought earnings statutes entitled married women to keep their own wages; now, one law writer declared, the married woman "has the right to her labor."¹²⁹ But the new statutes left untouched the web of custom, union rules, and legal proscriptions that kept women out of most industrial jobs, skilled trades, and professions. Moreover, the earning statutes covered only wages or income earned outside the home, and so for the majority of working women, who toiled inside the household, the earnings statutes left the old doctrine of marital service intact.¹³⁰

Here nineteenth-century feminists did not challenge the gender division of labor so much as the gendered definition of labor.¹³¹ The law of marital property, they argued, did not merely impose dependency by divesting wives of rights in their labor; it defined wives as dependents who were "supported" by their husbands, thereby obscuring the fact that wives' labor had value. The "economy of the household," a Woman's Rights Convention resolved, "is generally as much the source of family wealth as the labor and enterprise of man"; yet the law effaced women's contribution, embedding it in property to which men held title. No less

128. See PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23D & 24TH, 1850, at 4-5 (Boston, Prentiss & Sawyer 1851), quoted in Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1100 (1994); see also NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 162-99 (1982) (discussing the links between women's battles for equality in the domestic sphere, contract and property rights, and suffrage).

129. GEORGE E. HARRIS, *A TREATISE ON THE LAW OF CONTRACTS BY MARRIED WOMEN, THEIR CAPACITY TO CONTRACT IN RELATION TO THEIR SEPARATE STATUTORY LEGAL ESTATES, UNDER AMERICAN STATUTES* 114 (1887), quoted in Stanley, *supra* note 103, at 482.

130. Only later, during the Gilded Age in a handful of Western states, and not until the 1970s in the rest, would legislatures recognize women's joint title to the household's entire property and income. Thus, Reva Siegel's superb article errs in its repeated claim that the joint property idea — and the broader struggle for legal recognition of women's unpaid domestic labor — were abandoned by women's rights advocates in the 1870s in favor of "the two-career marriage strategy," which focused on equal opportunities in the sphere of paid work. Siegel, *supra* note 128, at 1189-98, 1213-15. In fact, women's rights advocates figured prominently in the constitutional conventions that adopted such measures in several Western states during the Gilded Age. Likewise, "second-wave" feminists led the battles for community property reforms during the 1970s. See Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA L. REV. 1 (1976).

131. I borrow this phrase from JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* at xi-xv (1990).

economically productive than men, the Convention went on, women were entitled to participate equally in managing assets both helped to accumulate. In this manner, as Reva Siegel has shown, women's rights advocates cannily employed the mainstream constitutional language of self-ownership and labor rights to dismantle and reconstruct the legal and cultural discourse that cast women as unproductive dependents.¹³²

3. *African Americans and the Reconstruction Roots of Social Citizenship*

Like the advocates of white workingmen in the industrial North, most freedmen and women in the South hewed to the old republican view that freedom entailed ownership of productive property; self-ownership alone was not freedom. Most of them apparently agreed with Thaddeus Stevens on the necessity of confiscating the largest plantations of the South and redistributing them to ex-slaves in order to secure the African Americans' liberty. "Only land," said former Mississippi slave Merrimon Howard, would enable "the poor class to enjoy the sweet boon of freedom."¹³³ In an 1865 "colloquy" with General Sherman and Secretary of War Stanton, twenty "Colored Ministers" concurred. Asked as to "what you understand by slavery, and the freedom that was to be given by the President's Proclamation," ex-slave Garrison Frazier, a Baptist preacher and the group's spokesman, replied: "The freedom, as I understand it, promised by the proclamation, is taking us from under the yoke of bondage and placing us where we could reap the fruit of our own labor, and take care of ourselves." "Freedom," he went on, meant that ex-slaves were entitled "to have land, and turn and till it by our labor . . . and we can soon maintain ourselves."¹³⁴

General Sherman's famous Field Order 15 embodied the view that the freedmen were entitled to the confiscated estates of the old planter elite. So did the provision of the Freedmen's Bureau Act authorizing the Bureau to settle freedmen on confiscated and abandoned lands. Sherman's field order called for using the property under Bureau control to provide freedmen with forty-acre homesteads "where by faithful industry they can readily achieve an independence."¹³⁵ President Johnson, however, halted that experiment; he issued a rash of special par-

132. See Siegel, *supra* note 128, at 1112-18.

133. Letter from Merrimon Howard to Adelbert Ames (Nov. 28, 1873) (on file with Ames Family papers, Sophia Smith Collection, Smith College, Northampton, Mass.), quoted in Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, Presidential Address of the Organization of American Historians (Apr. 15, 1994), in 81 J. AMER. HIST. 435, 458 (1994).

134. *Colloquy with Colored Ministers*, 16 J. NEGRO HIST. 88, 90-91 (1931); see also FONER, *supra* note 104, at 68, 235-37; LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 401-04 (1979).

135. FONER, *supra* note 104, at 159 (quoting Gen'l Rufus Saxton, Freedman's Bureau Director in Ga., S. C., and Fla.).

dons, restoring the property of former Confederates and ordered the Bureau's leader, O. O. Howard, to restore the freedmen's land to the pardoned planters. To Howard also fell the task of informing the freedmen that the land would be restored to their former owners and that they must either agree to work for the planters or be evicted. He journeyed to low-country South Carolina, hoping to "ease the shock as much as possible, of depriving the freedmen of the ownership of the lands."¹³⁶

At one stop on this journey, Howard requested the freedmen of Edisto Island to appoint a three-man committee to consider the fairest way of restoring ownership to the planters. Their response gave eloquent testimony to the convictions about land and liberty shared by freedmen and women throughout the South:

General we want Homesteads; we were promised Homesteads by the government; If It does not carry out the promises Its agents made to us, If the government Haveing [sic] concluded to befriend Its late enemies and to neglect . . . the principles of common faith between Its self and us Its allies In the war you said was over, now takes away from them all right to the soil they stand upon save such as they can get by again working for *your* late and thier [sic] *all time enemies* . . . we are left In a more unpleasant condition than our former You will see this Is not the condition of really freemen.¹³⁷

Most national African American leaders during Reconstruction took a more moderate stance on the land question than the Edisto Island freedmen. They heartily agreed that freedom demanded material independence, but, like most other prominent Republicans, the nation's most prominent African Americans claimed that as long as they had suffrage, equal civil rights fairly administered combined with a right to "common school" education would suffice for hard-working freedmen and women to become freeholders and free-standing citizens. They urged ex-slaves to labor hard, save their earnings, and buy land on their own.¹³⁸ These urgings, prompted by whatever mix of caution and conviction, did not fully reflect the rights consciousness of ordinary African American citizens nor of many of their local and state-level leaders.¹³⁹

136. Journal of S. Willard Saxton (Oct. 22, 1865) (on file with Rufus and S. Willard Saxton Papers, Yale University), *quoted in* FONER, *supra* note 104, at 160.

137. Ira Berlin et al., *The Terrain of Freedom: The Struggle over the Meaning of Free Labor in the U.S. South*, 22 HIST. WORKSHOP 108, 127-28 (1986).

138. See FONER, *supra* note 104, at 54-57; LITWACK, *supra* note 134, at 399-408.

139. See generally FONER, *supra* note 104; THOMAS HOLT, *BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION* (1977); LITWACK, *supra* note 134; Michael Fitzgerald, "To Give Our Vote to the Party": *Black Political Agitation and Agricultural Change in Alabama, 1865-1870*, 76 J. AM. HIST. 489 (1989); Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863 (1987).

When Congress made plain its refusal to redistribute the estates of the South, the key sites of argument and struggle shifted to the hustings, legislatures, local courthouses, churches, and fields of the region. State and local Black Republican leaders formed coalitions with representatives of white yeomen and tenant farmers to build up a Southern base for the "party of Free Labor."¹⁴⁰ Meanwhile, "Black Republican" judges and justices of the peace adjudicated contract disputes between freedmen and former masters in a fashion that confirmed the planters' worst fears about "Negro rule" and confirmed as well the mutability and redistributive potential of common law doctrine. "Equal rights under law" was anything but self-defining; as is often the case in contract and property relations, the devil was in the details and who controlled them.¹⁴¹ Called on to elaborate and apply the principles of property and free contract to the emergent relations between landlord and sharecropper, Black Republican judges did so in ways that gave the latter a substantial measure of bargaining power and control over work and crop. No jurist ever plumbed more deeply the meaning of the individual's "right to the fruits of his labor."¹⁴² As "Black Republican" judges granted more power to sharecroppers, and "Black Republican" lawmakers enacted redistributive taxes, lien laws, and land-lease measures, the planter class and the Democratic Party turned to massive violence and economic coercion to quell black voting and political associations. The Democrats and the Klan also meted out violence against black property holders and skilled craftsmen, aiming, in one freedman's words, to "[keep us] as the hewers of wood and drawers of water to as mean a class of white men . . . as live in any one of these reconstructed states."¹⁴³

4. *The Distributive Ideal and the Architects of the Laissez-Faire Constitution*

By 1874, Northern weariness with Reconstruction and readiness to "leave the South alone" enabled the Democrats to regain control of

140. With the goal of broadening the distribution of property and creating a large class of viable freeholders, several of these so-called "Black Republican" state parties succeeded, for a brief season, in passing redistributive taxes, lien laws, and land-lease measures, and in creating the South's first public education systems. See FONER, *supra* note 104, at 281-411.

141. See HOLT, *supra* note 139; EDWARD MAGDOL, *A RIGHT TO THE LAND: ESSAYS ON THE FREEDMEN'S COMMUNITY* (1977); DONALD NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 1865-1868* (1979); Donald Nieman, *African Americans and the Meaning of Freedom: Washington County, Texas as a Case Study, 1865-1890*, 70 CHI.-KENT L. REV. 541 (1994); Donald Nieman, *Black Political Power and Criminal Justice: Washington County, Texas, 1868-1884*, 55 J. S. HIST. 391 (1989) [hereinafter Nieman, *Black Political Power*].

142. See Nieman, *Black Political Power*, *supra* note 141.

143. PETER J. RACHLEFF, *BLACK LABOR IN THE SOUTH: RICHMOND, VIRGINIA, 1865-1890*, at 65 (1984).

Congress. Southern Blacks continued to vote and form political associations for virtually two decades after Reconstruction, but all three branches of the national government began dismantling federal protections for the freed people's recently enacted rights. From the mid-1870s onward, racial backlash in the South and intensifying class strife and agrarian unrest in the North and Midwest drove Republican leaders to remake the party into a bastion of *laissez-faire*.

During the Civil War and Reconstruction, Radical Republicans like the leading Radical journalist and opinion maker, Edwin Godkin, editor of the *Nation*, had told labor audiences that a government "of and from the people . . . cannot destroy its (or their) liberties." But by the early '70s, Godkin and other Radical publicists were growing appalled to hear the vaunted language of popular sovereignty and active democratic government appropriated by labor agitators calling for such things as the demise of "property rights rulership."¹⁴⁴

During the early years of Reconstruction, Godkin's sympathetic but ambivalent analysis of the wage laborer's predicament still rested on a traditional republican outlook and, in significant ways, resembled the labor movement's own assessment. The industrial laborer, he wrote in '67, "is legally free while socially bound"; "since the rise of political economy," he "has been treated [in books] as the equal of the capitalist . . . but in real life his position has been that of a servant with a fixed status." He cannot "assume in practice the position [of a free agent] which the political economists have persistently assigned to him."¹⁴⁵ Godkin agreed with labor's tribunes that this system of social bondage undermined workers' capacities as citizens: "When a man agrees to sell his labor, he agrees by implication to surrender his social and political independence." Widespread "diffusion" of ownership of productive property was essential to a "virtuous" — "independent," "self-reliant," "frugal," and "intelligent" — citizenry and a nation's liberty.¹⁴⁶ The remedy to labor's "servile dependence" on capital, Godkin also agreed, lay in cooperative ownership of industry. He chided the labor movement for trying to enlist the state in its efforts to gain a greater

144. McNeill, *supra* note 119; see also S. JOHNSON, *LABOR PARTIES AND LABOR REFORM* 14-16 (1871).

Even the nationally prominent labor journalist John Swinton was turning the concept in perilous directions. "[T]he great feature of the public life of this country," Swinton declared in a widely reprinted Fourth of July oration, and "one which our industrial classes have seemed to be entirely unaware of," lies in the fact that "all power over all things is given to the people, over even laws, and possessions, and pretensions, and institutions, and shams!" JOHN SWINTON, *STRIKING FOR LIFE: LABOR'S SIDE OF THE LABOR QUESTION* 335 (1894). Here was an appeal to "intensely democratic instincts" and an attempt to educate the desires of the "industrial classes" in just the direction which so distressed middle-class Radicals and reformers. See E.L. Godkin, *Labor and Politics*, 24 *NATION* 386, 387 (1872).

145. E.L. Godkin, *The Labor Crisis*, 105 *N. AM. REV.* 177, 184, 188-89 (1867).

146. *Id.* at 184, 186, 207-08.

share of the "results of labor," but he vigorously defended workers' right to organize and strike for that end. And he enjoined workers to "never cease agitating and combining until the regime of wages . . . has passed away," and all "the great accumulations of capital are held by [labor] associations."¹⁴⁷

By 1872, Godkin had already had enough of labor's combining and agitating. Alarmed by the massive eight-hour day strikes which were sweeping New York and other industrial cities, he undertook to enlighten "the working-class mind." Previously hoping for the abolition of the wage system, now he chastened workmen for seeking to prevent capital from getting into the hands of the only class in the community that is competent to use it.¹⁴⁸ Above all, Godkin was outraged by the New York labor movement's successful campaign for an eight-hour day ordinance covering municipal contracts and employment, and by their demand for a general eight-hour law. Instead, Godkin declared that the "reward of labor" ought to depend "on the cost of material and transportation or on demand and supply."¹⁴⁹

As disturbing as labor's new politics to the "best people" of the North, like Godkin, were other contemporaneous signs of "runaway democracy," like the Granger agitation.¹⁵⁰ The disenchantment with federal intervention and "Black Republicanism" in the South that ran through the pages of Godkin's *Nation*, the *Atlantic Monthly*, and the *North American Review* was closely bound up with a desire to curb the extreme phase of republicanism and the clamor for class legislation which seemed rife at home in the industrializing North.¹⁵¹

In the 1860s the editors and contributors to these journals had helped etch out a theory of an active, democratic state which lent legitimacy and coherence to the expanded powers of the federal government and the project of Radical Reconstruction. Now many of the same thinkers and spokesmen coalesced into a new movement which gained adherents among prominent Northern lawyers, businessmen, and academics, many of them former Radicals and abolitionists. It styled itself "Liberalism" — appropriately enough, since its thinking represented an unraveling of Lincolnian "Free Labor" ideology, discarding many of its democratic strands and fortifying its liberal ones.¹⁵²

147. *Id.* at 197, 213.

148. Godkin, *supra* note 144, at 386.

149. *Id.*

150. See HAROLD M. HYMAN, A MORE PERFECT UNION 347-66 (1973); JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 223-25 (1968).

151. 4 NATION 520 (1871); FONER, *supra* note 79, at 97-127; HYMAN, *supra* note 150, at 361.

152. The best account remains SPROAT, *supra* note 150. See also FONER, *supra* note 79, at 97-127; DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL

Although they were anxiously renouncing one activist democratic outlook, many new liberals could feel they were returning to another, older democratic reform tradition: The first expressions of laissez-faire doctrine, the first systematic protests against state activism in America arose from the Jacksonian campaigns against national bank and state corporate charters, against government-created "monopolies" that subordinated the many to the few.¹⁵³ Many of the new liberals had been Jacksonians, even radical Jacksonians in their youths.¹⁵⁴ Now, ironically, they transformed the Jacksonian vocabulary into a defense of the few against the many. The new liberalism was, as David Montgomery and others have dubbed it, an "elitist reform movement."¹⁵⁵ But if they assailed labor's experimenting with the uses of state power, the new liberals often were no less alarmed by capitalists seeking "state favors," their "abuses of the taxing power," their clamoring for "tariff schemes, subsidy schemes, internal improvement schemes." The "aggrandizement of capital by law," they warned, was the "parent" and inspiration of labor's "socialism."¹⁵⁶ Not only capital's state subsidies but the unprecedented power of the emerging large corporation itself troubled these men. The common law was replete with doctrine and ideology hostile to corporate expansion and would remain so under the sway of the first generation of laissez-faire or new liberal jurists.¹⁵⁷

To be ambivalent about corporations' effects on individual freedom, free markets, and republican government was no more than to remain alive to the classical liberal view on corporations¹⁵⁸ and to the Jacksonian antimonopoly tradition from which so many new liberals sprang. Perhaps none felt this ambivalence in more pointed ways than the significant number of new liberal reformers who, like Justice Field's brother David Dudley Field, were also corporate attorneys.

REPUBLICANS, 1862-1872 (1967). The best recent accounts of the new liberalism in its constitutional incarnation are HOWARD BENEDICT, *THE CONSTITUTION BESIEGED* (1994), and Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985).

153. LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT* 289-320 (1948). For fuller discussion see Forbath, *supra* note 79, at 789-94.

154. See CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1930) (describing Justice Stephen J. Field and his brother, New York corporate attorney, new liberal reformer, and architect of the Field Code, David Dudley Field, as young Jacksonians); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 769 (1967) (describing Cooley as a radical Jacksonian).

155. See MONTGOMERY, *supra* note 152, at 368-86 (1967).

156. See Benedict, *supra* note 152, at 312-13.

157. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 65-109 (1992).

158. See, e.g., ADAM SMITH, *THE WEALTH OF NATIONS* 99-143 (Edwin Canaan ed., 1937). On Smith on corporations, see also DONALD WINCH, *ADAM SMITH'S POLITICS* (1978).

As Robert Gordon has shown, men like Field were on one hand exponents of liberal "Legal Science" and "Reform" extolling a legal order that protected a free and competitive marketplace, equal rights and equal opportunities; in this role, they saw themselves striving to release law and government from the grip of "class interests." On the other hand, as leading attorneys for the new corporations, they were implicated in their clients' purchasing of judges and legislators and, more importantly, they were successfully undercutting and supplanting the very legal concepts and doctrines that sought to keep corporations within the framework of competitive individualism their liberal legal reform ideology prized.¹⁵⁹ They were at once foes and agents of the "aggrandizement of capital by law."

Thus, Field fretted in the pages of the *North American Review*, "[w]e have created a new class of beings . . . [and] individuals find themselves powerless before these aggregations of wealth . . . [for] we have neglected to fence them about with . . . restraints."¹⁶⁰ How to restore the equality that "we" negligently have destroyed? How to bridge the ever more distant and antagonistic relations between capital and labor? Field's answer was to call on fellow members of the new corporate elite to appropriate the co-operative impulse among labor and agrarian reformers, to turn corporations from associations "of capital only" into associations "of capital and labor united."¹⁶¹ Like Godkin fifteen years earlier, Field beheld the labor upheavals of the mid-1880s and responded with anxious concern to wage-earners' protest that capital had reduced them to a "relation of dependence . . . incompatible with that sense of self-respect . . . that should be the patrimony of every American citizen."¹⁶² He did not share Godkin's early sympathy with strictly worker-owned businesses; rather, he hoped that profit-sharing and granting workers certain voting rights in the corporation would restore equality and respect between labor and capital. Of course, like Godkin, Field held that accomplishing these desirable reforms could not be the business of government. That was the "dream of madmen" and would violate "the Supreme Law."¹⁶³

Henry George was among the Gilded Age's leading radicals, just as Field was among its leading liberal reformers.¹⁶⁴ Author of *Progress and Poverty* and labor party candidate for mayor of New York in

159. See Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51 (Gerard W. Gawalt ed., 1984).

160. See David D. Field, *Industrial Cooperation*, 140 N. AM. REV. 411, 412 (1885).

161. *Id.* at 414.

162. *Id.* at 418.

163. *Id.* at 416.

164. See JOHN L. THOMAS, *ALTERNATIVE AMERICA: HENRY GEORGE, EDWARD BELLAMY, HENRY DEMAREST LLOYD, AND THE ADVERSARY TRADITION* (1983).

the remarkable election of 1884,¹⁶⁵ George questioned Field's reliance on corporate officials' good will to reform industry. Listening to Field expound on the proper limits of government in a revealing public debate, George emphasized that "all [his] earlier thought [like Field's] was in the direction . . . [of the] Democratic Party of the last generation [*i.e.*, the Jacksonians]." He had only concluded reluctantly that achieving Field's and the liberals' ends demanded abandoning their conception of appropriate means. Securing "the full and equal liberty of individuals" and mutual cooperation in an age of "great corporations and combinations" might require that government "regulate" or "carry on" certain businesses and "in larger and larger degree assume co-operative functions."¹⁶⁶ Sternly, Field replied that although he did not believe George to be "one of the Communists," he thought his ideas might entail "spoilation . . . tak[ing] from one man his property and giv[ing] it to another."¹⁶⁷

The prominence of elite attorneys in new liberal circles and the emerging ideology's antimajoritarian bent help explain why in government the new liberalism won most support in the judiciary. Indeed, as David Montgomery has noted, "the first systematic exposition of the new liberalism was an essay on the Constitution."¹⁶⁸ In 1868, Thomas M. Cooley, then chief justice of the Supreme Court of Michigan, published *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the Union*.¹⁶⁹ Cooley's *Treatise* would go through four editions in the next ten years and enjoy greater sales and circulation and more frequent citation than any other treatise of the latter half of the nineteenth century.¹⁷⁰

165. See David Scobey, *Boycotting the Politics Factory: Labor Radicalism and the New York City Mayoral Election of 1884*, 28-30 *RADICAL HIST. REV.* 280 (1984).

166. David D. Field & Henry George, *Land and Taxation: A Conversation*, 141 *N. AM. REV.* 1, 9 (1885).

167. *Id.* at 10.

168. MONTGOMERY, *supra* note 152, at 380.

169. Cooley's political odyssey was richly typical: a radical Jacksonian reformer in his youth; an abolitionist; a Free Soil Party organizer; a Republican Party founder who broke with the Republicans during Grant's administration; and finally an independent "Mugwump," or new liberal reformer and jurist. Like Justice Field's, Cooley's judicial opinions exemplify the highly abstract yet deeply felt fusion of Abolitionist and laissez-faire meanings of "discrimination by the state." He assailed "class legislation" in all its (to him basically identical and equally invidious) forms. *Compare* *People v. Board of Education of Detroit*, 18 Mich. 400 (1869) (denying Board's authority to segregate schools by race), with *People ex rel Detroit and Howell Railroad Co. v. Township Board of Salem*, 20 Mich. 487 (1870) (township may not use tax power to float bonds to subsidize private enterprise). Likewise, Cooley's *Treatise* treated as "discriminatory class legislation" hours laws on behalf of various categories of workers. For thoughtful assessments, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993), and Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 *J. AM. HIST.* 751 (1967).

170. On the influence of Cooley's treatise in addition to *Ambiguities*, see CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL*

In it he wrote that the "sacred right" to private property stood as "the old fundamental law" prior to the Constitution, and through it popular sovereignty was limited. Neither directly nor indirectly could legislatures "take property from one person and transfer it to another."¹⁷¹ With Justice Field's banner of "free labor" in one hand and Cooley's *Treatise* in the other, industrialists and their attorneys would soon proceed to court, contending that "property" implied capital and that "liberty" implied free contract and a free market in labor.

For his part, Cooley was ambivalent. As labor's political demands and initiatives grew more insistent, and the first crop of trial court decisions appeared, striking down several of labor's hard-won reforms,¹⁷² Cooley authored a revealing jeremiad. Having done more than anyone to craft the emerging laissez-faire Constitution, Cooley urged the employer not to stand upon his constitutional right "to control his business in his own way . . . [and] to make his own contracts."¹⁷³ Morally, he argued, the employer's business "is as much that of those who bring to it [their] labor"; moreover, their poverty was "not likely to impress [workers'] minds with the conviction that the business is exclusively . . . their employers'."¹⁷⁴ Unless employers voluntarily shared their "control," labor would continue enlisting behind "radically mischievous" labor legislation. The courts would be obliged to void the reforms, and the outcome would be that "the Constitution itself may come to be regarded by considerable classes as an instrument whose office is to protect the rich"¹⁷⁵ Of course, the prophecy proved only half true. While labor continued to press for legislation struck down by the courts, it did not come to hate "the Constitution itself" but to condemn the new liberals' Constitution as counterfeit.

Christopher Tiedman's contribution to laissez-faire constitutionalism was second only to Cooley's. His *A Treatise on the Limitations of the Police Power in the United States* was first published in 1886;¹⁷⁶ over the next several decades, it was cited in "well over 400 opinions

LAW (1954), and BENJAMIN TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT* (1942).

171. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION* 356-57 (5th ed., 1883).

172. See FORBATH, *supra* note 88.

173. Thomas M. Cooley, *Labor and Capital Before the Law*, 139 N. AM. REV. 503, 511 (1884).

174. COOLEY, *supra* note 171, at 512-14.

175. *Id.* at 514.

176. The *Treatise* was released in a revised two-volume edition in 1900. See CHRISTOPHER G. TIEDEMAN, *A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES* (1900).

of the highest courts of the states."¹⁷⁷ Imbued with the dark fears spawned by the Haymarket bombing, Tiedman's Preface to the 1886 edition of his *Treatise* has cemented his reactionary reputation. "Socialism, Communism, and Anarchism," he wrote, "are rampant throughout the civilized world."¹⁷⁸ Far more stringently than Cooley, Tiedman in his *Treatise* set about protecting private rights against this new "unreasoning" "absolutism" of a democratic majority by confining the exercise of state power to "the detailed enforcement of the legal maxim, which enunciates the fundamental rule of both the human and the natural law, *sic utere tuo, ut alienum non laedas*."¹⁷⁹

The *Treatise* may fairly be called reactionary, but not in the sense that the progressive historiography has depicted it. The main burden of Tiedman's constitutional political economy is not a defense of the emerging corporate elite, but, as Louise Halper has shown, the restoration of an idealized antebellum economy of small holders. The main foes are not only Socialism and Communism but equally the "giant combinations of capital" that threatened to drive "the small tradesman, manufacturer and artisan [the exemplars of Free Labor] . . . to the wall."¹⁸⁰ Here we see the fierce individualism of the laissez-faire Constitution with its egalitarian aspect still intact. For Tiedman, no less than for the era's famous reformers like Henry George or the Populists we are about to study, economic concentration, the incorporation of America, came to seem the most dire threat to the Constitution's promise of equal citizenship — and to that bond between equal rights and equal opportunity at the heart of the laissez-faire Constitution.

A careful reading of the *Treatise* reveals that Tiedman always had contended that the limitations of the police power he set forth "only . . . applied to the regulation of small business, what he called 'trades and professions.' " ¹⁸¹ As for corporations, their "rights and powers . . . depend altogether upon the will of the legislature."¹⁸² More than that, Tiedman came to agree with the Populists that the

177. Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1352 (1990).

178. CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* at vi (1886). "Contemplating . . . the great army of discontents," the Preface continues, "and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority." *Id.* at vii.

179. *Id.* at vii.

180. Halper, *supra* note 177, at 1356.

181. *Id.* at 1368.

182. TIEDEMAN, *supra* note 178, at 354.

Constitution's pledge of equal rights demanded "the conversion of all of these necessary monopolies [railroads, communications, public utilities] into government monopolies."¹⁸³ The "creation of such private monopolies [through incorporation and grants of eminent domain and other powers]," Tiedman argued in the pages of the *Harvard Law Review*, was a "patent and unmistakable violation of our constitutional guaranty of equal privileges and immunities."¹⁸⁴ But the constitutional infirmity of the giant corporation was not limited to railroads and utilities; by the *Treatise's* final edition, Tiedman had concluded that general incorporation statutes themselves trenched on "the constitutional guarantee of equality,"¹⁸⁵ because they constituted state action essential to the very existence of the equality-destroying concentrations of wealth and power all across the economic landscape. Tiedman's laissez-faire Constitution, in other words, came to command restoration of older forms of proprietorship. If a business, like banking or insurance, "cannot be successfully conducted by natural persons without the aid of incorporation, the only method of providing for such businesses, which is consonant with the democratic principles of equality, is by their conversion into government monopolies."¹⁸⁶

Few proponents of laissez-faire constitutionalism followed Tiedman down the heterodox path of government ownership and petty proprietorship, but as we have seen, a surprising number of his fellow liberals, like Cooley and David Dudley Field, shared Tiedman's fear that the corporate order, which they helped fashion and protect, did violence to the republican Constitution. Cooley, Field, and many other high-minded new liberal reformers embraced the idea of cooperative ownership of the tools of industry as a way of rebuilding the material foundations of equal citizenship — the modern equivalent of broadly distributed yeoman property. Of course, as "new liberals," most elite reformers could not abide the use of legislation to help bring about such reforms. Instead, they exhorted captains of industry to address the widening gulf between labor and capital.¹⁸⁷ But these pleadings produced more expiation than reform, and it fell to Gilded Age radicals to imagine a new and pragmatic political economy of citizenship and write the first serious chapter on the significance for an industrialized America of the distributive and enabling dimensions of the Constitution's promise of equal rights.

183. Christopher G. Tiedman, *Government Ownership of Public Utilities*, 16 HARV. L. REV. 476, 483 (1903).

184. *Id.* at 481.

185. 1 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 609-10 (1900).

186. *Id.* at 610.

187. See, e.g., COOLEY, *supra* note 171, at 511-15; Field, *supra* note 160, at 412-420 (1885).

5. Populism and the Social Meaning of Equal Rights

Populism and the People's Party marked an effort to rebuild a "poor man's party" akin to the southern Republicans' on new foundations. Not since the abolitionists had reformers plunged so deeply into constitutional discourse. Throughout the 1890s, Populists produced scores of books and entire weekly and monthly journals whose densely argued pages melded constitutional, political-economic, and sociological arguments, calling for the democratization of a range of national institutions: the banking and currency systems, corporations law, railroad regulation, industrial relations, and the constitutional framework itself. The Populists' account of constitutional crisis was two-fold. "Equal rights" and the very standing of farmers and working people as citizens were in jeopardy because of corporate power, and so too was popular sovereignty; corporate power had combined with an overweening judiciary and corrupt party system to shatter the sovereign people's control of the state and federal governments that were meant to carry out their will.

Like their labor-reform counterparts, Populists held that the "doctrine of equality" was "not limited to a dogma that all men should be made equal before the law."¹⁸⁸ The "real theory" of constitutional equality was this. "[I]n our Constitution the principle is imbedded" of securing "the widest distribution among the people, not only of political power, but of the advantages of wealth, education, and social influence." Only thus could the Nation "maintain the practical equality of all the people."¹⁸⁹ This idea of "equal rights," he insisted, echoing the *Slaughter-House* dissenters, was "the great basic idea of our laws, the very corner-stone of the republican structure."¹⁹⁰ And that structure was at risk. Corporations had arrogated to themselves the tools of industry, transportation, communication, and finance. Concentrating "egregious wealth in the hands of the few at the cost of creating a proportionate poverty among the many," corporations wielded their power to destroy the "democratic social fabric." This "departure from the fundamental intent and purpose of our republican system," however, was no sign of the "failure of the constitution," but of the "failure of this Nation to enforce" it.¹⁹¹

188. Jas. F. Hudson, *Railways: Their Uses and Abuses, and Their Effect Upon Republican Institutions and Protective Industries*, NAT'L ECONOMIST, May 11, 1889, at 113.

189. *Id.* at 113, 114.

190. Jas. F. Hudson, *Railways: Their Uses and Abuses, and their Effect Upon Republican Institutions and Productive Industries*, No. 2, NAT'L ECONOMIST, May 18, 1889, at 137.

191. *Id.* See also *Some Questions Answered*, NAT'L ECONOMIST, June 22, 1889, at 214-15 (arguing that corporate monopolies on "any field of labor" abridged the equal rights of citizens and were "consequently unconstitutional"); G. Campbell, *The Early History of the Farmers' Alliance*, 2 THE ADVOCATE 1, 2 (Topeka, Kansas) (April 8, 1891) (claiming that private railroad and banking corporations usurp functions assigned by Constitution to government).

a. Republican Congressmen and Populists Compared

The claim that the rise of the large-scale corporation marked a constitutional crisis was mooted inside Congress as well. Like the agrarian radicals, Senator Sherman claimed that the concentration of power in the new corporations was "fast producing [a] condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command."¹⁹² Justice Field's "right of free labor" echoed here as well: "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms. . . . This is industrial liberty and lies at the foundation of the equality of all rights and privileges."¹⁹³ Because corporate combinations were destroying the "industrial liberty of the citizens," Congress was obliged to act.¹⁹⁴

Of course, finding that Sherman shared this language of constitutional politics in common with the era's radicals is not to imply their remedies for the crisis were the same. Sherman hoped to reinvigorate the distributive ideal of broadly diffused property through rigorous application of restraint of trade doctrine. He had no sympathy for the Populists' claim that "industrial liberty" and the "right of free labor" demanded nationalizing the railroads and dismantling centralized private banking, nor for their labor planks of the eight-hour day and an end to the labor injunction.¹⁹⁵ Sherman had a much more generous view than the Court of Congress's authority to protect "industrial liberty."¹⁹⁶ But with the Court, Republican moderates like Sherman hewed to the central tenets of late-nineteenth-century liberal and liberal-legal orthodoxy — its commitment to a neutral, nonredistributive state and a neutral, self-regulating market order. They saw the giant trusts and combinations as both unnatural and illegitimate. At the same time, however, they saw the "essential rights and privileges" conferred by corporate charters as property rights, which could not be taken "under pretence of regulation" or in the name of redistributing economic power.¹⁹⁷

192. 21 CONG. REC. 2461 (1890) (remarks of Sen. Sherman).

193. *Id.* at 2457.

194. *Id.*; see also 21 CONG. REC. 1764-71, 2460-65.

195. See IRWIN UNGER, *THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879*, at 322-34 (1964).

196. See HANS THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1954).

197. See HORWITZ, *supra* note 157, at 65-108 (1992).

The constitutional dimensions of the antitrust crusade also loomed large in state court-houses and legislatures. State constitutions often contained detailed antitrust provisions, which lawmakers and state attorneys linked to more general guarantees of "equal rights." Thus, for example, in a *quo warranto* suit against the Chicago Gas Trust Company, Illinois's attorney general argued that the state's corporation law did not authorize defendant's holding stock in and thereby thwarting competition among the city's several gas companies. He defended his interpretation of the general incorporation statute by invoking the state's

The Populists, for their part, melded an older theory of the corporation — that it was an artificial creature whose rights could be extinguished when it ceased to perform a public function¹⁹⁸ — with a new concept of Congress's affirmative duties to regulate the economy for the "general welfare" that would bear fruit in the New Dealers' "general welfare Constitution" decades later. They accused the courts of corrupting both the Constitution and the common law by eroding the common law's many constraints on corporate expansion and endowing corporations with personhood and property rights that stymied regulation.¹⁹⁹ Moreover, as we will see, Populists argued that corporations were being allowed and even authorized to usurp powers the Constitution assigned to Congress and forbade to these new private actors.

Combination, Populists acknowledged, was an element of the age; it was "irresistible."²⁰⁰ The *New York Sun* was not wrong when it announced that "these hayseed socialists" were "disposed to make the experiment of consolidating their interests [through large-scale cooperation underwritten by public credit] after the fashion which they so bitterly denounce in the case of manufacturing [corporations and trusts]."²⁰¹ But, while corporate lawyers argued for the unique efficiency of corporate consolidations, Populists argued that there was no natural

Constitution. "To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business . . . is in contravention of the spirit, if not the letter of the constitution" — the spirit of its "equal rights" provisions and the letter of its antitrust norms. See 1890 ILL. ATT'Y GEN. BIENNIÉL REP. 40. Whether one turns to the legislative committee that authored New York's stringent 1897 antitrust measures, or to Missouri's celebrated 1905 antitrust suit against Standard Oil — both chronicled in James May's important work on state-level antitrust history — one finds the same doctrine of constitutional political economy, knitting "political liberty" and industrial freedom, "equal rights" and "equal opportunities." See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 336 (1989).

198. For an excellent discussion of the development of the legal concept of the corporation from the artificial to the natural entity idea, see HORWITZ, *supra* note 197, at 9-33, 65-109.

199. See, e.g., JAMES DAVIS, A POLITICAL REVELATION 134-38 (1894); S.M. JELLEY, THE VOICE OF LABOR 45-51 (1893).

200. Henry D. Lloyd, Notebook quoted in CHESTER MCARTHUR DESTLER, HENRY DEMAREST LLOYD AND THE EMPIRE OF REFORM 129 (1963).

201. *The Press and the Sub-Treasury Plan*, NAT'L ECONOMIST, Mar. 22, 1890, at 1. Just as industrialists sought to use combination to gain greater control over prices, create economies of scale, and avert "ruinous competition," so did the Populist farmers. So, for example, the dirt farmers of Texas joined the Populist Alliance in the hundreds of thousands, and, for a brief period, their state-wide marketing and purchasing co-op created a real hope of breaking free of the crop lien system. Using cooperative trade committees and warehouses, the poor cotton growers centralized their sales in the Dallas Exchange and dealt directly with the world market, instead of with local cotton buyers and furnishing agents. Likewise, by creating cooperative warehouses they strove to hold crops off the market when prices were low. State- and even region-wide systems of cooperative stores, elevators, warehouses, gins, insurance and purchasing agencies, as well as mutual marketing of products ranging from citrus to tobacco to livestock, all formed part of the Alliance program stretching from Florida to Kansas to Texas and beyond. See LAWRENCE GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA 125-46 (1976).

path for combination to follow, no natural laws dictating the course of commercial and economic development. Populist journalists like Henry Demarest Lloyd proved keen observers of corporate consolidation in the nation's courts and shrewd critics of claims that the modifications of the doctrine attorneys sought and judges granted were dictated by technical imperatives and economic laws. Rather, Lloyd argued, the legal and organizational changes championed by corporate consolidators were driven by the latter's particular group interests. In some cases, the changes worked to provide economies of scale and consumer savings. In other cases, they only profited the consolidators who fashioned them; but never were they the only efficient avenues of industrial change, and other workable alternatives promised more — materially and morally — for the broader citizenry.²⁰²

Another leading Populist lecturer explained that “the development of corporations under our changing laws has created especial advantages for the accumulation of property in the hands of a favored class . . . and increased the[ir] political and social power.” Yet, the very purpose of “inscribing in the Constitution the principle of equality” was “to secure a general diffusion of wealth and to maintain the practical equality of all the people.”²⁰³ Thus, it was “vital[ly] necess[ary to] discover[] exactly where and how the constitutional principle was violated, and restor[e] the supremacy of republican doctrine.”²⁰⁴ As federal courts struck down popular state railroad regulatory commissions and statutory controls on “the exactions of our own domestic corporations,” Populists like Oregon governor Sylvester Penneyer complained of one such violation of the “republican” Constitution: the “monstrous doctrine” that “sovereignty can be peddled out to corporations and frittered away.”²⁰⁵ In Congress, Populist Senator Kenna explained that

202. See HENRY D. LLOYD, *WEALTH AGAINST COMMONWEALTH* 285-312, 420-30 (1894) (using case studies to argue that various forms of ownership and control of large-scale industry equally possible and municipal ownership of utilities more efficient from consumers' perspective than private ownership; similarly comparing efficiency of giant corporation versus smaller-scale oil producer). See also GERALD BERK, *ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER, 1865-1917* (1994) which chronicles competing strategies of industrial development — a “regional republican” strategy favored by Populists and other reformers, including Thomas Cooley as first head of the Interstate Commerce Commission, versus a nationalizing “corporate liberal” strategy promoted by the corporate elite, Republican politicians, and most of the federal bench. Along with contemporaries like Lloyd, Berk argues that the outcome of the contests was determined largely not by technology or economic efficiency so much as by law and politics. Berk highlights the role of federal fiscal policy and of judicial decisions changing the ground rules of corporations law to favor large-scale corporate consolidators.

203. Jas. F. Hudson, *Railways: Their Uses and Abuses, and Their Effect Upon Republican Institutions and Productive Industries*, *NAT'L ECONOMIST*, May 11, 1889, at 113, 114.

204. *Id.* at 114.

205. Sylvester Penneyer, Speech at Pendleton, Oregon (May 9, 1888) (on file with Sylvester Penneyer Scrapbook, University of Oregon, Eugene, Oregon), quoted in Margaret K. Holden, *Legal Theory, Political Culture and Public Policy: The Rise and Fall of Oregon Populism, 1865-1896*, at 389 (manuscript on file with author) [hereinafter Speech of Governor Pen-

railroad regulation "was a reassumption by Congress of a power to regulate interstate commerce which the Constitution confers upon Congress, and which the railroads have usurped and absorbed." "Government cannot surrender," he explained, in terms Thomas Jefferson's friend Judge Roane of the Virginia Supreme Court would have understood,²⁰⁶ "the subordination of its own creations to public purposes."²⁰⁷ Populist presidential candidate Weaver generalized the point. With the rise of the "trusts," key functions of government — regulating interstate commerce and transportation, issuing and controlling currency — had been given over to private corporations and "leased to associated speculators." These were constitutional usurpations. Not only did the Constitution authorize Congress to perform these functions, but when otherwise Congress's powers were exercised by private actors in a fashion that violated the common good — dispossessing farmers and reducing wage earners to industrial slavery — it was "the Constitutional duty of Congress" to act.²⁰⁸

"Cyclone" Davis, one of Texas Populism's favorite orators, authored a book-length constitutional indictment of corporate "usurpation," a "communism of capital... unknown to our Constitution."²⁰⁹ Often carrying a dozen volumes of Jefferson to the podium, Davis, like many Southern Populists, struggled to reconcile an inherited strict constructionism with Populism's vision of the uses of national power. Davis returned to the founding era to recover for leery Southerners the nationalizing thrust of the framers' political-economic outlook. In Madison's Papers he found the report of the 1786 Annapolis convention highlighting the need for a new national " 'power of regulating trade . . . of such comprehensive extent . . . that to give it efficacy . . . may require a correspondent adjustment of other parts of the Federal system.' " "As James Madison and Thomas Jefferson tell us, the old Federal government was insufficient . . . and when a National convention met[,] . . . they found [their task was] impossible . . . without giving the government more power, a power . . . to act directly on the people and not through the States." Turning to constitutional text, Davis abjured the idea "that Congress can do anything and everything it chooses to think would secure the purposes named in the

noyer]; see also Harry Tracey, *Some Questions About "Vested Rights" Answered*, NAT'L ECONOMIST, June 22, 1891, at 214-15. Law students today are familiar with an earlier unhappy encounter between Pennoyer and the federal judiciary. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

206. See, e.g., *Currie's Administrators v. Mutual Assurance Soc'y*, 14 Va. 315 (1809) (Roane, J.).

207. 16 CONG. REC. 1208 (1885).

208. See JAMES B. WEAVER, *A CALL TO ACTION* 264-65 (1892).

209. JAMES H. DAVIS, *A POLITICAL REVELATION* 97 (1894).

[P]reamble . . . ”²¹⁰ Congress must, however, exercise its enumerated powers to fulfill the Preamble’s purposes. Instead, Davis charged, in its exercise of the commerce power — “this power that served as the mainspring to build up our government . . . and gave birth to this Constitution”²¹¹ — Congress has scorned the general welfare. “Congress allows, yea even charters, licenses a lot of cold, faithless, soulless, heartless, merciless corporations, to stand between the government and the people, and usurp the blessings conferred by this power, forcing the people to look to these conscienceless beings for money and transportation to carry on their commerce.”²¹² Allowing “monopoly in the . . . distribution of money” and “monopoly in transportation” fostered “monopoly in the distribution of wealth”; so doing Congress had abandoned the general welfare and destroyed equality before the law.²¹³ Threading his way through text and history to precedent, Davis conjured with the spirit of Jefferson’s nemesis, lending Marshall’s famous invocation of a national People a Populist punch: “[I]n every one of these powers . . . it is the duty of Congress *to act directly on the people and for the people* . . . not through the States . . . *much less through corporations or syndicates*.”²¹⁴ “[I]n every power [the United States] is a Nation and is expected to act through its own officers, and must . . . act directly on the people. To ‘farm out’ or delegate its powers” by authorizing virtually unfettered corporate control of the lines of commerce and finance and the world of industry was to betray the Constitution.²¹⁵

Of course, implementing the Populists’ “positive” Constitution demanded amending the Constitution to “free [it] from the courts.” Appropriately enough, agrarian and labor Antimonopolists decried the judiciary’s “asserted Monopoly on interpreting the Constitution,” for which “no warrant can be found in the Constitution itself.” By amending the Constitution, they sought to reclaim the “Power of the Co-Ordinate Branches and of the Sovereign People to render their own Interpretations.”²¹⁶ The constitutional amendments they championed to “tame” the judiciary and to restore popular sovereignty included election of federal and state judges; abolition or curtailment of judicial review of various classes of reform statutes; direct election of senators;

210. *Id.* at 70.

211. *Id.* at 72.

212. *Id.* at 73.

213. *Id.* at 15.

214. *Id.* at 70-71.

215. *Id.* at 82.

216. Speech of Governor Pennoyer, *supra* note 205. For extended discussions of the right and duty of coordinate branches to make and enforce their own interpretations of the Constitution, see DAVIS, *supra* note 199, at 23-67 (1893); JELLEY, *supra* note 199, at 26-63; and WEAVER, *supra* note 208, at 73-77, 134-35.

and provisions for the initiative, referendum, and recall in state constitutions.²¹⁷ Then, they could set about lawmaking to restore and renew farmers' and workers' citizenship rights. Substantively, this meant freeing the "colored laborer with the white" one from the "iron rule of the Money power" through public credit and support for cooperative enterprise; it meant nationalizing the railways; it meant ensuring for industrial workers the "right to a remunerative job" through public works and countercyclical spending and, through an end to the repressive common law restraints on workers' collective action and the savagery of "government by injunction," encouraging robust unions and industrial cooperation; and through these agencies, finally, it meant enabling workers to exercise the rights and responsibilities of control over productive property.²¹⁸

Thus, Gilded Age labor and agrarian spokespeople rejected the courts' view that constitutional liberties were only "negative." Theirs was a "positive" constitutional order, although they envisioned not welfare entitlements, but a "Reconstructed" political economy as the vehicle for securing the constitutional norms of decent livelihoods, independence, responsibility, and dignifying work.

b. African Americans: Populism and After

Southern blacks continued to vote and form political associations for virtually two decades after Reconstruction. The rights talk of the Gilded Age black labor and agrarian reformers "wove together the rhetoric of 'equal rights' and 'race pride.'" ²¹⁹ They continued to rage against Klan violence and forcible exclusion from skilled callings, but they also struck more expansive chords, drawing out the links between the labor-populist reform program and their Reconstruction-bred understanding of equal citizenship: a decent living and with it, dignity, autonomy, and equal standing in civil society and polity, secured by something beyond formal equality — enabling rights and resources, accessible land and credit, and new forms of civic association linking market and polity.²²⁰

217. The best and most thorough account of these campaigns is found in WILLIAM ROSS, *A MUTED FURY* (1994).

218. See Thomas E. Watson, *The People's Party Paper* (1892), reprinted in part in *THE POPULIST MIND* 374-75 (Norman Pollack ed., 1967). The "right to a remunerative job" appears in, *inter alia*, Chris Brown, *The Causes of Financial Crashes, Labor Strikes, and Tramps*, *AMERICAN NONCONFORMIST* and *KANSAS INDUST. LIBERATOR*, Apr. 7, 1887, at 1; *Hard Times*, *SO. MERCURY*, Apr. 11, 1889, at 1; *The Early History of the Farmer's Alliance*, 2 *ADVOCATE* 1, Apr. 15, 1891 (Topeka, Kansas); *Which Shall Control, Labor or Capital?* 7 *NAT'L ECONOMIST* 361, 362 (1892). See also NORMAN POLLACK, *THE JUST POLITY: POPULISM, LAW, AND HUMAN WELFARE* 14 (1987) (finding in Populist accounts of political economy and fundamental rights: "an inclusive entitlement to labor (and . . . a political economy organized to provide work for all who are willing)").

219. RACHLEFF, *supra* note 143, at 145.

220. See RACHLEFF, *supra* note 143; see also FONER, *supra* note 104; 3 *THE BLACK*

Another concerted wave of terror, violence, and massive disenfranchisement, unopposed by federal authority, stilled these voices. By the turn of the century, the very words "equality" and "equal rights" appeared less and less in the Black press, and the most insistent claim for equal protection of the laws was no longer against discrimination in credit, schooling, street cars, or public accommodations. It was against the denial of bare physical protection from the lynch mob, white violence, and a rule of terror condoned by local and state officialdom.²²¹

Waving the banner of white solidarity, the "Redeemers" yoked their campaign of fraud and violence against black voting to an ideological campaign against the fragile inter-racial alliance at the heart of southern Populism. By century's end, southern Populism's white leaders and constituents had largely succumbed. The People's Party lived on into the 1900s, lapsing into vile racism and supporting an end to African American suffrage. The Georgia Populist Congressman Tom Watson, who had stood firm against armed lynch mobs in the name of interracial solidarity and black suffrage, bitterly concluded that agrarian reform demanded black disenfranchisement: southern whites couldn't divide along class lines until they united against blacks.

The campaign to "redeem" the South into which a jaundiced, race-baited Watson enlisted was an elite-led affair, prompted by the threat of a poor people's party that joined tenants, sharecroppers, and mine and mill workers on both sides of the color line. The Redeemers did not disenfranchise poor blacks alone; to defuse Populism, they also aimed to strip the vote from lower class whites, and they succeeded handsomely. The poll tax proved a defining feature of the Jim Crow order forged around the turn of the century, and in many southern states far more whites than blacks — a majority of white voters — were barred from the ballot box by the tax. Combined with the all-white primary and racial intimidation, which took precedence in blocking black voter participation, the poll tax would operate during the New Deal era to deprive liberal Democrats of their natural constituency among hard-hit southerners of both races. Meanwhile, the codification of white supremacy and widespread disenfranchisement secured a closed, one-party system dominated by the landholding elites of the Black Belt and by New South entrepreneurs and industrialists, two groups joined in their determination to preserve a labor force that was poorly educated, racially divided, and "schooled in dependency."²²²

WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT (Phillip S. Foner & Ronald L. Lewis eds., 1978).

221. See CELESTE M. CONDIT & JOHN L. LUCAITES, CRAFTING EQUALITY: AMERICA'S ANGLO-AFRICAN WORD (1993).

222. ARTHUR RAPER, PREFACE TO PEASANTRY: A TALE OF TWO BLACK BELT COUNTIES 4 (1936); see also J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974); ARTHUR F. RAPER & IRAD. REID, SHARECROPPERS ALL (1941).

The U.S. Supreme Court played an important part in this process, almost strangling the Equal Protection Clause in its infancy, striking down or narrowly reading various civil rights acts, and confirming that the constitutional guarantees of Black citizenship would not impede Jim Crow, Klan violence, and mass disenfranchisement through the poll tax and other devices.²²³ The Court thus lent its sanction to the reconstituted caste system of the South; and the New South thereby secured its special status as a distinct society within the Union's new constitutional order. The Court's bad faith, shared by the other branches, led to a fatal anomaly in the constitutional revolution we are about to examine, producing a reactionary core, the Solid South, at the heart of the New Deal liberal coalition.

6. *Social Citizenship in the Early Twentieth Century*

The Progressives. As the Populist moment passed, the movement's commitment to multiracial democracy — always fragile and ambivalent on the part of white Populists — became a dissenting tradition within the tradition of dissent, shunted out of the mainstream of reform ideals by the increasingly virulent racism of white America in the first decades of the twentieth century. However, the Populists' vision of economic justice and an alternative industrial America continued to shape mainstream reform discourse. Progressive thinkers like Louis Brandeis and John Dewey carried these aspects of Gilded Age radicalism into this century. What the Populists and labor radicals did for agrarian and working class movements, Progressive thinkers like these did for their era's middle-class and elite reformers: they interpreted the emergence of big business and corporate capitalism in terms of an inherited democratic constitutionalism, and limned an alternative political economy of work and citizenship. Their translations of the social citizenship tradition were various, but, in general, they pushed that tradition toward a greater reliance on state-building, administration, and social insurance, while still holding out the prospect of a more democratic civil society.

What most separated Progressives from Gilded Age radicals was the death of racial liberalism among white reformers. Throughout the nation white Progressives concurred, or at least acquiesced without protest, in the soured Tom Watson's conclusion: social reform for white southerners depended on black disenfranchisement and segregation. From the perspective of southern Progressive history, "the great race settlement of 1890-1910 . . . was itself the seminal 'progressive' reform of the era."²²⁴ The plausibility of this outlook on the national scene hinged

223. See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Harris*, 106 U.S. 629 (1882); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1895); *Williams v. Mississippi*, 170 U.S. 213 (1898). A classic account of the Court's role is found in C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 69-72 (2d ed. 1966).

224. See JACK KIRBY, *DARKNESS AT THE DAWNING: RACE AND REFORM IN THE PROG-*

on a revaluation of Reconstruction, a new narrative, which the new social science and historical professions helped to frame. Reconstruction became a wildly misguided and self-regarding experiment on the part of Northern reform. A backward people, blacks had "suffered much but benefited more" under the civilizing "tutelage" of slavery. Reconstruction interrupted the civilizing process, duping the "race" with delusions of political grandeur beyond its reach. Former slaveholders had been obliged to "redeem" the South from governmental corruption and the madness of interracial equality. Disenfranchisement of a "backward people" was a grim but "necessary reform." Now the responsibility of Progressives was to "persuade the white masses" that benign segregation was "better than brutality."²²⁵ The gradual uplift of the "Negro" in "separate and special" institutions would lead him toward "industrial efficiency" without injuring the betterment of white farmers and workers.²²⁶

To this tidily evolutionary tale, the Progressive historians added their "economic interpretation" of the Radical Republican project — not a grand redefinition of "We, the People" but a shrewd capitalist scheme to clinch national policymaking for northern capital and open the South to northern industrial development and exploitation.²²⁷

Thus debunked, Reconstruction could be set aside. Professor of political science at turn-of-the-century Princeton, Woodrow Wilson wrote in his American history textbook that the compromise of 1877 meant that the "supremacy of the white people was henceforth assured in the administration of the southern States," and the "Union was now restored . . . to normal conditions of government." With the "abandonment of federal interference with elections, the 'southern question' fortunately lost its prominence" in national politics, to be replaced by the great Progressive issues of the day: "the reform of the civil service, the reduction of tariff duties, the control of corporations, . . . and the purifi-

RESSIVE SOUTH 4 (1972); C. VANN WOODWARD, TOM WATSON: AGRARIAN REBEL (1938). A standard bearer of "advanced" Progressive thinking in the nation's capital, the *New Republic* bluntly declared that constitutional challenges to "grandfather clauses" and other disenfranchising measures in the South were folly. "Whatever happens, the whites in the South will not allow the negroes to vote." What possible good could come from court judgments whose only possibility of enforcement would require "the actual presence at the polls throughout the South of national policemen"? See Editorial, *THE NEW REPUBLIC* 186 (June 26, 1915).

225. KIRBY, *supra* note 224, at 66-67.

226. *Id.* at 67. Hilary Herbert, a Progressive Alabaman novelist and politico, wrote in the *Atlantic Monthly*: Reconstruction era "Negro" leaders "deserted the cotton field for the field of politics The consequences of the mistake then made have come down to this day." "[N]egro suffrage . . . made unavoidable in the South the color line." Happily, "negro" educators today on their side of "the color line" know better, valuing industrial "usefulness" over "political strife." Hilary Herbert, *The Conditions of the Reconstruction Problem*, 87 *ATLANTIC MONTHLY* 145, 156-57 (1901).

227. See CHARLES BEARD, *THE RISE OF AMERICAN CIVILIZATION* (1933); RICHARD HOFSTADER, *THE PROGRESSIVE HISTORIANS*: TURNER, BEARD, PARRINGTON (1968); KIRBY, *supra* note 224, at 89-107.

cation of the ballot." Wilson would address these Progressive concerns in the White House, where, as the first southern occupant since the Civil War, his administration brought Jim Crow to the capital and the federal bureaucracy.²²⁸

Standard accounts paint a different gulf between Progressive era reformers and their Gilded Age predecessors. They emphasize the Progressives' accommodation to corporate dominance, their fondness for managerial and administrative solutions to social problems, and their role in recasting American "freedom" to mean abundance and security in the sphere of consumption, not dignity and independence in the sphere of production. The Progressives' vision of reform, the story goes, substituted a new consumerist welfare state for the old producerist commonwealth. They traded the ideal of democracy for that of administration.²²⁹

There is truth to the standard account, but its classically republican tale of change and decay paints over important continuities. True, the Progressives added state-based social provision to the rights contended for by the social citizenship tradition. Their administrative-state-building ambitions were foreign to most Gilded Age reformers. But even the most modernizing of Progressives, like Herbert Croly, were engaged with the political economy of citizenship. "How," Croly repeatedly asked, "can the wage-earners obtain an amount or a degree of economic independence analogous to that upon which the pioneer democrat could count?" Social insurance and social legislation were necessary, but no substitute for transforming "the wage system itself . . . in the interest of an industrial self-governing democracy . . ." This was essential, in Croly's account, to "convert[ing] civil and political liberty" under the "old Constitution" into their "socially desirable consummation."²³⁰

Like John Dewey, Croly's critique of the "old Constitution" extended to constitutionalism in general. Only after witnessing war-time repression did either find any enduring value in rights. Throughout

228. See WOODROW WILSON, *DIVISION AND REUNION, 1829-1889*, at 286-87, 290 (1893).

229. See e.g., ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* (1991); LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1978); 2 GUTMAN, *supra* note 118; CHRISTOPHER LASCH, *THE NEW RADICALISM IN AMERICA, 1889-1963: THE INTELLECTUAL AS SOCIAL TYPE* (1967); CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* (1991); MONTGOMERY, *supra* note 118; ROBERT H. WIEBE, *THE SEARCH FOR ORDER* (1967).

230. HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 215, 380, 384 (1914). On Progressive efforts at creating state-based social insurance, see ARTHUR LINK & RICHARD MCCORMICK, *PROGRESSIVISM* (1983); UDO SAULTER, *THREE CHEERS FOR THE UNEMPLOYED: GOVERNMENT AND UNEMPLOYMENT BEFORE THE NEW DEAL* (1991); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); DAVID P. THELEN, *THE NEW CITIZENSHIP: THE ORIGINS OF PROGRESSIVISM IN WISCONSIN, 1885-1900* (1972); DAVID P. THELEN, ROBERT M. LA FOLLETTE AND THE INSURGENT SPIRIT (1976).

the Progressive Era, one would have searched in vain for rights talk on the part of these thinkers; to them rights seemed destined to ossify into impediments to practical change. Constitutionalism was just what the laissez-faire jurists insisted: a limit on the democracy's capacity to reconstruct its social environment by redistributive means. Yet even such a thorough-going anticonstitutionalist as Croly framed the case for reform within a constitutional narrative and interpretation of the founding. Indeed, he developed his theory of "Progressive Democracy" around the contrast and continuities between a court-dominated mode of constitutional self-definition and self-restraint and a more democratic and participatory one.

"The American democracy," Croly argued, could accept "in the beginning an inaccessible body of [judge-made] Law," and the judiciary's "uncontrollable" sway over the political economy, because "the Law promised property to all."²³¹ This was the Constitution's "original promise": economic opportunity and a republic of freeholders secured by limited government and equal rights to own and hold property; and this promise made the Constitution a "working compromise" between the "pioneer democrat" and "the monarchy of the Law and an aristocracy of the robe."²³² In industrial America, however, the ideals of liberty and equality that were "wrought into our constitutions" no longer "consist[ed] in the specific formulation of legal and economic individualism" defended by the courts. Interpreting and safeguarding these constitutional ideals now properly belonged to the active law making and law-administering branches watched over by an active citizenry.²³³ This was warranted on grounds of popular sovereignty; it also had a compelling functional justification. Because securing the "socially desirable consummation" of the old liberties demanded data gathering, complex and necessarily fallible choices, and expert policymaking, the courts' authority to interpret and apply the norms of liberty and equality had to give way. Ending the "benevolent monarchy" of the courts was not chiefly a matter of institutional competence, however. For Croly, the main argument for a more democratic form of self-government and self-restraint was "educational." "Have the American people been prepared by the kingdom of the Law," he asked, for an "increase in popular political responsibility? Or is it just as necessary as ever to subordinate the active expression of the prevailing popular will to test . . . applied by an aristocracy of lawyers?"²³⁴ The Framers, Croly acknowledged, "were not seeking to establish a system of popular political education." But the "monarchy of the Constitution" proved "educational

231. CROLY, *supra* note 230, at 125.

232. *Id.* at 46, 58, 125, 215.

233. *See id.* at 208-09.

234. *Id.* at 144.

in spite of itself.”²³⁵ With “its assistance the American people have become a nation.” Meanwhile, the “American people were learning quite as much from their own unofficial experiments in democracy as they were from official instruction in the Word” of the law.²³⁶ They were “suffering,” however, “from the division of purpose between their democracy and their Law,” allowing the latter to substitute for any profound popular regard for vision, principle, and collective self-restraint.²³⁷ Nonetheless, broader literacy, participation in party politics and local self-government, and habits of “orderly procedure . . . wrought into the American national consciousness” over generations, all suggested an “increasing political maturity.”²³⁸ For “popular political education” to advance much further, the citizenry had to assume more of the “duty of thinking over their political system,” their basic principles, and their “fundamental political problems.”²³⁹

Thus, in good Deweyan fashion, Croly argued that “[p]rogressive democracy must reject the finality of [the] specific formulations” of “states rights” and “individual rights” offered up by the courts.²⁴⁰ The problem was not the practice of applying the ideals of constitutional liberty and equality to challenged laws and institutional arrangements; that “would always be binding and liberating.” The problem was “the sacredness attached to a particular method of applying the ideal.”²⁴¹ Instead, Croly evoked a more responsible and active exercise of character-forming collective deliberation and choice, mindful of the principles that underpinned the courts’ “specific formulations,” and subject, therefore, to “severe limitations” on majority will, but only by dint of citizens’ own self-reflective deliberations and self-imposed constraints.²⁴² Whether the pragmatist “progressive” had the better of the legalist “conservative” in this debate was not solely a matter of empirical observation or reasoned argument; for the “progressive” case admittedly rested also on a “democratic faith.”²⁴³ The faith may have been easier come by because the imagined field of action was chiefly that of economic relations — not civil liberties, about which Croly, like most leading Progressives, was largely indifferent, nor race relations, about which they nursed a callous and bigoted notion of evolutionary “progress.” Perhaps, as pragmatists, some of them would not have been surprised to learn that

235. *Id.* at 145-46.

236. *Id.* at 146-47.

237. *Id.* at 158.

238. *Id.* at 144, 210-11.

239. *Id.* at 150.

240. *Id.* at 240.

241. *Id.* at 209.

242. *Id.* at 151.

243. *Id.* at 199.

theirs has proved a partial and one-sided view of the democratic resources of rights, "higher law," and judicial authority.

In any case, creating the conditions for the citizenry's playing an active role in constitutional politics demanded first of all amending the amendment process. The "amending clause of the Constitution" was "unquestionably the most formidable legal obstacle in the path of progressive democratic fulfillment." Making it "much more easily worked" would go a long way toward converting our "semi-democratic constitutionalism" into genuine "constitutional democracy."²⁴⁴ Then citizens could begin to change the constitutional text and structure to accommodate the active branches' role in instituting the new social meanings of the old liberties.

Louis Brandeis had no use for Croly's centralizing, nationalizing impulses. Like Croly, Brandeis was a stern critic of the laissez-faire Constitution and classical legal orthodoxy, but his critique demanded an enlightened rather than marginalized constitutional judiciary, one that still enforced tempered norms of federalism and separation of powers. But for Brandeis too, the nation's industrial and economic orders were fraught with constitutional infirmities. The key object of law and government, Brandeis held, in good republican fashion, was sustaining a politically and economically independent citizenry. The Constitution must safeguard not only a framework of government, but also the project of fitting citizens for "their task" of self-rule.²⁴⁵

Constitutional scholars have noted aspects of this republican vision in Brandeis's First Amendment jurisprudence²⁴⁶ and in his famous views on federalism.²⁴⁷ Less prominent in Brandeis's judicial opinions, but more central to his constitutional vision, was the ambitious conception of industrial and economic democracy forged during his career as a reformer. No more than his grittier counterparts in the labor movement did Brandeis expect the courts to enact this vision, but in this era, that took nothing away from its constitutional moorings. Most Progressive reformers, even those as different as Croly and Brandeis, agreed that their time was one of constitutional crisis. The courts, they said, were

244. *Id.* at 230.

245. LOUIS D. BRANDEIS, *True Americanism: Fourth of July Oration, 1915*, in BUSINESS — A PROFESSION 364, 366 (1933) [hereinafter BRANDEIS, *True Americanism*]; see also Louis Brandeis, *How Far Have We Come on the Road to Industrial Democracy? — An Interview*, LA FOLLETTE'S WKLY. MAG., May 24, 1913, reprinted in LOUIS D. BRANDEIS, THE CURSE OF BIGNESS 43-47 (1934) [hereinafter BRANDEIS, THE CURSE OF BIGNESS]; UNITED STATES COMM. ON INDUSTRIAL RELATIONS, S. DOC. NO. 26-6936, at 7657-81 (1915) (testimony of Justice Brandeis) [hereinafter Brandeis's Testimony before Comm. On Industrial Relations], reprinted in THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 380-385 (Alfred Lief ed., 1930), and in BRANDEIS, THE CURSE OF BIGNESS, *supra*, at 70-95.

246. See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

247. See, e.g., PHILLIPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 172-73, 395 (1984).

defending one constitutional order — “static,” “formal,” “authoritarian,” “aristocratical,” or “monarchical” — and the reformers were struggling to advance another — “evolving,” “experimental,” “democratic.”²⁴⁸ Today, we remember the restraint the Progressives demanded of the judiciary.²⁴⁹ And we forget the affirmative obligations their vision laid on the other branches of government. They sought not the divorce of constitutional discourse from political economy, but the replacement of the judiciary by “democratic” state actors as the nation’s “authoritative” constitutional political economists.²⁵⁰

With this new dispensation, all agreed, there would come an end to the use of common law rules and entitlements to define the substantive content of constitutional guarantees. Thus, in a widely published 1915 address at Boston’s Faneuil Hall, Brandeis evoked the possibility of interpreting “those rights which our Constitution guarantees — the rights to life, liberty and the pursuit of happiness” in terms of the social and economic conditions for their meaningful exercise in modern America. All Americans “must have a reasonable income” and regular employment; “they must have health and leisure,” decent “working conditions,” and “some system of social insurance.” However, the “essentials of American citizenship are not satisfied by supplying merely the material needs . . . of the worker.”²⁵¹ There could be no more “political democracy” in contemporary America, Brandeis told the U.S. Industrial Commission that same year, without “industrial democracy,” without workers’ “participating in the [business] decisions” of their firms as to “how the business shall be run.”²⁵² Only by bringing constitutional democracy into industry could the U.S. produce not only goods but citizens.²⁵³

248. A compelling example of the constitutional rhetoric drawing these contrasts is CROLEY, *supra* note 230, at 132-65. For an appreciative recent assessment of Progressive jurisprudence, including Croley’s withering critique of the court’s constitutionalism, see ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* (1994).

249. See Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AMER. HIST. 125, 132-38 (1992).

250. See COMMONS, *supra* note 9, at 7.

251. BRANDEIS, *True Americanism*, *supra* note 245, at 367-68, 370.

252. Brandeis’s Testimony before Comm. on Industrial Relations, *supra* note 245, at 7657-81, reprinted in BRANDEIS, *THE CURSE OF BIGNESS*, *supra* note 245, at 73-74.

253. Like Croley and Brandeis, virtually every Progressive-era industrial reformer and reform organization relied on the language of democratic constitutionalism. Whether they were championing collective bargaining between employers and trade unions, or other reform visions — government ownership, producers’ cooperatives, labor copartnership — all employed some version of the argument that “arbitrary government” and “industrial feudalism” must be abolished, workers’ citizenship acknowledged, and industry “constitutionalized.” See, e.g., MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, at 136-74 (1970); WALTER E. WEYL, *THE NEW DEMOCRACY* 164 (1912); Howell John Harris, *Industrial Democracy and Liberal Capitalism, 1890-1925*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 43 (Nelson Lichtenstein & Howell John Harris eds., 1993); *Democracy*, in *THE ENCYCLOPEDIA OF SOCIAL REFORM* 482-86 (William D. Bliss ed., 1907); *The*

The Labor Movement in the Progressive Era and the 1920s. The mainstream of the early twentieth-century labor movement did not rise above the currents of racism that ran through middle-class Progressive politics. When the southern Redeemers destroyed the citizenship rights of black toilers, white trade unionists did not protest. Indeed, many unions enacted formal color bars during the decades bracketing the turn of the century, and by the 1900s most native-born white trade unionists championed immigration restrictions, against the "cheap," "servile," "unassimilable" southern Europeans as well as the Chinese. Along gender lines as well, native-born skilled white workingmen abandoned the broad, inclusive understanding of who belonged to the community of citizen workers that had characterized organized labor two decades earlier. The fate of this more inclusive identity was bound up with labor's fortunes in the political and economic battlefields.

The Knights of Labor expired during the 1890s; their startling successes organizing industries across barriers of skill, race, and ethnicity had prompted a sustained counteroffensive by employers and employers' attorneys. From the mid-1880s onward, capital turned increasingly to blacklists, labor spies, private police, and the state. The nation's courts outlawed the Knights' and kindred unions' principle economic weapons. Elsewhere I have described in some detail how this constitutionally enshrined judge-made law of industrial relations limited, demeaned, and demoralized workers' capacities for broad social and political action.²⁵⁴ By reinvigorating old common law limits on collective action and applying them to emergent forms of industrial organization and protest, the courts helped instill the view among skilled workers that inclusive, class-based unionism and the organizing tactics it entailed were too costly; such tactics invited brutal repression, sponsored and validated by the nation's high courts.²⁵⁵ At the same time, by invalidating hours laws and other positive measures, and turning the Anti-Trust Act against the very organizations that had sponsored it, the courts made legislation seem an unreliable, sputtering engine for industrial reform.²⁵⁶ The idea of using the ballot to transform the political economy

Constructive Work Before the Industrial Relations Commission: A Symposium with Introduction by Paul U. Kellogg, THE SURVEY 571-88 (August 2, 1913).

254. See FORBATH, *supra* note 88.

255. Forbidding "whomsoever" from doing "whatsoever" — quitting or threatening to quit, meeting, singing, assembling, or encouraging others to do so — in support of a boycott or strike, the labor injunction was enforced by summary proceedings. The decrees encouraged and validated state and federal police intervention, where local authorities frequently sided with strikers; the decrees also legitimated the widespread use of deputized private troops. See *id.* at 59-127.

256. A majority of the U.S. Supreme Court and of most of the important state high courts made plain their view that the broad, positive vision of equal citizenship animating the Knights and the Gilded Age labor movement was flatly unconstitutional. They also made plain their determination to expand their powers — "magnifying, like the Apostle of old . . . [their] office" in Justice Brewer's famous words — to destroy "that movement's" rival vision and secure "the

and the "whole social order" began to seem like tilting at windmills to these same skilled workers.²⁵⁷ So, in the wake of the bitter defeats suffered by the Knights, the Homestead workers, the Pullman workers, and the Populists, many native-born, white working people retreated into insular cultures and narrower, meaner, and more defensive group identities and interests.

Skilled workers remained committed trade unionists; but their commitments shifted to the American Federation of Labor. AFL president Samuel Gompers propounded a "pure and simple [craft-based] trade unionism" that shunned the broad reform goals as well as the inclusive membership and identity of the Knights.²⁵⁸ Organized labor's political goals under Gompers were narrow and sharply drawn: no positive regulation, but repeal of the judge-made restraints on collective action and an end to immigration. The social citizenship impulse hardly vanished among trade unionists, but it was driven out of the center precincts of labor politics until the New Deal.

In the meantime, however, the AFL's "pure and simple trade unionism" was no rejection of politics, constitutional or otherwise, and the AFL-led labor movement continued to cast its attacks on "industrial autocracy" in boldly constitutional terms. The "right of labor to have a voice in the industrial world" was the fundamental question of the industrial conflict, editorialized the *Iron Molders' Journal*. "Political equality is not sufficient and unless the wage-earner possesses an industrial equality that places him on a par with his employer there can never exist that freedom and liberty of action which is necessary to the maintenance of a republican form of government."²⁵⁹ Workers' rights to associate, assemble, unionize, and strike constituted First, Thirteenth, and Fourteenth Amendment claims repeatedly spurned by the courts that labor brought again and again to Congress and state legislatures.

The 1920s saw a burgeoning of antistrike decrees, until the proportion of injunctions to the total number of strikes reached a remarkable

salvation of the nation." David Brewer, *The Nation's Safeguard*, N.Y. STATE BAR ASSN., PROC. 39 (1893), quoted in ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 238-39 (1992). See generally FORBATH, *supra* note 88, at 37-58 (documenting that during these decades courts generally struck down or vitiated the broad hours laws and other reforms at the heart of labor's political program).

257. FORBATH, *supra* note 88, at 37-58, 94-97.

258. *Id.* at 12-19. See generally JULIE GREENE, *PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM, 1881-1917* (1998).

259. 40 *IRON MOLDERS' J.* 750, 750 (1904), quoted in Harris, *supra* note 253, at 46-47. The indispensability of "industrial democracy" for a "republican form of government" was not an argument limited to labor journalists. At the Senate Hearings on the National Labor Relations Act in '34, counsel for the AFL defended the constitutionality of the Act on Guarantee Clause, not Commerce Clause, grounds. *To Create a National Labor Board, 1934: Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor*, 73d Cong. 109 (1934) [hereinafter *To Create a National Labor Board*].

25 percent.²⁶⁰ Master-servant law proved alive and well, as the Supreme Court upheld the use of ancient antienticement doctrines to underpin the widespread use of "yellow-dog" injunctions against organizing campaigns.²⁶¹ Amid these events, labor's advocates again brought to Congress their common law arguments, constitutional claims, and stories of judicial repression of worker-citizens in the nation's coalfields and manufacturing districts. Senators like Shipstead of Minnesota echoed labor's constitutional outlook when he concluded at the hearings' end, "If they go on making human relations into property relations, the Thirteenth Amendment to the Constitution will be evaded, circumvented, and dead." Likewise, Senator Norris declared that the labor injunctions' "effect has often been involuntary servitude on the part of those who must toil in order that they and their families may live."²⁶²

Finally, in the '30s, Congress embraced much of labor's exiled interpretations of the First, Thirteenth, and Fourteenth Amendments, largely outlawed the federal labor injunction, and inscribed much of the constitutional freedom workers claimed into federal law with the Norris-LaGuardia and Wagner Acts.²⁶³

Passed in '32, the Norris-LaGuardia Act created a thorough set of statutory hedges against federal labor injunctions; its preamble sounded some of the key themes of labor's exiled constitution.²⁶⁴ But Norris-LaGuardia did no more than prevent judicial repression of workers' exiled freedoms; it did nothing to protect them against employer interference and coercion. Only with the Wagner Act was the employer's common law authority over workers and workplace largely torn away.

As we have seen, the "industrial democracy" idea was to bring citizenship rights into the factory and the employment relation. Historians have amply demonstrated the centrality of the idea in the outlook and arguments of the Wagner Act's proponents.²⁶⁵ Witness after

260. See FORBATH, *supra* note 88, at 193-98.

261. See *id.* at 98-127.

262. See *id.* at 160.

263. See *id.* at 128-66.

264. Act of March 23, 1932, 47 Stat. 70 (current version at 29 U.S.C. §§ 101-115 (1994)) (stating that "full freedom of association, self-organization, and designation of representatives of his own choosing" were essential to make real the liberty of contract and freedom of labor an individual worker was helpless to enjoy under the old regime, with its one-sided legal recognition of capital's right to organize under the corporate form.).

265. See, e.g., DAVID PLOTKE, *BUILDING A DEMOCRATIC POLITICAL ORDER: RESHAPING AMERICAN LIBERALISM IN THE 1930S AND 1940S* (1996); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993). On the variety of reform programs that marched under the "industrial democracy" banner, see Harris, *supra* note 253.

witness on the Act's behalf — lawmakers, labor leaders, and middle-class reformers — cast the problem as not merely economic or social, but as constitutional as well. The Senate Report rang out the constitutional changes. "A worker in the field of industry, like a citizen in the field of government," had an "inherent right" to "self-government." In both fields, it declared, he "ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities."²⁶⁶ But instead, as one local union official testified, "[i]ndustrially," the citizen-worker is "dis[en]franchised."²⁶⁷ Similarly, a congressman argued, self-government was an "inherent" American right, and "[t]his bill does no more than guarantee that right to American labor."²⁶⁸ The right of labor representation, Senator Wagner later explained, was fundamental to "democratic self-government"; in an industrial society, it marked the "difference between despotism and democracy."²⁶⁹ The statute's cornerstones, set forth in its central section, were those rights organized labor had long claimed under the Guarantee Clause and the First, Thirteenth and Fourteenth Amendments: to associate, organize, and act in concert, and to "representatives of their own choosing."²⁷⁰

The statute passed in 1935. It met with renewed organizing campaigns by workers, and massive defiance by employers. Organizers and activists continued to be fired, beaten, and blacklisted. Where new unions had sprung up, employers continued to refuse recognition. Employers defended their defiance of the Act in the name of constitutionally enshrined contract, property, and states' rights; and employers' defiance was seconded by the lower federal courts. The latter uniformly enjoined enforcement actions by the new National Labor Relations Board.²⁷¹ Would workers' exiled rights prevail over the old Constitution in the Supreme Court? Pundits predicted not, but of course, events proved them wrong.

266. S. REP. NO. 1184, at 4 (1934), *quoted in* Becker, *supra* note 265, at 503.

267. *To Create a National Labor Board*, *supra* note 259, at 51 (statement of Richard W. Hogue), *quoted in* Becker, *supra* note 265, at 502.

268. 79 CONG. REC. 9691 (1935) (statement of Rep. Withrow), *quoted in* Becker, *supra* note 265, at 503.

269. Senator Robert F. Wagner, Address Before the National Democratic Forum (May 8, 1937), *quoted in* Leon H. Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT: AFTER TEN YEARS* 13 (Louis G. Silverberg ed., 1945).

270. National Labor Relations (Wagner) Act, ch. 372, sec. 7, 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 151 et seq. (1994)).

271. See RICHARD CORTNER, *THE WAGNER ACT CASES* (1964); PETER H. IRONS, *THE NEW DEAL LAWYERS* 244-48 (1982); Drew Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE L. REV. (forthcoming Spring 2000).

III. THE INCOMPLETE REVOLUTION: THE HALF-LIFE OF THE NEW DEAL CONSTITUTION

It was more than happenstance that so many of the key cases marking off the New Deal's constitutional revolution — *A.L.A. Schechter Poultry Corp. v. United States*, *Morehead v. New York ex rel Tipaldo*, *West Coast Hotel Co. v. Parrish*, *NLRB v. Jones & Laughlin Steel Co.* — involved labor and labor regulation.²⁷² They did so for the same reason as *Lochner*, the case that gave its name to the Constitution's *ancien regime*: the common law ordering of labor-capital relations, invested with the permanence of fundamental law, was the social institution at the center of that regime.

Beginning with the Court's attack on key New Deal measures in 1935 and climaxing with FDR's court-packing plan and the Court's famous 1937 "switch in time that saved nine," by the early 1940s the *ancien regime* in constitutional law had been overthrown. Following on the appointments of New Deal Justices Black, Reed, Frankfurter, Douglas, Murphy, Stone, Byrnes, Jackson, and Rutledge — several of them leaders of the intellectual and political battles against the old order — the *Lochner* Constitution was swept away. Entire doctrinal structures were cast aside and the judge-made impediments to enacting social citizenship and what FDR would dub the "general welfare Constitution" were razed. Democracy now could reach labor-capital relations, and Congress had no judge-made limits on its power to regulate the nation's economy.

In theory, big changes in the Constitution come about by amendment. Yet no amendments accompanied this sea change. Until recently the issue hardly mattered; no one questioned the wisdom of interring the *Lochner* regime. Now, however, many law professors say *Lochner*-ism should have won. They say the New Deal changes were unjustified; they required but received no validating constitutional amendment.²⁷³ These conservatives go on to argue for undoing the New Deal changes and resurrecting the pre-New Deal Constitution in a wide range of areas, including labor law.²⁷⁴ And some federal judges and Republican Party leaders seem to agree.²⁷⁵ Faced with this new crisis of legitimacy,

272. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

273. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

274. See *id.*; RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

275. See, e.g., *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring);

the New Deal Constitution has found its defenders. One theory argues that the New Dealers had merely returned to the faith of the fathers.²⁷⁶ It was the jurisprudence of *Lochner* that had departed from precedent and tradition. But this restorationist perspective won't wash. As far as fidelity to the Framers is concerned, recent scholarship leans heavily in favor of the *ancien regime*.²⁷⁷

There is a second, more sophisticated defense, which Lawrence Lessig and Cass Sunstein describe as "translation."²⁷⁸ It also fails. By Sunstein's own account, the New Deal "refashioned the three basic cornerstones" of the "original Constitutional structure": (1) federalism — by expanding the powers of the national government to "something close to general police powers"; (2) checks and balances — by delegating "enormous policymaking power to the President and creat[ing]... powerful, autonomous executive and independent agencies" which combined "traditionally separated powers of adjudication, execution, and legislation"; and (3) individual rights — by authorizing a "wide range of redistributive policies."²⁷⁹ Sunstein rightly sees these changes as embodying a "revolutionary redefinition of constitutional commitments," a "New Deal Constitution."²⁸⁰ Yet, at the same time, Sunstein sides with those who insist that the New Deal era saw no rupture with the constitutional past — only a "translation" of tradition in light of changed circumstances. He cannot have it both ways. True, the process of uprooting old institutional arrangements and creating and legitimating new ones necessitates new readings or "translations" of normative traditions, but it also entails collective choices and committed action.

Thus, Sunstein and Lessig are talking about politics, constitutive politics, and not simply "translation." Their account of New Deal constitutional change assumes constitutional actors besides the courts, but their theory puts all the burden of justification on judicial inter-

REPRESENTATIVE DICK ARMEY, *THE FREEDOM REVOLUTION: THE NEW REPUBLICAN HOUSE MAJORITY LEADER TELLS WHY BIG GOVERNMENT FAILED, WHY FREEDOM WORKS, AND HOW WE WILL REBUILD AMERICA* (1995).

276. See, e.g., Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1294-99 (1995).

277. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* (1991); Horwitz, *supra* note 7, at 57; Stephen Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

278. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Cass Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253-57 (1996) [hereinafter Sunstein, *Cost-Benefit State*]; Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) [hereinafter Sunstein, *Constitutionalism*]; Cass Sunstein, *New Deals*, NEW REPUBLIC, Jan. 20, 1992, at 32 (reviewing ACKERMAN, *FOUNDATIONS*, *supra* note 10).

279. Sunstein, *Constitutionalism*, *supra* note 278, at 423-25.

280. Sunstein, *Cost-Benefit State*, *supra* note 278, at 253-54.

preters. Non-judicial actors have no interpretive authority of their own; their constitutive choices and actions and their extra-judicial “translations” of constitutional tradition play no part in Lessig and Sunstein’s hermeneutics. And since courts may not enact such changes as Sunstein describes, their theory ends up papering over the New Deal’s genuine rupture with the constitutional past and leeching politics, choice, and agency out of the story.

A. *The New Deal as a “Constitutional Moment”*

Putting politics, “constitutional” or “higher lawmaking politics,” at the center of his argument lends Bruce Ackerman’s defense of the New Deal Constitution its originality and importance. Ackerman agrees with today’s conservatives that the New Deal transformations were significant enough to require constitutional amendment. But he interprets the political processes that attended those transformations as sufficient to amend the Constitution. For Ackerman, the New Deal marked a “constitutional moment,” a sustained, self-conscious political act by the citizenry that overthrows one constitutional regime and ushers in a new one.²⁸¹

Ackerman finds his warrant for this unconventional theory in the history of Reconstruction. Generalizing the Reconstruction pattern, Ackerman sums up the process “in terms of a simple schema: Constitutional Impasse → Electoral ‘Mandate’ → Challenge to Dissenting Institutions → the ‘Switch in Time.’”²⁸² It is not hard to see how the schema applies to New Deal history. Roosevelt’s first term culminated in a constitutional impasse between the branches similar to that of 1866. Once again, the separation of powers and interbranch conflict created the arena for constitutional debate, enabling the conservative branch “to raise basic questions of legitimacy and challenge the reformers to go to the People if they hoped for ultimate success.”²⁸³ Then, when the New Dealers won crushing victories in the presidential and congressional elections of 1936, they claimed a mandate from the People in support of their constitutional vision.

Ackerman is right about the self-consciously constitutional character of New Deal politics and right that New Dealers claimed a constitutional mandate arising from the election of ‘36 — or the sequence of elections, ‘32, ‘34, and ‘36. But Ackerman is wrong — and here his thinking rejoins conventional wisdom — in suggesting that the New Deal’s “constitutional mandate” amounted simply to an authorization

281. See ACKERMAN, FOUNDATIONS, *supra* note 10; ACKERMAN, TRANSFORMATIONS, *supra* note 10; Ackerman, *Higher Lawmaking*, *supra* note 10.

282. Ackerman, *Higher Lawmaking*, *supra* note 10, at 79.

283. *Id.* at 80.

for expanded federal power and an activist national government.²⁸⁴ Although Ackerman urges us to study constitutional discourse outside the courts in "congressional committee reports, presidential proclamations, and party campaign platforms with the same care that lawyers usually reserve for Supreme Court opinions,"²⁸⁵ his own recent account based on extensive work with the nonjudicial texts of the New Deal era dodges the question of whether the New Dealers, like the Reconstruction Republicans, sought a mandate to redefine national citizenship.²⁸⁶ They did, and that redefinition was their warrant for expanded powers and an activist national government.

B. The "Mandate"

In May 1935, the Court decided *Schechter Poultry*, striking down the National Recovery Act and ruling that the federal government had no power to regulate wages and hours in the nation's industries, save where the workplace was directly part of interstate commerce. In May 1936, *Carter Coal Co.* reaffirmed that "Congress is powerless to regulate anything which is not commerce." Two weeks later, *Tipaldo* invalidated the New York minimum wage law for women and children, echoing the 1923 *Adkins* decision: "The State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid." The Court's "stone wall" across the path of New Deal reform seemed complete.²⁸⁷

Conservative Republicans and business organizations like the Liberty League hailed the Court, and as the 1936 campaign got underway, they repeatedly accused FDR and the New Deal of "running against" and "tearing down the Constitution." The Republican Platform declared, "America is in peril" for FDR was "insist[ing] on the passage of laws that are contrary to the Constitution," "violat[ing] the rights and liberties of citizens," and "constantly seeking to usurp" the rights "reserved to the people and the States."²⁸⁸ Roosevelt responded in kind.

284. See ACKERMAN, FOUNDATIONS, *supra* note 10, at 103.

285. Ackerman, *Higher Lawmaking*, *supra* note 10, at 74.

286. See ACKERMAN, TRANSFORMATIONS, *supra* note 10, at 279-382.

287. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 297 (1936); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); see also IRVING BERNSTEIN, *A CARING SOCIETY: THE NEW DEAL, THE WORKER, AND THE GREAT DEPRESSION* 128 (1985).

288. See PLATFORMS OF THE TWO GREAT PARTIES, 1932-1940, at 373 (Leroy Blanton ed., 1940).

1. *The Language of Constitutive Politics and the Redefinition of Citizenship*

Throughout the summer and fall of 1936, FDR characterized the campaign as a moment of extraordinary popular deliberation and a time for basic, constitutive choices about the powers and duties of government and citizens' legitimate claims on the state.²⁸⁹

Looking back in early '37, FDR and New Dealers in Congress depicted their crushing victory as a "great revolution."²⁹⁰ The "dominant five-judge" "economic-social-constitutional philosophy" "was repudiated by the people of America."²⁹¹ The people "have overwhelmingly approved this [New Deal] legislation" that the "Federal courts have struck down."²⁹² In these terms Hugo Black put the case for the administration's controversial court-packing plan. It was "not only the right of Congress under the Constitution, but the imperative duty of Congress, to protect the people" from the "miserable and degrading effects" of joblessness, exploitation and poverty.²⁹³ This was the constitutional philosophy FDR put before the people. The people adopted it, but, New Dealers lamented, the courts "have not understood . . . this revolution."²⁹⁴

In his second term's "first radio report to the people," Roosevelt himself put forward the constitutive-politics case for his "Plan for Reorganization of the Judiciary." "I hope that you have re-read the Constitution of the United States in these past few weeks," he told his millions of listeners.²⁹⁵ Like the Protestant Bible, the Constitution was a "layman's document." No priesthood or legal elite enjoyed a monopoly of interpretive authority. To the contrary: at critical moments in the past, the "lay rank and file," "the American people," and their reform-minded "leaders" had "interpreted the Constitution for themselves" and set their own constitutional vision against the doctrines of the judiciary and legal elite and "ultimately prevailed." They "overruled" the

289. See e.g., Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency, Philadelphia, Pennsylvania (June 27, 1936), in 5 PUBLIC PAPERS, *supra* note 301, at 234 ("Never since the early days of the New England town meeting have the affairs of government been so widely discussed . . ."). In another speech, FDR described the fundamental choice between returning "to that definition of liberty under which for many years a free people were gradually regimented into the service [of capital]," or else embracing a "changed concept of the duty and responsibility of government toward economic life." ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 10 (1995).

290. 81 CONG. REC. 1291 (1937) (remarks of Sen. McKellar).

291. 81 CONG. REC. App. 307 (1937) (reprinting radio address by Hon. Hugo L. Black).

292. 81 CONG. REC. App. 639 (1937) (reprinting radio address by Hon. Hugo L. Black).

293. See 81 CONG. REC. App. 636, 639 (1937) (address of Hon. Hugo Black).

294. See 81 CONG. REC. 1291 (1937) (remarks of Sen. McKellar).

295. See Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (March 9, 1937), in 6 PUBLIC PAPERS, *supra* note 301, at 124.

Court. So it was today.²⁹⁶

But wasn't the amendment process the proper route? No, the President answered. It would take years to get "substantial agreement upon the type and language of an amendment." Even then, "five percent of the voting population" could block ratification. Moreover, the plutocrats, who had tried to thwart the "people's mandate in the last election," now aimed to make the amendment process their "last stand." And the Article V rules would enable them to make that process an endlessly protracted and procrastinated one.²⁹⁷

In the end, FDR and the New Dealers had to depend on neither the amendment process nor the court-packing plan to "save the Constitution from the Court."²⁹⁸ While Congress was debating the latter, the Court made its famous "switch in time." Soon the appointments of New Dealers to the Court would turn acquiescence into assent toward the New Deal "mandate."

But what was the mandate's substance? Did it leave the meaning of citizenship untouched? Ackerman implies as much, and the result is a partial, truncated picture of the principles FDR and the New Dealers brought to the electorate for "ratification." The constitutional choices they laid out during the 1936 campaign were not only about lawmakers' authority to regulate the economy; they also involved the recognition of new rights and new rights-bearers. Prior to the assertion of enlarged governmental powers was a redefinition of national citizenship, which entailed those expanded powers.

This should not surprise Ackerman. Precedent is Ackerman's method. To understand the deep pattern of New Deal constitutional or "higher lawmaking" politics, he counsels, look to Reconstruction.²⁹⁹ But of course, when the Reconstruction Republicans enlarged the powers of Congress and the federal government, they did so in the name of a new and enlarged conception of national citizenship. Sixty years later, the New Dealers did the same. In both moments, the new, contended-for rights of citizenship promised to supplant a body of law and custom that had codified an outcast, second-class status — the Black Codes and other "badges and incidents of slavery" in the first case,³⁰⁰ and in the second, the caste-ridden common law of employment and the labor market, and the status of millions of workers as "industrial serfs" or

296. See also *The Constitution of the United States was a Layman's Document, Not a Lawyer's Contract* (Sept. 17, 1937), in 6 *PUBLIC PAPERS*, *supra* note 301, at 363-65. For reflections on the relation between Protestant and Catholic views on interpretive authority regarding the scriptures and "Protestant" and "Catholic" views on authority to interpret the Constitution, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

297. See Roosevelt, *supra* note 295, at 131.

298. *Id.* at 126.

299. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 10, at 265.

300. See *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

unemployed "outcasts." Seeking a mandate for a great expansion of national power in the face of a strong popular antistatism, it is no wonder New Dealers tied that expansion to popularly conceived precommitments in the form of social and economic rights.

Already during the first New Deal, FDR promised a redefinition of the duties of government and a "re-definition of [classical liberal] rights in terms of a changing and growing social order."³⁰¹ In the past, FDR explained, quoting Jefferson (and with Jefferson neglecting the black laboring class), America had "no paupers. The great mass of our population [was] of laborers . . . [and m]ost of the laboring class possess[ed] property . . ."³⁰² For this yeoman citizenry, Roosevelt observed, the rights "involved in acquiring and possessing property" combined with the ballot and the freedom to live by one's "own lights" to ensure liberty and equality.³⁰³ "The happiest of economic conditions made that day [of Jeffersonian individualism] long and splendid. [For on] the Western frontier, land was substantially free."³⁰⁴ The "turn of the tide came with the turn of the century [T]here was no more free land and our industrial combinations had become great uncontrolled and irresponsible units of power within the State."³⁰⁵

"Traditionally, when a depression came a new section of land was opened in the West."³⁰⁶ Not so today; today's conditions impose new requirements upon Government and new meanings on old texts. A mature industrial society could not be governed by a laissez-faire Constitution, insulating industry and finance from the modern claims of liberty of equality. America needed an "economic constitutional order."³⁰⁷ The "terms" of our basic rights "are as old as the Republic"; but new conditions demand new readings. "Every man has a right to life," Roosevelt declared, and this means a "right to make a comfortable living." The "government," he went on, "formal and informal, political and economic, owes to everyone an avenue to possess himself of a portion of [the nation's wealth] sufficient for his needs, through his own work."³⁰⁸

During the first New Deal, FDR and his allies in Congress also

301. Franklin D. Roosevelt, *New Conditions Impose New Requirement upon Government and Those Who Conduct Government*, Campaign Address at the Commonwealth Club, San Francisco, Calif. (Sept. 23, 1932) in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 752, 753 (1938) [hereinafter PUBLIC PAPERS].

302. *Id.* at 745.

303. *Id.* at 746.

304. *Id.* at 746.

305. *Id.* at 749.

306. *Id.* at 746-47.

307. *Id.* at 752.

308. *Id.* at 754.

seized on the time-honored reformers' reliance on the language of the Preamble to undergird a positive vision of national responsibilities:

If, as our Constitution tells us, our Federal Government was established among other things, "to promote the general welfare," it is our plain duty to provide for that security upon which welfare depends . . . [T]he security of the home, the security of livelihood, and the security of social insurance — are, it seems to me, a minimum . . . of the promise that we can offer to the American people. They constitute a right which belongs to every individual and every family willing to work.³⁰⁹

Thus did FDR introduce the "general welfare Constitution" in his 1934 address to Congress announcing the formation of the Committee on Economic Security. There he also continued to assimilate the new social rights to the "old and sacred possessive [traditional, constitutionally enshrined common law] rights" of property and labor. In preindustrial America, these common law rights had had rich significance for the "welfare and happiness" of ordinary Americans; now, only the recognition of new governmental responsibilities would enable "a return to values lost in the course of . . . economic development" and "a recovery" of the old rights' once robust social meaning.³¹⁰

Here again we mark FDR's increasingly pointed use of the reformers' hermeneutics — the argument of changing conditions imperiling old principles, and new interpretations and institutional arrangements restoring them. Likewise, in speaking of "government, formal and informal, political and economic," Roosevelt and his speechwriters had embraced the reform tradition's pragmatist insight into the public, legally constructed, character of private economic power. This opened the space where equal citizenship norms could compel changes in the private law rules governing market and property relations.

2. *Social Citizenship and Social Movements in Congress*

In Congress too, New Dealers echoed earlier twentieth-century reformers' demands that the constitutional protections of life, liberty, and property be interpreted, in Brandeis's words "according to the demands of social justice and of democracy." Thus, the Legal Realist Robert Hale told the Senate Committee on Education and Labor that the situation of an employee at a non-union steel plant was akin to that of a "non-voting member of a society."³¹¹ Senator Robert Wagner attacked the existing legal order for "perpetuating in modern

309. Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), in 3 PUBLIC PAPERS, *supra* note 301, at 291-92 (1938).

310. *Id.*

311. *To Create a National Labor Board*, *supra* note 259, at 51 (statement of Robert L. Hale, Professor of Law, Columbia University).

industry... aspects of a [feudal] master-servant relationship.”³¹² As citizens, workers deserved “democratic self-government,” not “despotism” at the workplace.³¹³ Likewise, Wagner echoed the terms in which organized labor had greeted the nation’s many previous moments of mass unemployment. He called for hours laws, unemployment insurance, and “a long-range public-works program,” decrying the government’s role in depriving millions of citizens of the “sacred... right to earn their bread.”³¹⁴

But the New Dealers’ social and economic rights talk also had more immediate resonance: it tapped a protest language millions of industrial workers encountered in the groundswell of CIO organizing. The new industrial union organization spurned the antistatist reform vision of Sam Gompers’ AFL. Like the Knights of Labor, the CIO’s political identity rested on an inclusive labor movement across the boundaries of skill, ethnicity, gender, and race, and on the insight that bold state action was needed to help organize the unorganized and to answer the other moral and material needs of workers spurned by the AFL. So, CIO leaders and activists demanded affirmative government protection for union organizing and collective bargaining as well as government protection against the hazards of illness, unemployment, and old age, through social insurance and full employment policies. By 1936 the CIO, with its call for jobs, security, and industrial democracy as every citizen’s rights, had become the organizational and financial mainstay of the Democratic Party in much of the country as well as the principal funder of FDR’s reelection bid.³¹⁵

It was not only union leaders, however, but ordinary workers who made this social rights talk part of mass consciousness. As Elizabeth Cohen’s work suggests, the changing experiences, attitudes, and demands of ordinary workers vis-à-vis the national government lay at the heart of the “making of the New Deal.”³¹⁶ Through the 1920s the nation’s millions of unorganized, largely “new immigrant,” factory workers looked on the national government with mistrust and indifference. Scorned by the AFL and ignored by Washington, their welfare needs were met, if at all, by paternalistic employers or ethnic organizations. National politics, like the old AFL unions, seemed largely irrelevant; by and large, they did not vote in national elections. Now, they were ardent — and overwhelmingly Democratic — voters; they had turned

312. Robert F. Wagner, *Company Unions: A Vast Industrial Issue*, N.Y. TIMES, Mar. 11, 1934, § 9, at 1, quoted in Barenberg, *supra* note 265, at 1423.

313. Wagner, *supra* note 269, at 13.

314. 79 CONG. REC. 9283 (1935) (remarks of Sen. Robert F. Wagner).

315. ROBERT H. ZIEGER, *THE CIO, 1935-1955*, at 39-40 (1995).

316. LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939* (1990); see also BERNSTEIN, *supra* note 287; IRVING N. BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941* (1969).

away from employers and ethnic associations and looked instead to the national government for such basic goods as welfare, security, and employment. Mobilized by CIO locals and local activists, as they became the base of the New Deal Democratic Party, this American-born generation of ethnic workers and their immigrant parents transformed the substance of electoral politics. Experience with early New Deal programs and rhetoric engendered among these millions of working-class families a remarkable new sense of entitlement. They made no apologies, Cohen shows, for taking relief, social security, insurance, mortgages, and jobs from the state. As contributing members of society, they had rights to such things, and they rallied behind those politicians, labor leaders, and other reformers who championed expanding the programs that backed up these rights.³¹⁷

Thus, when Representative Ernest Lundeen of Minnesota demanded action on his plan for universal social insurance financed by general revenues, administration officials might complain that the Lundeen bill was drafted by Reds and would never pass through a committee system dominated by Southern Democrats; but they could not gain-say the clamorous grassroots support the bill enjoyed, nor the rights consciousness attending it. And when Lundeen insisted that Congress must act on social insurance or else face mass marches on Washington “of people who may come here not to overthrow the Government, but for the purpose of demanding their rights The American people, all of them, are entitled to life, liberty and the pursuit of happiness” — the administration did not challenge his prophecy nor his melding of old rights and new.³¹⁸ Instead, FDR continued to make this social rights rhetoric his own, both responding to and encouraging workers’ new sense of entitlement, while his administration used the evident popularity of Lundeen’s bill “as a ‘scarecrow’ to get action” on its own more conservative measure.³¹⁹

3. *FDR Adopts the Oppositionist Narrative*

Famously “pragmatic” and frequently cautious in reform strategies, FDR proved constant in employing social citizenship as a language of ends. This public rhetoric — of which FDR and his speechwriters were creatures as much as creators — shapes and defines the texts to which Ackerman’s method would have us look for the content of the “Elec-

317. See COHEN, *supra* note 316, at 252-83.

318. 79 CONG. REC. 6, 5968 (1935).

319. Edmund Witte, the University of Wisconsin labor economist who headed the staff of the President’s Committee on Economic Security, characterized the Lundeen Bill in these terms in his contemporaneous notes on the Bill’s role in the legislative battles around social security measures. Edmund Witte Papers (on file with Wisconsin State Historical Society, Madison, Wisc.), quoted in Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 301 (1994).

toral Mandate" of 1936. Roosevelt's speech at the 1936 Democratic Convention rang in the oppositionist Constitution. FDR set out "the people's mandate" for new understandings of "liberty" and "equality" and of the citizen's legitimate claims on the state. Here was the oppositionist narrative of social change and constitutional usurpation. Like Brandeis in the 1910s and Weaver in the 1890s, FDR told of the emergence of new "royalists" and "despots," and the dangers of a new kind of tyranny, not political but economic: a "new industrial dictatorship" that had "concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor — other people's lives." With such "concentration of control," "the political equality we once had won was meaningless in the face of economic inequality." Not content with economic power, however, the "new economic royalty" "reached out for control over Government itself," and then wrapped their public and private power "in the robes of legal sanction."³²⁰

Thus, Roosevelt's constitutional narrative reached the same crisis and turning point as Weaver's and Brandeis's. Struggling against such "tyranny as this," Roosevelt proclaimed, has given "us as a people a new understanding of our Government and of ourselves." Our inherited understandings had brought us to the brink of "economic slavery." Now we know, "freedom is no half-and-half affair." Political and social and economic citizenship were inseparable. Government has "inescapable obligations" to "protect the citizen in his right to work and his right to live," no less than "in his right to vote."³²¹

Repeatedly, from '36 onward, FDR and New Dealers in Congress spoke in terms of the nonjudicial branches' obligation to redeem the "new social rights" that were the "modern substance" of the old guarantees of constitutional liberty and equality. Always "paramount" was work, or what FDR's Committee on Economic Security, which planned the Social Security Act of '35, called "employment assurance" for "those able-bodied workers whom industry cannot employ at a given time."³²² As the Social Security Act's sponsor in the Senate, Wagner underscored that "[a]t the very hub of social security is the right to have a job." Unemployment insurance was designed "not to supplant, but rather to supplement" the government's obligation to

320. Roosevelt, *supra* note 289, at 232-34. Speaking two weeks earlier on June 12th at the Texas Centennial Exposition, FDR invoked the antimonopoly campaigns and constitutional outlook of Texas Populists and Progressives. He credited the state-based antimonopoly movements with stemming "the destruction of the base of our form of government," which was "the inevitable consequence" of "economic and financial control in the hands of the few." "For its splendid structure there would have been substituted . . . an autocratic form of government." Franklin D. Roosevelt, Address at the Texas Centennial Exposition (Jun. 12, 1936), in 5 PUBLIC PAPERS, *supra* note 301, at 209, 212.

321. Roosevelt, *supra* note 289, at 233-34.

322. H.R. DOC. NO. 81, 79 CONG. REC. 1, 546 (1935).

assure work for the “bulk of persons . . . disinherited for long periods of time by private industry.” The Social Security Act would not work without federal guarantees for those who could not find private employment.³²³ Roosevelt concurred. A national guarantee assuring the “opportunity to make a living — a living decent according to the standard of the time” was at the heart of the new understanding of liberty he had proclaimed in Philadelphia.³²⁴ Income security for those who could not work, and public employment for those who could not find decent jobs in the private economy, had to become the “permanent policy [of] the federal government.”³²⁵

4. *The Second Bill of Rights and the “Paramount” Right to Work*

After the legal defeat of the NIRA and the practical failure of its regulatory strategy for economic revival, the administration turned to public spending. Increasingly, FDR lent support to those in his administration, like Harry Hopkins, Harold Ickes, and Frances Perkins, who argued that the answer to unemployment lay in public spending tied to macroeconomic objectives and permanent public employment programs. Lodged in the White House, the Department of Commerce, the Budget Bureau, and the National Resources Planning Board, were a group of policymakers under the intellectual leadership of “social Keynesians” like Harvard’s Alvin Hansen.³²⁶ They supplied not only legislative proposals like the Full Employment Bill of ‘45, but also much of the rhetoric and outlook animating key speeches, including the social and economic policy portions of FDR’s 1943 and ‘44 State of the Union addresses.

Speechwriter and editor of Roosevelt’s *Public Papers*, Samuel Rosenman, has described FDR’s meetings with the National Resource Planning Board as they formulated the Declaration of Principles for their important 1942 report, *Security, Work, and Relief Policies*. Roosevelt himself set about “simplifying and dramatizing” the Declaration for his speeches.³²⁷ The nation needed to adjust “our

323. 79 CONG. REC. 9283, 9284 (1935) (remarks of Sen. Wagner).

324. Roosevelt, *supra* note 289, at 233.

325. Preliminary Report of the Staff of the Committee on Economic Security 415 (Sept. 1934), reprinted in STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 72, 73 (Robert B. Stevens ed., 1970).

326. See ALVIN H. HANSEN, AFTER THE WAR — FULL EMPLOYMENT (1942); James Tobin, *Hansen and Public Policy*, 90 Q. J. ECON. 32 (1976). Margaret Weir and Theda Skocpol coined the phrase “social Keynesianism.” See Margaret Weir, *The Federal Government and Unemployment: The Frustration of Policy Innovation from the New Deal to the Great Society*, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 149 (Margaret Weir et al. eds., 1988); Margaret Weir, *Innovation and Boundaries in American Employment Policy*, 107 POL. SCI. Q. 249 (1992).

327. See The President Transmits to the Congress a Report on Development of Natural Resources (Jan. 14, 1942), in 11 PUBLIC PAPERS, *supra* note 202, at 52, 53.

provisions for human freedom.” “[T]o the old freedoms,” the Board declared, “we must add new freedoms and restate our objectives in modern terms.”³²⁸ With the Board, the liberal wing of his party, and his labor backers, FDR advocated a “second, economic Bill of Rights” and to undergird it a reorganized federal budgeting process and an unequivocal federal commitment to full employment, as well as expanded social insurance and public investment. In addition to “adequate food and clothing and recreation,” medical care, and “a decent home,” Roosevelt’s “Bill of Rights” included “[t]he right to a useful and remunerative job . . . ; [t]he right to earn enough . . . ; [t]he right of every farmer to raise and sell his products . . . ; [t]he right of every businessman . . . to trade [free from] domination by monopolies at home or abroad . . . [and all of these rights] regardless of . . . station, race, or creed.”³²⁹

The ALI and the Right to Work. By 1945, when Congress took up the administration’s Full Employment Bill, the “all-important right to work” seemed secure, not only in labor movement and reform rhetoric but in the discourse of the liberal legal establishment. That year the American Law Institute appointed a committee of legal luminaries to draft a “Statement of Essential Human Rights.” The staff of the Senate committee holding hearings on FDR’s “Full Employment Bill” asked the members of the ALI group to prepare “an analysis of the legal and philosophical considerations that led to the inclusion” of the right to work in the ALI Statement. Their response reflects, in part, the war-time flowering of “social Keynesianism,” with its new practical confidence in full-employment policies; it also suggests the confident footing that the right to work, and social rights generally, had found in the mandarin legal culture of the day.³³⁰

Liberal legal notables like these had inscribed FDR’s “four freedoms” and “second Bill of Rights” into the founding documents and machinery — the Atlantic Charter, the UN Charter, Bretton Woods — of the post-war international order. As they surveyed those new institutions, as well as the “the [forty] nations whose current or recent constitutions contain provisions granting various social and economic rights,” and put these alongside the “fundamental legislative measures passed in the United States in the last dozen years . . . to secure such rights to its citizens,” they concluded that “the place of social and economic rights in

328. NAT’L RESOURCES PLANNING BD., DEVELOPMENT OF NATIONAL RESOURCES — REPORT FOR 1942, *quoted in* 11 PUBLIC PAPERS, *supra* note 301, at 53.

329. See Message to the Congress on the State of the Union, *in* 13 PUBLIC PAPERS, *supra* note 301, at 32-44; see also Address to the Congress on the State of the Union, *in* 12 PUBLIC PAPERS, *supra* note 301, at 21, 34.

330. See *Full Employment Act of 1945: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency on S. 380*, 79th Cong. 1248-59 (1945) (statement of John R. Ellingson, member of the drafting committee of the Statement of Essential Human Rights).

any modern declaration of the rights of man had already been decided.”³³¹

In particular, no “modern understanding or bill of rights” could omit the right to work, whose popular support seemed “irresistible.” Yet, this idea of a right, “which requires positive action by government, involving complex organization and the expenditures of public funds,” seemed to many “inconsistent with the American tradition,” “paternalis[tic],” potentially “tyrann[ical],” and, at the same time, “useless because it is impossible to go into court and force the government . . . to insure that a man has a job.”³³²

The ALI draftsmen set out to respond, justifying the idea “in the light of these traditional habits of thought.” To those who insisted on “the traditional legal habit of looking upon rights as negative,” the ALI draftsmen replied with arguments that continue to run through contemporary debates over positive versus negative rights. They suggested that conceptions inherited from the “seventeenth and eighteenth centuries” imparted “confusion” and “rigidity to legal thinking about rights” that ill-served “the legislators who must implement” the Constitution. Thus, they pointed out that several of the rights in the Bill of Rights “actually require government to take very positive action indeed . . . [entailing] all the involved and expensive machinery for the administration of civil and criminal justice In terms of mechanism and trained personnel, a system of social security is child’s play in comparison with the system that gives effect to due process of law.”³³³

To the reproach that the right to work did not lend itself to judicial enforcement, they responded first that “legal invention [could] develop new procedures” and second that, in any case, “immediate judicial enforceability” was not the right test of a right. The framers afforded good authority that the Constitution “was equally binding” on the Congress, and that the latter “had the right to determine for itself the meaning of its provisions.” “A Bill of Rights, is more than a consolidation of the fractions of freedom already gained It is a directive to the whole of society and a guide to legislatures and executives in the framing of laws and regulations that will gradually make the rights effective.” The reason to recognize social and economic rights in a Bill of Rights is chiefly to erect a standard “around which public opinion can mobilize . . . [and] the acts of legislatures and executives can be guided and judged.”³³⁴

331. *Id.* at 1248-49.

332. *Id.* at 1254.

333. *Id.* at 1252-53, 1255.

334. *Id.* at 1255.

C. *Jim Crow and the Half-Life of the New Deal Constitution*

1. *The Dixiecrats' New Deal*

Despite his characterization of constitutional moments as occasions for considered popular judgments on "the rights of citizens and the permanent interests of the community,"³³⁵ Ackerman remains silent and seemingly unsure about how, if at all, the New Deal Constitution redefined citizenship rights. There is a real gulf between the robust, encompassing rights talk of FDR's 1936 campaign, and his "second Bill of Rights" and the partial patchwork of entitlements that comprised the New Deal's actual institutional legacy — a gap between the "mandate" and the outcome of the New Deal "moment," for which Ackerman's constitutional narrative provides no explanation. But an explanation is at hand, if one takes a more sober look at our constitutional moments and the reversals and contradictions bound up with them.

The explanation lies in what V.O. Key called the "Southern Veto": the hammer lock on Congress that the Southern Democrats enjoyed by dint of their numbers, their seniority, and their control over key committees. Key described how the Dixiecrats exercised this power to veto civil rights legislation — hence, the New Deal's notorious failure to enact a federal antilynching law.³³⁶ But the Dixiecrats used their veto power more broadly. Hailing from an impoverished region with a populist tradition, most southern Democrats were staunch supporters of the New Deal until the late '30s. In exchange for their support, they insisted on decentralized administration and standard setting of all labor measures and demanded that key bills exclude the main categories of southern labor. Otherwise, how "were they going to get blacks to pick and chop cotton when Negroes were receiving [on federal work programs] more than twice as much as they had ever been paid," and when old-age insurance and social security bills had provisions that "would demoralize the region" until the southern committee heads rewrote them.³³⁷

By allying with northern Republicans, or by threatening to do so, they stripped all the main pieces of New Deal legislation of any design or provision that threatened the separate southern labor market and its

335. ACKERMAN, FOUNDATIONS, *supra* note 10, at 240, 272-74.

336. See V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1949).

337. HARVARD SITKOFF, A NEW DEAL FOR BLACKS, THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE, VOLUME I: THE DEPRESSION DECADE 104 (1978) (quoting Senator Carter Glass of Virginia); see also, e.g., THE NEW DEAL AND THE SOUTH (James C. Cobb & Michael V. Namorato eds., 1984); GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 219 (1986) (quoting Congressman "Cotton Ed" Smith: "Any man on this floor who has sense enough to read the English language knows that the main objective of [the original Fair Labor Standards bill] is, by human legislation, to overcome the splendid gifts of God to the South").

distinctive melding of class and caste relations, its racial segmentation, and its low wages. Consider, for example, the Social Security Act. The Committee on Economic Security had crafted the administration's proposals to propitiate the southerners. For that reason the proposals favored state-level autonomy — albeit with national minimum standards — in both the unemployment insurance and assistance for the needy-aged, dependent children, and blind programs. Only the old-age benefits program would be purely federal.³³⁸ But the Dixiecrats exacted more concessions from the congressional sponsors of the administration bill. National standards for unemployment and old-age insurance were dropped, and the administration's commitment to include all employed persons in the unemployment and old-age insurance schemes was sacrificed. The price of Dixiecrat support included drumming out of the insurance programs agricultural and domestic workers — and thereby the majority of black Americans, who worked in these two occupations.³³⁹

The AAA, the NRA, the National Labor Relations and Fair Labor Standards Acts, were all tailored in this fashion. More encompassing and inclusive bills, bills with national, rather than local, standards and administration, enjoyed solid support from the northern Democrats (and broad but bootless support from disenfranchised southern blacks and poor whites); but the southern Junkers and their "racial civilization" exacted a price, and FDR, willingly at first, paid up.³⁴⁰ This " 'gentleman's agreement' that held the party . . . together appeared unshakable. The White House and the Dixie courthouse seemed solidly allied."³⁴¹ However, as the new industrial unions of the CIO and the black voters of the North loomed large in FDR's 1936 reelection bid, and his social and economic rights talk grew more and more robust and universal, the southern attacks began. Governor Talmadge of Georgia convened a "Grass Roots Convention" to "uphold the Constitution" against "Negroes, the New Deal and . . . Karl Marx,"³⁴² while Senator Carter Glass of Virginia worried if the white South "will have spirit and courage enough to face the new Reconstruction era that Northern so-

338. See ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* 14-16 (1966); FRANCES PERKINS, *THE ROOSEVELT I KNEW* 292 (1946); EDWIN E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 143-45 (1962).

339. See generally ALTMAYER, *supra* note 338, at 34; PERKINS, *supra* note 338, at 296-301; WITTE, *supra* note 338; Kenneth Finegold, *Agriculture and the Politics of U.S. Social Provision, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES*, *supra* note 326, at 199-234.

340. See generally JAMES T. PATTERSON, *CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933-1939* (1967); SITKOFF, *supra* note 337; NANCY WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* (1983); Finegold, *supra* note 339; Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 *POL. SCI. Q.* 283 (Summer 1993).

341. SITKOFF, *supra* note 337, at 103.

342. *Id.* at 106.

called Democrats are menacing us with."³⁴³

The next few years brought more "interference." Minimum wage legislation, CIO organizing drives, rural poverty programs, and recurrent political initiatives and mobilizations among the disenfranchised, both white and black, began to undermine the political and economic sway of industrialists and Black Belt landowners. Although early New Deal programs like the AAA had been tailored by these local southern elites, and their powerful representatives in Congress, to pour aid into southern agriculture without upsetting the plantation system, the very inequities of these programs from tenants' and sharecroppers' perspective sparked protests and national debate. CIO organizers, NAACP leaders, and progressive New Deal administrators lent support to grass-roots movements like the biracial Southern Tenant Farmers Union. They wheedled new programs from sympathetic New Dealers in Washington like Secretary of Agriculture Henry Wallace.³⁴⁴

By the late '30s, then, roughly half of the southerners in the Senate voted consistently against FDR. Increasingly, roll call votes in both houses revealed southern Democrats joining with Republicans to oppose administration measures in the areas of labor reform and social insurance. Even more Dixiecrats "backed Roosevelt on a final vote but fought against his program in their respective committees, in conference committees, in supporting crippling amendments . . . [and] in block[ing] consideration of certain [labor, health, and housing] measures."³⁴⁵ Then with the coming of War, the "gentleman's agreement" collapsed. During this uncertain moment of wartime labor shortages, national mobilization, and rapid economic and central-state expansion, the Solid South redrew its lines of toleration toward New Deal reform. Southern congressmen openly joined ranks with the minority-party Republicans to defeat those 1940s legislative programs and structural innovations and institutional reforms in the executive branch that looked toward "completing the New Deal" by enacting and implementing FDR's "second Bill of Rights."³⁴⁶ Thus, the Dixiecrats allied with Northern Republicans

343. *Id.* at 109-110; see also WEISS, *supra* note 340, at 186.

344. See generally SIDNEY BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* (1968); DAVID CONRAD, *THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL* (1965); DONALD GRUBBS, *CRY FROM THE COTTON: THE SOUTHERN TENANT FARMERS' UNION AND THE NEW DEAL* (1971); EDWIN G. NOURSE ET AL., *THREE YEARS OF THE AGRICULTURAL ADJUSTMENT ADMINISTRATION* (1937); Lee J. Alston & Joseph P. Ferrie, *Resisting the Welfare State: Southern Opposition to the Farm Security Administration*, in *THE EMERGENCE OF THE MODERN POLITICAL ECONOMY* 83 (Robert Higgs ed., 1985).

345. SITKOFF, *supra* note 337, at 112; see also JILL QUADAGNO, *THE COLOR OF WELFARE* 1-23 (1994); Katznelson et al., *supra* note 340 (analyzing Southern Democrats' voting patterns in eighty-nine Senate and sixty-one House roll call votes on critical New Deal bills and amendments).

346. See RICHARD BENSEL, *SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880-1980*, at 152-68 (1984); MARION CLAWSON, *NEW DEAL PLANNING: THE NATIONAL*

to scuttle FDR's executive reorganization plan, gutted the administration's 1945 Full Employment Act, and took the lead in abolishing the National Resources Planning Board.³⁴⁷ Together, these would have laid an institutional foundation for active national labor market and full employment policies.³⁴⁸ These defeated and dismantled laws, agencies, and innovations would have sustained the public rhetoric and generated the new institutional capacities and commitments embodied in the "all-important right to work," in the "right to useful, remunerative, regular . . . employment,"³⁴⁹ and "to education, for work, for citizenship,"³⁵⁰ and ample opportunities for "training, and retraining."³⁵¹

As a consequence, we have forgotten that New Dealers uniformly insisted that the "right to a decent, remunerative job" was "the very hub of social security," and that "employment assurance" was "paramount" over income transfers in the original architecture of the New Deal welfare state and all the major reports and proposals by New Deal cabinet commissions and Congressional policymakers from 1934 onward through 1946.³⁵²

RESOURCES PLANNING BOARD 283-332 (1981); Katznelson et al., *supra* note 340.

347. See CLAWSON, *supra* note 346, at 283-332. Stephen Bailey provides the most detailed legislative history of the administration's Full Employment Bill. Bailey chronicles the efforts of Truman and his cabinet to pressure Congress into passing the administration's 1945 Bill. He makes clear that the key players in gutting the Bill were all Southern Democrats — Congressmen Carter Monasco of Alabama and Will Whittington of Mississippi, in particular. Their key positions on the Expenditures Committee, on the subcommittee that drafted the House substitute bill, as well as on the Conference Committee enabled them to engineer a bill that would "exclude the last remnants of what he considered to be dangerous federal commitments and assurances (including the wording of the title)," as well as the original bill's provisions for new planning and budget offices and capacities. STEPHEN BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 165 (1950). "The emasculation, or as some wit put it, the 'Manasco-lation' of the policy commitments and the economic program of the original bill needs no further elucidation here." *Id.* at 167.

348. See BAILEY, *supra* note 347; CLAWSON, *supra* note 346, at 283-332; BARRY DEAN KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL: THE GENESIS OF ADMINISTRATIVE MANAGEMENT, 1900-1939, at 145-78 (1963); MARGARET WEIR, POLITICS AND JOBS 134-89 (1992); Ira Katznelson & Bruce Pietrykowski, *Rebuilding the American State: Evidence from the 1940s*, 5 STUDIES AMER. POL. DEV. 301 (1991); Katznelson, et al, *supra* note 340.

349. *Full Employment Act of 1945: Hearings Before a Subcomm. of the Comm. on Banking and Currency on S. 380*, 79th Cong. 2, 6 (1945).

350. U.S. NAT'L RESOURCES PLANNING BD., NAT'L RESOURCES DEVELOPMENT REPORT FOR 1943, 78th Cong. 3 (1943).

351. U.S. NAT'L RESOURCES PLANNING BD., SECURITY, WORK, AND RELIEF POLICIES 508 (1942).

352. 79 CONG. REC. 9283 (1935) (statement by Sen. Wagner); *Preliminary Report of the Staff of the Committee on Economic Security* 30 (Sept. 1934); *Final Report of the Committee on Economic Security* 1 (Jan. 1935), reprinted in STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 72-75, 88-94 (Robert B. Stevens ed., 1970); Address to the Congress on the State of the Union (January 7, 1943), in 12 PUBLIC PAPERS, *supra* note 301, at 21-34; NAT'L RESOURCES PLANNING BD., *supra* note 328. See generally PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES 1-23 (1989).

2. "A New Reconstruction Era": The Contours of a Labor-Based Civil Rights Movement

Between the popular ratification of the New Deal vision of social citizenship and its enactment into law stood Jim Crow. The New Deal era saw an effort to oust him, a labor-based civil rights movement that linked the struggles for racial justice and social citizenship. Thus, Senator Glass of Virginia was not wrong. In the late '30s and early '40s a "new Reconstruction" did menace the South. The Great Migration of African Americans from the rural South to the industrial cities of the North, which began during World War I, laid the foundation. By the late '30s the black vote was "important and sometimes decisive" in scores of northern congressional districts;³⁵³ and black workers had become a significant part of the nation's industrial work force.³⁵⁴ With the birth of the CIO, a new national labor organization once more welcomed black workers. In the 1880s, African Americans had been a small part of the nation's industrial workforce and so a small fraction of the Knights of Labor's constituency; but in the 1930s black workers were central to union organizing throughout the nation — in southern metal and coal mining, longshore, and tobacco manufacturing, as well as in northern auto, steel, and meatpacking. "Equal rights for Negro workers" was a defining demand of the new CIO, and friend and foe alike agreed that the new industrial unions would not have prevailed without the militant support they won from black workers.³⁵⁵ One canny observer of New Deal politics concluded that the CIO's battle for black rights became a vital symbol of the CIO's fight for equality for all Americans — especially in the minds of the first-generation offspring of southern European immigrants.³⁵⁶ Nor was this identification by "new immigrant" workers with equal rights for black workers only symbolic; in contrast to its parents and its children, the 1930s-40s generation of working-class "white ethnics" often proved ready to elect black shop stewards and union presidents.³⁵⁷

353. See HENRY LEE MOON, *BALANCE OF POWER: THE NEGRO VOTE 198* (1948); SITKOFF, *supra* note 337; WEISS, *supra* note 340.

354. See IRA KATZNELSON, *BLACK MEN, WHITE CITIES, RACE, POLITICS AND MIGRATION IN THE UNITED STATES, 1900-30, AND BRITAIN, 1948-68* (1973); NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991); SITKOFF, *supra* note 337, at 89-92.

355. See HORACE CAYTON & GEORGE MITCHELL, *BLACK WORKERS AND THE NEW UNIONS* (1939); NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR* (1995); HERBERT R. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* (1944); ROBERT H. ZIEGER, *THE CIO: 1935-1955* (1995).

356. See MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 218 (1997); SAMUEL LUBELL, *THE FUTURE OF AMERICAN POLITICS* 46-47, 49-50 (1952).

357. See AUGUST MEIER & ELLIOTT RUDWICK, *BLACK DETROIT AND THE RISE OF THE*

Meanwhile, the traditional leaders of the cause of racial equality found the CIO an alarming upstart. From Detroit and Chicago to Winston-Salem and Birmingham, NAACP newsletters and board meetings bristled with misgivings about the "new crowd" of black union activists and their demands for a "more militant civil rights program."³⁵⁸ The NAACP, with its litigation and social work orientation and its middle-class leadership, seemed ill equipped to act in the workplaces and in working-class neighborhoods where black Americans fought their most decisive battles in the New Deal era. Instead, the half million black workers who joined CIO unions thrust themselves into the vanguard of civil rights struggles. As a study by one of the NAACP's chief foundation funders uneasily concluded, "the characteristic movements among Negroes are now for the first time becoming proletarian . . .";³⁵⁹ and a reporter for *Crisis*, the NAACP's national journal, observed that the CIO had become a "lamp of democracy" throughout the old Confederate states. "The South has not known such a force since the historic Union Leagues in the great days of the Reconstruction era."³⁶⁰

This movement gained much of its dynamism from the creative tension that arose between unionized black workers and the federal government — a relationship that Lichtenstein and Korstad compare to the one between the church-based civil rights movement and the national government two decades later.³⁶¹ *Brown v. Board* legitimated the protest movement and sit-ins of the early '60s, and the latter, in turn, lent political force and urgency to *Brown's* dormant promise of racial equality. In like manner, the rise of inclusive industrial unions and the passage of New Deal labor legislation provided working-class blacks a new standard to legitimate grass roots civil rights protest and demands for reform. The 1935 National Labor Relations Act excluded agricultural workers to accommodate Jim Crow, and it contained no explicit antidiscrimination provision for the same reason.³⁶² Nonetheless, the "one

UAW (1979); Kevin Boyle, "There Are No Union Sorrows That the Union Can't Heal": The Struggle for Racial Equality in the United Auto Workers, 1940-1960, 36 LAB. HIST. 5 (1995); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988).

358. See ADAM FAIRCLOUGH, *RACE AND DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972* (1995); ROBIN D.G. KELLEY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* (1990); RAYMOND WOLTERS, *NEGROES AND THE GREAT DEPRESSION: THE PROBLEM OF ECONOMIC RECOVERY* (1970); Beth Tompkins Bates, *A New Crowd Challenges the Agenda of the Old Guard in the NAACP, 1933-1941*, 102 AM. HIST. REV. 310, 345 (1997); Korstad & Lichtenstein, *supra* note 357, at 787-88.

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

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

361. See Korstad & Lichtenstein, *supra* note 357.

362. See JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD*:

man, one vote" policy implemented in thousands of National Labor Relations Board elections enfranchised black industrial workers who never before had voted or participated as rights-bearers in the public sphere. The new unions, in turn, offered black workers industrial citizenship — participating in union governance, deliberating and deciding upon workplace grievances and broader goals; and these experiences combined with the patriotic egalitarianism of the New Dealers' war-time propaganda to generate a militant rights-consciousness among black workers as powerful as that evoked by the Baptist spirituality of Martin Luther King, Jr. a generation later.³⁶³

This was manifest in the labor-led voting rights movement across the South, and in the leading black trade unionist A. Philip Randolph's union-sponsored "March on Washington for Jobs and Equal Participation in National Defense."³⁶⁴ In 1941, Randolph called on "Negro America" to march on the capital: "[I]f American democracy will not give jobs to its toilers because of race or color . . . it is a hollow mockery."³⁶⁵ FDR responded by creating the Fair Employment Practices Committee (FEPC), which promised to end job discrimination in defense industries. The first civil rights beachhead in the federal government since the Freedmen's Bureau, the FEPC was a weak agency; but its interracial staff conducted well-publicized hearings and investigations, exposing racist conditions and spurring on black protest.³⁶⁶ Beginning in 1943, Randolph addressed rallies demanding a permanent FEPC to be organized "roughly like the NLRB" with similar authority to identify and adjudicate "violations of rights" and "go to court if necessary." Like the National Labor Relations Act, this law would secure "the right to work without demeaning discrimination." The one protected the "dignity of union membership and industrial democracy"; the other would protect the "dignity of fair employment."³⁶⁷ Bills to transform the war-time FEPC into a permanent federal agency came before Congress in 1945, the same year that it took up the administration's Full Employment Act. Both were cast as measures to enact FDR's "second Bill of Rights." The social "right to work" and the civil right to "seek work without dis-

A STUDY IN ECONOMICS, POLITICS, AND THE LAW 45-56 (1974); SITKOFF, *supra* note 337, at 52.

363. See Korstad & Lichenstein, *supra* note 357, at 787.

364. See PAULA F. PFEFFER, *A. PHILIP RANDOLPH, PIONEER OF THE CIVIL RIGHTS MOVEMENT* 45-118 (1990).

365. A. Philip Randolph, *Call to Negro America* (on file with C.R. Dellums Papers, Bancroft Library, U.C. Berkeley, Carton 23, Folder: *March on Washington; Statement of Facts*), quoted in Eileen Boris, "The Right to Work is the Right to Live!": Fair Employment and the Quest for Social Citizenship (unpublished manuscript, on file with author).

366. See MERL E. REED, *SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941-1946* (1991).

367. See Daniel Bell, *A. Philip Randolph Leads Drive for Permanent FEPC*, NEW LEADER 1 (Sept. 18, 1943).

crimination”³⁶⁸ were two sides of the same equation — both of them parts of the “economic rights of American citizenship,” which, beginning in the early ‘40s, FDR always declared were vested “regardless of race and color.”³⁶⁹ A year later, the Dixiecrats defeated the civil right to work with filibusters and the social right to work by gutting the administration’s bill in committee.³⁷⁰

The defeat of these two core rights was no surprise to sober New Dealers. Eight years had passed since the Solid South first stopped the New Deal’s legislative engine in its tracks, and important nationally based institutions and reformers had begun to assail the Solid South, realizing that the future of New Deal reform hinged on confronting Jim Crow.

In the summer of 1938, Roosevelt intervened in several primary elections in the South, hoping to defeat some of the most prominent reactionary Democrats. For the first time he openly attacked the South’s congressional leadership for thwarting legislation that would reform the South’s “low-wage economy” and its “feudal economic system.” The president met with success in “woo[ing] southern labor and tenant farmers into the camp of his new liberalism,” one of his southern foes observed. Nonetheless, the effort to unseat these foes was doomed by the fact that the white primary, the poll tax, and other restrictions kept most blacks and a majority of low-income whites, the “new liberalism’s” constituency, in other words, from voting.³⁷¹

If it did not stop the conservative Democrats, FDR’s campaign to elect southern liberals helped galvanize the labor-based civil rights movement. The 1938 primaries led to the founding of the Southern Conference on Human Welfare (SCHW), a biracial coalition organized by southern trade unionists and civil rights activists and funded by the CIO to attack disenfranchisement and complete the liberal realignment

368. *Fair Employment Practice Act*, 78th Cong., 2d Sess. (1944) (extension of remarks of Hon. Charles M. La Follette of Indiana), quoted in Boris, *supra* note 365, at 10.

369. Franklin D. Roosevelt, “We Are Not Going to Turn the Clock Back” — Campaign Address at Soldier’s Field, Chicago, Illinois (Oct. 28, 1944), in 13 PUBLIC PAPERS, *supra* note 301, at 369, 370; see also, e.g., Franklin D. Roosevelt, “Unless There is Security Here at Home, There Cannot Be Lasting Peace in the World” — Message to the Congress on the State of the Union (January 11, 1944), in 13 PUBLIC PAPERS, *supra* note 301, at 32, 41 (“a second Bill of Rights . . . regardless of station, race, or creed”); Franklin D. Roosevelt, “International Cooperation on Which Enduring Peace Must Be Based on Not a One-Way Street” — Annual Message to the Congress on the State of the Union (January 6, 1945), in 14 PUBLIC PAPERS, *supra* note 301, at 483, 503 (“an American economic bill of rights . . . regardless of station, race, or creed”).

370. See BAILEY, *supra* note 347, at 165–69; CLAWSON, *supra* note 346; REED, *supra* note 366, at 321–44.

371. “Fireside Chat” on Party Primaries, in 7 PUBLIC PAPERS, *supra* note 301, at 399. His southern foe is quoted in PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA 66 (1996). See also RALPH BUNCHE, THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR 384–437 (1973).

of the Democratic Party.³⁷² Virginia Durr, a leader of the antipoll tax movement, wrote Eleanor Roosevelt, "[t]he whole Southern bloc is blocking us at every turn. They realize it is the beginning of their end. Thank God for that happy day."³⁷³

But Durr's happy day did not arrive, not in time to oust the "Southern bloc" and complete the New Deal's unfinished reforms. To be sure, by 1944, many New Dealers agreed with Vice President Henry Wallace's assessment that completing the New Deal demanded overturning Jim Crow. That year the Supreme Court decided *Smith v. Allwright*,³⁷⁴ declaring the all-white primary unconstitutional; this combined with an outpouring of money and black and white organizers by the CIO to produce an extraordinary voter registration drive in the South. In a few southern states like Alabama and Georgia, the number of black and poor white voters increased several fold.³⁷⁵ At a rally in Birmingham, a black leader recalled those "first bright days of Reconstruction [when] the legislatures controlled by the newly freed slaves and the emancipated poor whites gave to our region its first democratic governments." It was time, he said, for "history to repeat itself."³⁷⁶

That too was not to be. The fraud, intimidation, and violence that greeted the SCHW and the southern movement to revive the democratic promise of Reconstruction confirmed once more how dependent such a regional movement ultimately was on a national commitment to decisive action based on a broad interpretation of constitutionally protected civil and political rights. Presented with such a federal commitment, even in the late 1930s or early '40s, perhaps a majority of hard-hit white southerners would have proved willing to forsake old political identities rooted in states' rights and white supremacy, and wager once more on the promised boon of social citizenship wedded to racial justice. But states' rights and white supremacy remained too deeply etched in the national government and party system from which such a com-

372. "There is another South," SCHW president Clark Foreman proclaimed, "composed of the great mass of small farmers, the sharecroppers, the industrial workers white and colored, for the most part disenfranchised by the poll tax and without spokesmen either in Congress, in their state legislatures or in the press." This latter South, "he claimed, was the great majority of the region's population. Were this majority but mobilized and enabled to vote, he sanguinely prophesied, the South would become "the most liberal region in the Nation." Clark H. Foreman & James Dombrowski, Memo for the CIO Executive Board (Nov. 13, 1944), in RECORDS OF THE SOUTHERN CONFERENCE FOR HUMAN WELFARE, Box 43, Tuskegee Institute Archives, quoted in NUMAN BARTLEY, *THE NEW SOUTH, 1945-1980*, at 24 (1995).

373. THOMAS A. KRUEGER, *AND PROMISES TO KEEP: THE SOUTHERN CONFERENCE FOR HUMAN WELFARE, 1938-1948* (1967). Virginia Durr is quoted in SULLIVAN, *supra* note 371, at 103.

374. 321 U.S. 649 (1944).

375. See SULLIVAN, *supra* note 371, at 169-220.

376. Osceola McKaine, "For Victory at the Ballot Box," quoted in SULLIVAN, *supra* note 371, at 191.

mitment would have had to emerge.

The constitutional bad faith that for half a century enabled both parties and all three branches of the federal government to condone or support Jim Crow and disenfranchisement, produced the anomaly of a reactionary core at the heart of FDR's New Deal liberal coalition. This excluded most of black America from the benefits of the main New Deal programs.³⁷⁷ This same constitutional bad faith at black America's expense also deprived all Americans of the institutional foundations and ideological legacy of social citizenship. Broad social and economic rights talk fell into disuse after the decisive defeats the New Deal agenda suffered in the 1940s. Blocked by the Dixiecrats at every legislative crossroad, the CIO, social citizenship's only powerful, organized constituency, gradually abandoned its efforts to "complete the New Deal." By the mid-'50s the industrial unions had begun instead to fashion with employers a *private* system of social provision and job security through collective bargaining in core sectors of the economy.³⁷⁸ During the same moment, the rigid consensus politics of the Cold War eclipsed the confident liberalism of New Deal America.

IV. THE CIVIL RIGHTS MOVEMENT AND THE "NEGROES' NEW DEAL"

Beginning with the Montgomery bus boycott in '56 and culminating in the epic confrontation in Birmingham, the wave of sit-ins, demonstrations, and near-riots that swept the South and the nation in spring and summer '63, the civil rights movement opened the door to reform for the first time since the '30s. Today, after thirty more years and a "civil rights revolution," blacks remain disproportionately at the bottom of the nation's increasingly unequal class structure: black unemployment remains more than twice that of whites. "All too many . . . black people . . . are more deeply mired in poverty and despair than they were

377. More than that, it produced a system of social provision that would remain split along racial and class lines. "Social Security" originally embraced all three programs that fell within the scope of the '35 Act. In other words, the aid program for dependent children (later AFDC) which, until 1996, we knew and reviled as "welfare," was part of "social security." By the same token, FDR's "general welfare Constitution" and "general welfare state" embraced all the New Deal social insurance programs, including contributory old-age insurance. Today, no politician would associate "social security" with the "welfare state."

Of course, FDR and the CES did distinguish between "social insurance" and "public assistance," but they also believed that within a generation, contributory old-age insurance and unemployment insurance combined with employment assurance would cover almost everyone and leave only a handful of people dependent on "public assistance." This comfortable illusion was premised on the exclusion of most of black America from the nascent "general welfare state." The illusion crumbled as soon as blacks won political rights and black poverty and unemployment gained urban visibility.

378. See Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 122-53 (Steve Fraser & Gary Gerstle eds., 1989).

during the 'separate but equal' era."³⁷⁹ Critical race theorists find it "amazing in retrospect... how very little actual social change was imagined to be required by 'the civil rights revolution.'"³⁸⁰ In fact, most of the leaders of that "revolution" were keenly aware of the profound changes their vision of equality entailed in respect of America's class structure and political economy. We have forgotten how many black leaders and white policymakers of the civil rights era consciously set out to complete the New Deal moment, convinced that without social citizenship for all Americans, many, perhaps most, black Americans would remain part of a subordinate caste. Bayard Rustin was a lieutenant of A. Phillip Randolph during Randolph's 1941 March on Washington campaign and chief organizer of the 1963 March on Washington. In 1964 he warned the Democratic National Convention that the "solution to our full citizenship" demanded more than "the Civil Rights Bill."³⁸¹ "What will [the Negro] gain by being permitted to move to an integrated neighborhood if he cannot afford to do so because he is unemployed... [W]hat advantage is it to the Negro to establish that he can... go into any establishment open to the public," if "he is bound to [an economic] servitude?"³⁸²

It was "essential" but insufficient "to outlaw discrimination in employment when there are not enough [jobs] to go around." Civil rights, he told Congress the year before, "are built on" "the right to a decent livelihood," or they rest on sand.³⁸³ Indeed, "it would be dangerous and misleading to call for [enforcement of antidiscrimination norms] without at the same time calling attention to the declining number of employment opportunities in many fields."³⁸⁴ And Rustin detailed the "displacement of lesser and unskilled workers" in the nation's "relatively high-wage heavy industries into which Negroes have moved since World War I" and the vast numbers of black workers cast aside each year by the "diminishing number of [decently paid unskilled and semi-skilled] jobs."³⁸⁵ Nor was displacement "confined to the cities," he went on, noting that "[m]echanization of agriculture" in the past decade meant

379. Derrick A. Bell, Jr. *Racial Realism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 306 (Kimberle Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY*].

380. KIMBERLE CRENSHAW et al., *Introduction*, in *CRITICAL RACE THEORY*, *supra* note 379, at xvi.

381. Bayard Rustin, Address to Democratic National Convention, Atlantic City, N.J. (Aug. 1964), in Bayard Rustin Papers, Reel 3, at 27 (Univ. Pub. of America, Inc. 1988) [hereinafter Rustin Papers].

382. *Id.* at 21.

383. Bayard Rustin, Draft for Testimony on FEP, in Rustin Papers, *supra* note 381, Reel 4, at 6.

384. *Id.* at 7.

385. *Id.* at 4.

that "as the great city minorities feel the pressures of increasing unemployment and poverty themselves, their numbers may be swelled by other unskilled workers from the country."³⁸⁶ "We cannot have fair employment," he warned, "until we have full employment."³⁸⁷

This same insight drove Martin Luther King to launch the Poor People's Campaign. The "full emancipation and equality of Negroes and the poor," he repeatedly told rallies and demonstrations, legislative hearings and White House conferences, demanded a "contemporary social and economic Bill of Rights." King's "Bill," like FDR's, emphasized decent incomes, education, housing, and full employment.³⁸⁸

The initiative that fleshed out King's "Bill" was the Freedom Budget for All Americans. Its prompting came from the November 1965 White House Civil Rights Conference, where King, Randolph, and others underscored the inadequacy of the administration's antipoverty programs: they provided job counseling but no jobs; they targeted black ghettos as a kind of riot control and fostered the "mischievous" notion that "the War on Poverty is solely to aid the colored poor."³⁸⁹ Instead, King and Randolph proposed a "Freedom Budget," a "multi-billion dollar social investment to destroy the racial ghettos of America, decently house both the black and white poor, and to create full and fair employment in the process."³⁹⁰ Randolph compared the idea to the "social investments of the New Deal," noting that the New Deal's labor legislation and public investments did more than provide jobs and foster collective bargaining; they "evoked a new psychology of citizenship, a new militance and sense of dignity" among white workers, and so would the Freedom Budget "among millions of Negroes." It would be "their New Deal thirty years late."³⁹¹

386. *Id.* at 5. Increasingly, then, where Negroes find work at all, they find themselves "to an unusually high degree concentrated in poverty jobs: domestics, the janitorial occupations in the service trades, laundry workers, etc. These are people who often labor a full two thousand hours a year and who are, nevertheless, bitterly poor." Bayard Rustin, Freedom Budget Article, n.d., in Rustin Papers, *supra* note 381, Reel 13, at 5.

387. Rustin, *supra* note 383, at 7.

388. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY 193, 199-200 (1967). King underscored the class-based character of his "Bill." "Any 'Negro Bill of rights,'" he wrote, "based upon the concept of compensatory treatment as a result of the years of cultural and economic deprivation resulting from racial discrimination must give greater emphasis to the alleviation of economic and cultural backwardness on the part of the so-called 'poor white.' It is my opinion that many white workers whose economic condition is not too far removed from the economic condition of his black brother, will find it difficult to accept a 'Negro Bill of Rights,' which seeks to give special consideration to the Negro in the context of unemployment, joblessness, etc. and does not take into sufficient account their plight (that of the white worker)." See DAVID GARROW, BEARING THE CROSS 312 (1986).

389. Rustin Papers, *supra* note 381, at 27.

390. Bayard Rustin, Untitled Article on the Freedom Budget, in Rustin Papers, *supra* note 381, Reel 13, at 1.

391. *Id.* at 9. When Randolph and King enlisted Leon Keyserling to lead a group of AFL-CIO, Department of Labor, and academic economists charged with drafting a detailed pro-

The same genre of full employment policies was pressed on Congress and the President by Walter Reuther and the industrial union wing of the AFL-CIO.³⁹² More strikingly, these policies found bold champions among the New Dealers in the Kennedy and Johnson administrations, above all in Johnson's Secretary of Labor, Willard Wirtz. Wirtz and others waged a sustained battle against the "partial and piecemeal" social services/work counseling approach being adopted by the War on Poverty. Eloquent in his carefully documented accounts of the "human slag heap"³⁹³ emerging in the nation's industrial regions, including its central cities where black unemployment already had begun to "explode," Wirtz, like the drafters of the Freedom Budget, urged instead regional and sectoral public investment, other incentives for job creation, and coordinated employment services and training.³⁹⁴

But the Wirtz/Freedom Budget approach got nowhere. Most contemporaries explained its failure in terms of the escalating costs of waging the Vietnam War and LBJ's desire for a cheap, quick fix for ghetto unrest. The impediments, however, were deeper. Committing the Democrats to the kind of political economy King now demanded would require mobilization and coalition-building on a much vaster scale. It required a palpable threat of mass protest on the part of the poor and working class, black and white — a felt crisis of governability — sufficient to compel LBJ and the Democrats to act and to give them the kind of strategic mobility and leverage over business that FDR enjoyed in the '30s; otherwise, structural economic reforms simply could not pass.

But such a conjuncture was not in the cards. Reuther and other progressive labor leaders supported King's vision — but not the AFL-CIO leadership under George Meaney's wing, and not Reuther's own constituents. The latter, as Meaney pointedly observed, cared about the pensions, health plans, and job security measures in their union contracts, not about raising hell until government provided these things for

gram, they assured the project's continuities with the New Deal, for Keyserling had been a principal architect of both the Wagner Act and the original 1945 Full Employment Bill. See Bayard Rustin, *Memo to Gerhart Colm et al.* (December 9, 1965), in Rustin Papers, *supra* note 381, Reel 12; Bayard Rustin, *Profile of Leon Keyserling, Freedom Budget Press Release*, in Rustin Papers, *supra* note 381, Reel 12. For a detailed account of Keyserling's New Deal activities, see Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285 (1987).

392. See LICHTENSTEIN, *supra* note 355; KEVIN BOYLE, *THE UAW AND THE HEYDAY OF AMERICAN LIBERALISM* (1996).

393. U.S. Dep't of Labor, *What is Structural Unemployment?* (Nov. 20, 1963), in *The Administrative History of the Department of Labor*, Vol. III, Documentary Supplement, Box 12 at the LBJ Library, at 3.

394. Memorandum from Secretary of Labor, Willard Wirtz, to the Chairman of the Council of Economic Advisors (Nov. 19, 1963), in *The Administrative History of the Department of Labor*, Vol. III, Documentary Supplement, Section III-B, Box 12 at the LBJ Library. See generally WEIR, *supra* note 348.

everyone. Ironically, Reuther's own accomplishments had helped ensure that organized labor's grievances now came in more administrable packages.³⁹⁵ The defeats social citizenship suffered in the '40s, when the whole CIO demanded it, and the "private welfare state" that its unions created in the '50s and '60s, meant that now the language of social and economic rights no longer resonated for organized workers.

CONCLUSION

So black America never got its "New Deal thirty years late." Nor did white working-class America get the New Deal Constitution it was promised thirty years earlier. The reasons are many, but the central ones trace back to DuBois's "unending tragedy of Reconstruction" and the tangled knot of race and class. From the perspective of this history, the New Deal constitutional legacy that is under unprecedented attack today is a marred one. We have enshrined the vast expansion of national governmental power, but not what it was expanded for. This suggests why Ackerman's theory might explain how constitutional politics authorized the New Deal Justices to hand down their transformative opinions, but it cannot readily show how the "rights of citizens" were transformed by the New Deal moment. Matters would be different if the only fault line were the exclusion of blacks from a newly enacted national commitment to social citizenship. But as we have seen, the betrayal of Reconstruction had more pervasive consequences. It subverted white America's capacity to enact even a racially exclusionary form of social citizenship. Accordingly, there is no "synthesis" of racial equality and social rights to be drawn here; the fault lines are too many.

Thus, Ackerman points to "the Full Employment Act of 1946" as a "framework statute[]" that was "part of a 'New Deal Constitution' " that the people had forged.³⁹⁶ But as we have seen, "We" hollowed out the constitutional substance of that statute. Ackerman gets the law's actual title wrong; it was the "Employment Act of 1946," reflecting the removal of the new federal right and the institutional and policy innovations proposed in the "Full Employment Bill of 1945." What possible precommitment could one draw from the '46 Act to constrain the "ordinary politics" of today? In general, the commitments "We" made to ourselves in the New Deal moment were too deeply compromised by our past inconstancy to undergird the kind of "preservative" theory Ackerman desires.

My constitutional narrative offers the colder comfort of a deeper

395. See BOYLE, *supra* note 392; LICHTENSTEIN, *supra* note 355. Nor was Reuther's racial egalitarianism well-rooted in the white rank and file of CIO unions like the UAW. See Thomas J. Sugrue, *Crabgrass-Roots Politics: Race, Rights, and the Reaction Against Liberalism in the Urban North, 1940-1964*, 82 J. AM. HIST. 551 (1995).

396. See ACKERMAN, FOUNDATIONS, *supra* note 10, at 107 n.*.

understanding of the most embattled dimensions of liberal constitutional theory. The historical knot of race and class has tied liberal constitutional theory to a conception of the affirmative dimensions of constitutional equality that does not fit the moral and historical arguments meant to support it. Those arguments call for a broader conception — as did the New Dealers and the Civil Rights leaders we canvassed. The twice-told defeat of social citizenship prevented this. Synthesizing the majoritarian and countermajoritarian ideals of equal citizenship remains a task for future movements and a future moment; no theorist can reclaim such a synthesis from our flawed past.

But perhaps this history also yields a constitutional imperative. If so, it is a much weaker one that only binds us in the arena of public discourse and debate. If the narrative outlined here proves persuasive, and we can agree that the question of social citizenship was concluded by the shadow of Jim Crow on the nation's polity, then perhaps we can agree it was concluded illegitimately and must be reopened. If we do reopen the question, we may find that a conception of social citizenship centered on a decent livelihood is not only better grounded in our history, but also more appealing as a normative matter. A right to welfare is insufficient to underpin the equal respect on which equal citizenship rests. Equality of worth, not in dollars but in the sense of having an opportunity to earn one's livelihood, is essential.

It is no longer seriously disputed that the nation is witnessing a dramatic decline of decent jobs with decent pay. While newly created jobs burgeon in many parts of the country, most of these pay the minimum wage, and most recipients of that wage are not raising families, and for good reason: even after the increase recently enacted by Congress, a minimum wage will not bring a family of three up to the poverty line. Estimates vary, but even today in one reasonable reckoning, as many as one-third of the American work force is looking for more work than they now have, while the poverty rate for full-time workers has been increasing — a 50% increase from 1980 to today. And both trends seem very likely to mount.³⁹⁷ The split society — riven by harsh class inequality — is not coming; it is here.

Broadening "the base of citizenship by broadening the base of work" is no simple task, and the capacity of government to do so is constrained in many ways.³⁹⁸ Plainly, however, many ill-paid jobs could be decently paid. Meeting unmet public needs could generate many new jobs. Our understanding of the kinds of toil and contributions to the common good that count as compensable "work" could be enlarged. And countless demeaning workplaces could benefit materially as well as morally from a measure of democracy. This is not the place for policy

397. See HANDLER & HASENFELD, *supra* note 41, at 11-12.

398. See Karst, *The Coming Crisis of Work*, *supra* note 39, at 560.

discussion, but policy must take account of what this history suggests. There are constitutional stakes in the present “crisis of work”³⁹⁹ — and in its consequences in second-class citizenship, where caste and class intersect for millions of Americans.

399. *See id.*