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THE ANTI-OLIGARCHY POPULAR CONSTITUTION

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I. BASIC ELEMENTS

A. "Constitutional" Argument

"Reclamation project" would fit well as description for *The Anti-Oligarchy Constitution* ("*TAOC*").[1] Authors Joseph Fishkin and William E. Forbath ("F & F") aim by this work to spark a return to form of an ancient fixture in United States politics, now recently (within living memory) gone into eclipse. That old American political folkway F & F name our country's "democracy-of-opportunity tradition."[2] To its late demise they link a collapse of American political capacity and will to address a challenge to society—a "crisis," as they name it, "of inequality"—on which, they believe, the American democratic republic soon could find itself foundering.[3] As contribution toward a reignition, F & F tender a rich and detailed recollection of the tradition's career over the course of American history, along with sharp-eyed (and sharp-edged) examination into the causes of its recent evacuation and the means of its restoration.

As *TAOC*'s historical chapters—eight of them, the bulk of the book, reaching from "The Early Republic" to "The Great Society"—are meant to remind us, the challenge to society our authors have in view is not late-coming to the United States. It is as old as the country is, a recurrent and persistent stream of issues of class and power reaching to the foundations of the republic. What has steeled our politics over decades and centuries to meet these issues head on has been, in F & F's persuasive retelling, the American democracy-of-opportunity tradition.

1 Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Foundations of American Democracy (2022).

2 *Id.* at 3.

3 *Id.* at 1.

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But then what, a bit more precisely, *is* this tradition? Of what does it consist that has gone missing from American politics of late? F & F's book's title tells you . . . up to a point. It was a practice, the title indicates, of political contention over the country's economic-structural choices and pursuits conducted in a *constitutional* vein; it manifested as a regularity of "*constitutional* argument" over economic policy.[4] That much, the title tells you. What the title does not quite in itself convey is that the anti-oligarchy Constitution of the tradition is an object of address *through politics*, not just (or mainly) through law. The tradition our authors have in their sights is one of argument not chiefly in courtrooms but in everyday political venues, from Congress on down, in which the Constitution figures as a constant guiding authority. F & F thus here take their stand as advocates for constitutional government, if not for judicial supremacy in the constitutional field. Their book should figure as contribution to the exposition of what marches these days under banners of "popular" or "populist" constitutionalism.[5]

Establishing those points and what I mean by them will be a part of my aim for what follows. Doing so will set us up for a further probe I have in view, and that is into the connection (if any) between the attraction of F & F to a tradition of constitutional argument over economic-structural policy (as differentiated, I mean, from just plain political argument) and the progressive-leaning partisan-political stance that also drives their effort in *TAOC*. What exactly, I ask, is the magic attached by F & F to the constitutional modality of public contention over economic-structural policy, given their substantive-egalitarian partisan interest? That probe will lead me to a question that may register as unexpected: do (or would) F & F carry a brief for routine attachment of constitutional import to debates over structural features of the American economy, regardless of expected partisan consequence; if, say, they weighed the chances of a resultant advantage as even between progressive-leaning and, say, neo-liberal political outcomes?

To that question, my answer will be uncertain. I can see (and can hope that they would, too) what I would count as good reasons, having to do with the cause of constitutional democracy in general, why the answer could be yes. I also can see perfectly decent, partisan-colored reasons on their part for wishing that American citizens could come again (as once upon a time) to see the politics of economic-policy choice through lenses of constitutional identity, constitutional faith, and constitutional patriotism. I will come to those reasons, briefly, at the end.

B. Sample of the Goods: A "New Deal Settlement"?

The main stem of *TAOC* consists, as I have said, in a chronologically ordered series of eight chapters, recounting in detail the tradition's figurations from political era to political

4 *Id.* at 2.

5 *See* Mark Tushnet & Bojan Bugaric, Power to the People: Constitutionalism After Populism (2021); Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

era. Readers will want a taste of what these chapters have to offer in the way of historical reawakening. I take as my example a recollection from New Deal political argument that will be pivotal for the questions I have in view.

Liberals and progressives of the last several American generations have largely taken for granted, as a leading premise in our national constitutional law, a rule of New Deal vintage by which resolutions of socioeconomic policy are placed almost entirely beyond the remit of the Constitution. We take that as a switch in understanding from the preceding *Lochner* era, promoted by New Deal politicians by way of clearing a path to adoption of their programs: the "New Deal settlement" you can find in all the casebooks.

That has been the standard story. The *real* story, courtesy of F & F, is more fine-grained. What our authors let us see is that it was neither the intention nor the practice of New Deal progressives thus to blanket out some category of economic-policy matters from constitutional purview or Constitution-powered public argument. That was, say F & F, an "unintended upshot" (propelled by reasons we will come to[6]) of a New Deal lawyers' contrivance for getting their programs safely past the censorship of a Supreme Court imbued with fringe-conservative political-economic leanings.[7] At the Supreme Court, yes, what the New Dealers thought it smartest to propose was not for the Court to turn its own constitutional thumbs up on the New Deal—to "make the New Deal constitutional political economy its own." They could, rather, propose for the Court to "step aside" and let "legislative and administrative actors carry on with the constitutional work they were better equipped and disposed to do."[8] By contrast, as F & F quite effectively show, when arguing in Congress and in public discourse, New Dealers pitched their arguments as constitutional. "FDR and New Deal lawmakers," as they write, "championed their legislative agenda in terms of implementing their new social-democratic 'economic constitutional order.'"[9] Robert LaFollette, for example, "claimed a fundamental rights–based constitutional warrant for Congress to protect the 'right to work at a gainful employment' against invidious discrimination," with implications not only for labor-law policy but for the "state action" doctrine in constitutional law.[10]

Now, this may strike you as only a mild twist or refinement on received American legal history. The twist turns out, though, as we will see later, to figure significantly in F & F's plea to liberal- and progressive-minded Americans to get over our crush on a "New Deal

6 *See* Part III, *infra*.

7 Fishkin & Forbath, *supra* note 1.

8 *Id.* at 254.

9 *Id.*

10 *Id.* at 335.

settlement" and learn again to make the Constitution the very ground of demands for a steadiness of anti-oligarchy commitment in economic-structural policy.

C. *"Political Economy"*

Given F & F's motivation for seeking a revival of it now, the democracy-of-opportunity tradition's aspect of substantive-egalitarian political stance—*anti-oligarchy*—must of course figure saliently in their account of it and its workings in our politics over time. That aspect comes coupled to another key term in the book's vocabulary, "political economy." The reference of that term is double-barreled: to a field of disciplinary study (like physics), and to an attribute of a country, something you'd want to know about it before moving there (like climate or language). The expression conveys recognition of a relation of co-dependency between a country's socioeconomic and governmental orders. It was with a sense of "how political decisions shape and constitute [economic] relations [and how] economic relations . . . shape politics"[11] that world-historical researchers in the field—Smith, Mill, Marx—conducted their studies and disquisitions on "wages, prices, labor and capital [and] the distribution of wealth."[12] Their work as political economists stands, for F & F, in contrast to today's successor discipline of economics, directed as the latter is (in their description) toward technical goals of efficiency, consumer satisfaction, stability, growth, and so on, while shedding off to "politics" all questions about how, if at all, to implement its findings in the form of legislated public policy.[13]

D. *Composition of the Tradition*

The aim, as I have said, of F & F in *TAOC* is restoration to effective presence in American political life of a certain tradition of argument in matters of socioeconomic policy. Arguments in this tradition

> hold, broadly, that we cannot keep our constitutional democracy—our "republican form of government"—without (1) restraints against oligarchy and (2) a political economy that sustains a robust middle class, open and broad enough to accommodate everyone. The most important and compelling arguments in this tradition hold [further] that (3) a principle of inclusion—across lines such as race and sex—is

11 *Id.* at 2.

12 *Id.* at 1–2.

13 *See id.* at 2, 365. "Political economy" as the name of a study parallel to economics has not fallen out of use. Fishkin and Forbath must be pleased to note the presence in Harvard Law School's course lineup for the current term of a course on "Law and Political Economy." *See Course Catalog* (2021–2022 academic year) 306, HARV. L. SCH., https://hls.harvard.edu/academics/curriculum/catalog/index.html.

> inseparable from the first two requirements, and equally necessary for sustaining the political economy that republican government demands.[14]

This deeply embedded vein in American political consciousness and debate—this democracy-of-opportunity tradition—is, say F & F (backing the claim with their succession of richly detailed historical chapters), "as old as the republic itself."[15] It has been, through most of our history, a commonplace of our politics, only recently faded away. We badly want it back now, in the urging of F & F, for its aptness and capacity to address pressing problems of inequality and hierarchy now facing our country.

Likely the first thing you'll notice about F & F's democracy-of-opportunity tradition is its claim to a substantive-ideological coloration: "blue," to wit, in our current journalistic color-coding—to the left, egalitarian, redistributive, "progressive." But progressive partisan stance is only one out of three elements that, in combination, define the political-argumentative style of which F & F seek a reignition. The other two are topical focus and "key" or "pitch" (as I will call this third aspect). The *topical focu*s in the tradition is "political economy." The *partisan stance*, yes, is "progressive"—opposite, say, to a neoliberal sort of political-economic stance. The *pitch* is "constitutional."

I am strongly on board (color me social-democratic liberal) with the claimed tradition's partisan-political leaning. But still, to me as scholar coming at F & F's work from the field of constitutional studies (or "constitutional theory"), partisan stance is in a way the least interesting of the tradition's three dimensions. I see that aspect as in a way incidental to those of political-economy focus and constitutional pitch. (Consider that political-economy counterparts to Epsteinian classical liberalism[16] and Hayekian catallaxy[17] do also compete these days for American political-cultural hegemony. Will not *those* partisan causes also face choices about whether and how to pitch at the "constitution" level, no less interesting to constitutional theory than those faced by anti-oligarchy progressives?)

The wish of F & F for a restoration to American politics of a disposition to pitch economic and related social policy debates at a level of always immanent "constitutional" resonance and import comes tightly coupled to a wish to see the debates routinely cast in a "political-economic" frame, where political-structural dependencies and consequences

14 Fishkin & Forbath, *supra* note 1, at 2.

15 *Id.*

16 See Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government (2014).

17 "Catallaxy," for Friedrich Hayek, designates a "special kind of spontaneous order produced by the market through people acting within the rules of the law or property, tort, and contract." *See* Friedrich A. Hayek, 2 Law, Legislation and Liberty: The Mirage of Social Justice 108–09 (1976). For Hayekian political economy, see generally Friedrich A. Hayek, The Constitution of Liberty (1960).

routinely figure as primary considerations, along with those of efficiency, productivity, growth, and so on. Throughout *TAOC*, those two aims travel together. The evident premise is that it's when you cast choices of regulatory policy—take, for example, regulation affecting the legal status and relations of labor unions—in a political-economic frame that you more likely will see them as constitutionally fraught, and vice versa.[18]

As we have already begun to see, though (the putative New Deal settlement), the two aims can at least formally be pried apart, so that choices of regulatory policy are routinely presumed to lie *outside* the Constitution's gaze. "Today," write F & F, "structural political-economy arguments tend to strike [us] as policy arguments"—as distinct, they mean, from "constitutional" ones.[19] They say this ruefully, even as they recognize how that very tendency has generally been seen from the left as more advantageous than detrimental for the progressive cause.[20] F & F think that has been our mistake. They urge on us a push toward a restoration of political economy to a constitutional level of attention and concern in American politics.[21] Do they see in such a restoration an important gain for the quality of our democracy, *aside from* effects on the prospects for a democracy of opportunity—even if, say, the resulting advantage would accrue to supporters of a classical-liberal political economy?

E. "Constitution" as Higher Directive Authority

Our authors distinguish the modern investigative field of economics from its predecessor field of political economy, in part by the former's comparative disregard for the political-structural implications of its scientific findings of regulatory cause and effect for technical targets of output, growth, efficiency, and so on.[22] But looking, then, to recent American politics, you might find yourself doubting any claim that *they* have been

18 Some may look for comparison here with Marxist or pseudo-Marxist ideas about "base" and "superstructure." Others may find more apt a comparison with John Rawls's idea of a society's "basic structure" as the focus for a liberal conception of justice. (For Rawls, a society's basic structure consists in its "main political and social institutions [and the way] they fit together into one system of social cooperation [and] assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time." JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 10 (2001).) But Rawls and F & F are on differing sides of the question of including economic-opportunity aspects of the basic structure among a country's "constitutional essentials." See JOHN RAWLS, POLITICAL LIBERALISM 227–30 (1993); Frank I. Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*, 60 DRAKE L. REV. 1001, 1005, 1016–17 (2012).

19 FISHKIN & FORBATH, *supra* note 1, at 8.

20 *See id.* at 15, 362, 484. "New Deal constitutionalism . . . was not what we have been taught in law school" (i.e., "a constitutional outlook that thrust economic rights and liberties beyond [constitutional] purview"). *Id.* at 334.

21 They aim at getting "liberals and progressives [to] understand constitutionalism anew [meaning once again as formerly] as a field where . . . important work of reimagining the relationship of democracy and capitalism can resume." *Id.* at 141.

22 *See id.* at 2, 365.

oblivious to social- and political-structural consequences of regulatory policies. (Ronald Reagan, Paul Ryan, Bernie Sanders, Elizabeth Warren?) What you should then—again—read F & F to bemoan is loss of a former American predilection for contention over such concerns in a *constitutional* key. *That* is what for them has most grievously gone missing from our politics: not so much attention to political-structural ramifications of economic policy directions as *constitutional argument* addressing those ramifications; or rather, to be more precise, addressing them not obliquely and stealthily through First Amendment (or Takings Clause or Vesting Clause) back doors but head-on, frontally, treating those matters as directly constitutionally targeted, in and for themselves. Where Americans in the past routinely "viewed and argued about . . . the political economy through a constitutional lens,"[23] grieve F & F, we now oppositely cast issues of economic policy *as such*—as a category—beyond and beneath constitutional concern, regardless of apparent or arguable political-structural ramifications from those issues.

But then we need to be clear about what F & F mean when they speak of "constitutional" argument or "constitutional" politics. To begin with, the term "constitutional" may be used to label either a topic of debate or an authority to be consulted in resolving the debate. Used to name a topic, "constitutional" signifies having to do with the basics of a country's political order or character. Political-economic argument then being, by definition, *always* in that sense "constitutional," this could hardly be the sense in which F & F *join* "constitutional" *to* "political-economic" in their call for revival of a form of political address to economic policy featuring both of those attributes, not as one but distinctly as two.[24] By "constitutional" argument, here, F & F undoubtedly mean argument referring to an authority taking precedence over the contingencies of our ordinary-level legislative politics. They mean argument appealing to an American (capital-*C*) Constitution as biblical for this domain. The tradition they have in view is one of advocates presenting their cases at the ordinary-politics level in terms (partly) of demands precedently imposed by that Constitution.[25] It is one of argument giving as a compelling reason in support for its policy positions that that Constitution says so.

F. A "Dualist" (not "Monist") Conception of Democracy in America

That still leaves open, of course, large questions about exactly what, for F & F, that authority-casting "Constitution" consists of and how we make out exactly what it says.

23 *Id.*

24 *See*, *e.g.*, *id.* at 2 (differentiating between argument "in a constitutional" lens from argument "in a political-economy" lens); *id.* at 3 (recalling a time when concentration of economic power was seen to pose "not *just* a political" but furthermore a "constitutional" problem) (emphasis supplied).

25 *Id.* at 3.

Is their Constitution all and only a written text subject to the interpretative tools and techniques of lawyers? Does it consist in part of some prior normative conception of good or right government that informs, or ought to, an attribution of meaning to the text? F & F's answers might or might not jibe with what we call textualist and originalist themes in current American constitutional-legal scholarship. Below, we will look and see.[26] For now, though, I mean to have established only that F & F evidently are at home with what we can call, in the coinage of Bruce Ackerman, a "dualist" conception of American democracy, meaning one that distinguishes a "higher law of the people" from an "ordinary law of legislative bodies" and subordinates the latter to the requirements of the former.[27] At least, they are to the extent of joining up with a habitual American readiness to take the Constitution (whatever exactly we make that out to be) as a kind of decalogue-equivalent for politics here: a tablet of mandatory fixed high principles for the guidance of political power, to which we count on officials and their influencers to feel themselves obliged.

That is not a minor point to make about the work of F & F. From the start and repeatedly, American history has shown a split of dispositions toward that sort of civil-religious regard for the Constitution. That split is quite visibly with us today, at least among our legal intelligentsia.[28] We have among us our committed democratic "monists" (as Ackerman would style them) for whom unbound rule by current majorities is and must be the ultimate sovereign coin of legitimacy in a democratic politics.[29] What is more: if and insofar as the split of democratic dualists and monists might carry for you a hint of a left/right connotation, F & F's apparent constitutional-democratic allegiance would place them on what normally would appear—at least prior to the education tendered by their historical diggings—to be the side less receptive to the political outcomes they seek. The figure of Frederick Douglass comes to mind. (The anti-slavery *Constitution*?? Really??) I am here looking to understand further what might be the full complement of political values or other considerations that land F & F in this position.

26 *See* Part IV, *infra*.

27 John Rawls, Political Liberalism 231 (1993). Rawls was there, as he said, *see id.* at 231 n.17, taking a cue from Bruce Ackerman. *See, e.g.*, Bruce Ackerman, We the People 1: Foundations 6–7 (1991).

28 On the dualist (constitutional) democratic side (variously nuanced), see, e.g., C. Edwin Baker, Human Liberty and Freedom of Speech (1989); Ronald Dworkin, Freedom's Law (1996); James Fleming & Linda C. McClain, Ordered Liberty (2013); Robert C. Post, Citizens Divided; Campaign Finance Reform and the Constitution (2014). On the monist (majoritarian) side, see, e.g., Louis M. Seidman, From Parchment to Dust (2021); Jeremy Waldron, Law and Disagreement (1999); Steven Winter, *"Who" or "What" Is the Rule of Law?*, Phil. & Soc. Criticism (June 2021), doi: https://doi.org/10.1177/01914537211021148.

29 *See* Ackerman, *supra* note 27, at 7–16. "[A]t its root," wrote Ackerman, "monism is very simple: Democracy requires the grant of plenary lawmaking authority to the winners of the last general election. . . . [D]uring the period between elections, all institutional checks upon the electoral visitors are presumptively antidemocratic." *Id.* at 8.

II. STRATEGIC CONSIDERATIONS

I look first from an instrumentally calculative, strategic standpoint. Consider yourself, then, in the United States in 2022, a seeker after policies to implement a progressive-minded, democracy-of-opportunity conception for this country now and into the future. For that, you need a steady stream of positively supportive responses from the legislative and executive departments of government. The standing challenge, then, for you in a dualist-democratic environment, is twofold. You need to sustain above threshold levels your quantums *both* of effective motivation of majorities disposed toward your side as a matter of partisan goals *and* of belief on their part in an alignment of those goals of theirs with constraints—positive, negative, or some of both as the case may be—imposed by a Constitution laid down by generations past. To complicate matters, these two thresholds—of partisan goal-commitment and constitutional belief—are terms in a simultaneous-equation assignment, not separately fixed but rather reciprocally dependent. Constitution-based reservations can yield to especially widespread and urgent commitment on progressive goals, as conversely can perceived constitutional mandates offset (but maybe also aggravate) uncertainties about the goals. Partisan goals and constitutional beliefs can fuse across the border of their notional separation, with Constitution-based promptings infiltrating what participants still experience as definitions of their goals and vice versa.[30]

To complicate further your predicament, there is the little matter of judicial review. Knowing your favored policies will meet serious and sincere contestation in political venues, but perceiving (let's say) a better-then-even chance of their prevailing there assuming no higher-directive institution in place, you still face prospects of having them derailed, in the Constitution's name, by a judiciary and a legal fraternity you believe to be systemically disposed—structural elitism working as it does—to lean to the right in its constitutional interpretations, by comparison with the general voting population.[31]

With all that in mind, your reflection at the moment turns to a choice you face about how to read the Constitution, specifically with regard to its inclusion (or not) of directives affecting questions of economic structure. As it happens, the country's history to date has left you with a clear opening to insist—and I mean as a settled point of constitutional law, our beleaguered "New Deal settlement"—that the great bulk of the measures you care

30 *See* Fishkin & Forbath, *supra* note 1, at 19 ("[T]he border between constitutional politics outside the courts and constitutional litigation inside the courts is a thin, permeable membrane. Arguments cross it all the time in both directions.").

31 The theme (I am not knocking it) of the historic elitist leaning of the courts, and especially of the Supreme Court, is a constant drumbeat in *TAOC*. *See, e.g.*, *id.* at 23, 139–40, 144–48, 157, 168, 362, 405. The Supreme Court, remark F & F at one point, "has always been the most elite branch of the government in many senses of the word." *Id.* at 403.

about fall into a category (say, "ordinary economic and social legislation") with regard to which the Constitution is read to take no position. A complication, however, lies across that path, in case it would be the one to which you would otherwise incline. Taking it involves you in fighting back against conservative judicial chiseling at the New Deal settlement through those First Amendment and other clausal back doors I mentioned above.[32] Insofar as you might doubt of possible success in that fight-back campaign, an alternative choice also now beckons. Having just read through *TAOC*, you find yourself attracted to the Douglass-like line of affirmation—indeed, insistence—that the Constitution *does* have application here *and* is favorably and positively disposed toward the anti-oligarchy policies and measures you favor.

As between those two options, we can lay out broadly the strategic-instrumental considerations bearing on your choice one way or the other.

Against the Constitution's bearing on socioeconomic policy choices

A1. You assess at least somewhat optimistically the chances for favored political outcomes with the Constitution out of the picture.

A2. Allowing the Constitution in introduces some risk of loss at the political stage for favored policies that otherwise would have prevailed there.

A3. Allowing the Constitution in introduces risks of judicial invalidation of favored policies politically approved.

Supporting the Constitution's bearing on socioeconomic policy choices

B1. You are at least somewhat—maybe quite gravely—doubtful of the chances of political success for your program without positive support from a public regard for the Constitution.

B2. You believe that Constitution-based argument of a certain kind can in fact significantly improve your chances at the political stage.

B3. You believe that popular support induced by Constitution-based argument of that certain kind can reduce the risk of judicial invalidation of favored policies politically approved.

It is time, now, to replace our speculative "you" in these deliberations with our actual friends F & F. We can then also replace "arguments of a certain kind," envisaged by our propositions B2 and B3, with "arguments of political economy." On that understanding, F & F take their stance in support of the Constitution's bearing on governmental policy-choice in matters of political-economic moment. And then, if we suppose that stance to be purely instrumentally strategically motivated, it aligns F & F with judgments B2–3 as opposed to A2–3.

32 *See id.* at 355, 416–17, 435–38.

And then here is my concern. In the historical course of American Constitution-centered, political economy-focused debate, *as* recounted by F & F in *TAOC*, it is not clearly the case that the democracy-of-opportunity side has overall been hegemonic; not nearly so. F & F's historical chapters show democracy-of-opportunity as a contender against adversary political-economic visions of a distinctly more (shall we say) elitist-liberal bent, sometimes prevailing against them and sometimes not. The history, as richly and bravely recounted by F & F, does indeed, as they claim, show a predilection for treating as of "constitutional" import issues of policy bearing political-economic implications.[33] In so showing, however, it offers scant support for premises B2 and B3 in my table of strategic considerations (from a partisan-progressive standpoint) bearing on a move to resuscitate that predilection today. True, that still leaves standing, on the "pro" side, B1; but B1 alone gives no strategic-instrumental advice on a push now for reescalation to the "Constitution" level of our debates over political economy. Supposing we *could* now successfully achieve such an effect, the history suggests an indeterminacy of consequence as between a democracy-of-opportunity political outcome and some sort of antithesis to that.

Or so the matter appears to me, fresh from my reading of *TAOC*. F & F may disagree. They may sum the evidence differently. Americans *today*, they posit, share broad agreement on the importance of "promot[ing] opportunity, avoid[ing] oligarchy, and build[ing] a robust middle class open to all."[34] They "understand . . . that [a] crisis of inequality threatens our democracy."[35] That understanding, add F & F, may often today be "inchoate."[36] Possibly what clouds it from full awareness is precisely that erasure of political economy from the field of front-line Constitutional vision that it's a main purpose of *TAOC* to reverse. And then once that reversal is accomplished, F & F may believe, the chances are good for a kind of tidal resurgence here of the democracy-of-opportunity stream in our heritage, of a force that would beat back, too, any conservative judicial urges to bar the way. Or we might read them less optimistically, not as predicting victory but as urging that in that direction anyway still lies our best (if modest) hope at present for achievement of a just or decent political and social order in this country. Getting political economy back as a front-burner *constitutional* question, they thus may be understood to say, is our best remaining choice, *given* a firm dualist commitment of American democracy that we have no way to unhinge. *If* the Constitution we will always have with us, what to make of it is a question we cannot evade.

33 *See id.* at 8 (claiming that "throughout the long period from the founding through the New Deal," democracy-of-opportunity advocates "*and their opponents* . . . agreed that part of arguing about the Constitution is making claims about what it requires of our political economy"); *id.* at 138–39 (recounting how, in the Gilded Age, key issues of economic ordering were "cast in terms of constitutional political economy").

34 *Id.* at 18.

35 *Id.* at 1.

36 *Id.*

But that little word "if" (like "given" in the sentence preceding) carries a heavy load. It implies a third strategic option for promoters of an anti-oligarchic, American democracy of opportunity, about which *TAOC* has little to say. I mean the option to join forces with the democratic-monist-leaning contingent at work in our legal academy today, in a move to wean our politics away from the idea that the Constitution lays down norms of substantive public policy that should carry anything beyond a purely rhetorical or topic-of-conversation-steering relevance for the proper conduct of our democratic politics. And so, again, my question comes. Regarding F & F as a brace of especially informed, determined, and thoughtful allies in a partisan-political cause that I share (and being myself firmly a friend of constitutional democracy), I am anxious to discover from a reading of their work: why their apparent comfort with *constitutional* democracy as the American way? Why are they not joining with the monist-majoritarians, or at least giving that camp a nod of sympathy?

Possibly, they just assume that the democratic monist option in these United States today—the option of washing out the Constitution's substantive bearing on our politics to a thinly rhetorical or conversational remainder—is hopeless of success. In what follows, though, I will be headed toward a different kind of answer—a suggestion of belief on the part of F & F in some distinct value in a constitutional conception of democracy, aside from considerations of relative advantage thereby gained for one side or another in partisan debates. They do not say this. Such a belief, if present on their part, is inchoate. It is, however, a possible reading to which I direct the remainder of this essay.

I will pursue the possibility by way of further probes into three questions: First, do I need to qualify in some way my classification of F & F as devotees of dualist democracy? Is constitutional patriotism for them a mere rhetorical trick we can learn to play, or is it an American political-emotional fact we should respect and embrace and can learn (again) to argue from? (I will say it is the latter.) Second, what is "the Constitution," to which constitutional argument, as they mean the term, is to be directed? Is "Constitution" meant by them to evoke some abstract-universal theory of rightness in politics, or does it name a concrete development in a country's actual history? (I will say it is most definitely, for F & F, the latter, but subject to "constructivist" interpretation.) Third, exactly what is contained in the idea—which F & F would have us expel from our minds—of the Constitution lying "beyond" or "separate from" politics? (I will say "it's complicated.")

III. DUALIST ALLEGIANCE? (AND POPULAR CONSTITUTIONALISM)

Between democratic monists and dualists—majoritarian and constitutional democrats—the most basic line of division is over the idea of a country's politically enacted constitution as an advance and obligatory mandate for policy directions in the country's ground-level laws, to which lawmakers from time to time in office (and the political majorities presumably behind them) stand beholden. Beholden, I mean, in a moral way

regardless of risk that institutional formations of superior strength—say, a Supreme Court of the United States—will block disobedient pursuits. The bias of the authentic majoritarian-democratic streak in our conversation is against any such idea of constitutional fidelity, whether or not attended by judicial backup.[37]

On that definition of the categories, there cannot be a doubt that *TAOC* is plotted on a dualist-democratic presupposition. F & F there plainly are calling for argument in political venues that invokes an American capital-*C* Constitution as civically obligatory authority. One can still, though, probe that dualist stance on two fronts. One front is that of commitment: are F & F in *TAOC* dualist at heart or only as a matter of tactical prudence, given their partisan objectives in a given constitutional-cultural *milieu*? The other front is that of qualification or reservation: are F & F in some way paring back on the muscularity of the higher constitutional authority to which they are *arguendo* committed? The commitment probe I keep for the windup of this essay. The reservation probe I take up now.

F & F close their book with a plea to "liberals and progressives" not to "disdain the Constitution" or disparage Constitution-talk as an "essentially demobilizing" channel for "ced[ing] power to . . . courts." The truth, they say, is "just the opposite:"

> It is the failure to speak about the Constitution in politics, an insistence on treating it as a thing outside of politics, setting the boundaries of politics, that cedes power to the courts. And more often than not, over the long arc of American history, courts have used their power to protect economic and political oligarchy.[38]

Plain on the face of that message is a stance on the side of dualist (constitutional) democracy. Equally plain there is a stroke against judicial supremacy in the constitutional field. Might the anti-judicial stroke be counted as a reservation or cutback on the dualist stance? I do not see how. Constitutional-democratic opinion on the American legal left divides these days between a qualified judicial-supremacist and a distinctly more popular-constitutionalist wing.[39] In this division, F & F register distinctly on the popular side. But the point to see, here, is that the popular-constitutionalist idea is exactly one of *retaining* constitutional fidelity as a prime civic motivation, even as it would assign final, decisive authority over constitutional meanings and applications to political forums.[40]

37 *See* Michael J. Klarman, *Antifidelity*, 37 So. Calif. L. Rev. 381 (1997); *supra* note 28 (authorities placed on the majoritarian side).

38 Fishkin & Forbath, *supra* note 1, at 486.

39 *Compare*, *e.g.*, James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms (2015), *with, e.g.*, Mark Tushnet, Taking the Constitution Away from the Courts (1999).

40 *See*, *e.g.*, Kramer, *supra* note 5, at 24, 227 (describing an early American view of the Constitution as surely higher law, but a law whose applications are finally to be determined not by judicial delegates but by "the people themselves").

This coherence of the popular-constitutionalist cause with a dualist-democratic conception is a matter to which I will return before finishing.[41] Given that it is so, not even a flat and clear preference of F & F to do away entirely with judicial review should counter my ascription to their dualist-democratic allegiance.

In fact, F & F do not declare so flat a preference. They do not love judicial supremacy, but judicial supremacy figures in their narrative in a more complicated, interesting way. Frustrated—so runs F & F's quite shrewd and credible account—by obstruction to their legislative programs from a conservative Supreme Court, American progressives of the New Deal era had a choice to face. They could push to wean American political practice entirely away from attachment to judicial supremacy, in the process coming somehow to terms with a Supreme Court membership perhaps not overly inclined to give up that perch in the tree. Alternatively, they could push for settlement on a deal by which a certain class of issues—those of socioeconomic policy—would be placed almost entirely beyond the remit of the Supreme Court.

I reported above on F & F's recollection of how the New Dealers, thus enmeshed by circumstance, responded by seeking (this is now me, Frank, talking, not F & F, although it is only cues from them that could have set me thinking this way) to split the atom of constitutional-rights recognition and protection.[42] And that along two axes: first, an axis of division between kinds or topics of laws that do and do not enjoy, in court, a "presumption of constitutionality;"[43] second, an axis of division between constitutional mandates cognizable and not cognizable in court (the latter then still cognizable in political venues). The former differentiation has proved viable, more or less, and survives today as a "fundamental rights" (or "fundamental interests") branch of jurisprudence under the Constitution's Due Process and Equal Protection clauses. The latter one has turned out to be extremely difficult to sustain in a constitutional-legal culture tracing its root to *Marbury v. Madison*.[44] That culture is natally resistant to the idea of a class of issues within constitutional coverage but beyond remit of the courts. By its inborn logic, not only does "Constitution" equate to "higher law," but also "law" equates to "for courts";[45] so if *not* (this issue or that one) for the courts, then not legal either, and so not constitutional: Chief Justice Marshall's logic in *Marbury*, now run in reverse.[46]

I do not suggest that the logic is deconstruction-proof, only that it is legal-culturally embedded here and stands in the way of where F & F are trying to take us. They know it. We will look hard at their response,[47] but first we need to nail down more precisely than

41 *See infra* Part V.

42 *See* Part I(B), *supra*.

43 United States v. Carolene Prods. Co., 344 U.S. 144, 152 n.4 (1938).

44 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

45 "It is emphatically the province and duty of the judicial Department to say what the law is." *Id.* at 177.

46 *See id.* at 176–80.

47 *See infra* Part V.

we have done yet what F & F envisage by "the Constitution" to whose authority they would have our political debates over economic structure routinely appeal.

IV. "THE CONSTITUTION"

"Constitutional constructivism," explains James E. Fleming,

> conceives constitutional interpretation as a quest . . . for the best interpretation of our constitutional text, history, and structure, together with our constitutional practice, tradition, and culture. . . . [I]t conceives our Constitution as a scheme of abstract aspirational principles and ends, not a code of detailed rules.[48]

Think of a house lot, an owner-client, an architect, and a blueprint. Anticipatory to the blueprint would be the architect's talk with the client about basic priorities of design and function for the house to be built and the needs to be served by it. If those were distinct enough in the owner's conception, and sufficiently captured by the architect's blueprint, one familiar with the world and its conditions in which these events took place could deduce or read back from the blueprint a fair amount, at least, about the owner's conception. Doubtless some important parts would remain open to reasonable debate, but it would be debate constrained to fidelity to the blueprint, bringing to bear common cultural knowledge about why some feature would or would not have been included.

In our contemporary face-off of textualist/originalist versus constructivist approaches to constitutional fidelity, F & F plainly fall on the constructivist side. For them, the Constitution to which fidelity is owed is not the blueprint; it is that readback from it of guiding purposes and values. Always with approval express or implied, F & F furnish numerous instances from our history of a political-argumentative "hermeneutics" of "renovation," "restoration," "evolution,"[49] in which the house-equivalent is our constitutional law-in-action, an assemblage of institutions, practices, and principles accepted as guiding. The "restoration," then, is to compatibility with the client's statement of wishes and desires, a set of enduring basic aims for which, historically, the assemblage was initially designed and presumably found compatible, but found compatible given conditions of climate, terrain, and technological know-how, any or all of which may have undergone change since then (say, lead pipes).

Here is one instance of the authors' thinking:

> This particular way of threading the needle—advocating constitutional redesign, but arguing for it in terms of constitutional fidelity—became the centerpiece of Populist

48 Fleming, *supra* note 39, at 20–21.

49 Fishkin & Forbath, *supra* note 1, at 72, 102, 296.

> arguments for the Seventeenth Amendment, as it was in their interpretive arguments for enlarging the scope of congressional authority over political economy. . . . The solution was a constitutional change that was also a kind of restoration . . . for the purpose of maintaining [under changed conditions] the very principles which the fathers sought to establish.[50]

For F & F, then, "the Constitution" in the democracy-of-opportunity tradition of political argument is not the parchment blueprint, but neither is it some free-floating theory of good government. It is rather a constrained deduction, from a willful human act with a location in history, of a vision of good society supposedly informing and motivating *that act*. "Constitutional" argument, accordingly, will regularly revert to argument over that vision. That will be especially likely where at stake are implications for the country's political economy. If you accept that "economics and politics are inextricably linked, [so] that a republican form of government requires a republican political economy to sustain it," then the question of what the Constitution before you "requires" (in the way, say, of regulatory, monetary, fiscal, budgetary, and developmental strategies) refers not only to what it *directs* but equally to what it *presupposes or depends upon* in the way of social-structural underpinnings (a robust and all-encompassing middle class). Conceptions that would dismiss the latter set of concerns as "small-*c* constitutional" debates over "policy," in contradistinction (say) to large-*C* Constitutional claims over rights, are out of synch with F & F's coupling of a constitutional-constructivist to a political-economic perspective.[51] Resuscitation of a form of political argument built around that coupling—"the democracy-of-opportunity tradition"—thus entails a restoration of economic-strategic argument to full Constitution-claiming status.

But then given the centrality of economic-strategic choice-making to a country's politics (on virtually anyone's view of what "politics" covers), that makes claims for a separation of the Constitution from politics, or even the very idea of such a separation or its possibility, a red flag for our anti-oligarchy bulls.

V. THE CONSTITUTION "A THING OUTSIDE OF POLITICS"?

"We are asking liberals and progressives to step away from the idea that the Constitution [or constitutional law] is a thing outside of politics"[52]—"separate from politics, constraining politics, setting the boundaries of politics,"[53] "autonomous from politics,"[54] "a force

50 *Id.* at 245–46.

51 *See id.* at 8.

52 *Id.* at 30.

53 *Id.* at 419.

54 *Id.* at 4.

outside of politics."[55] It is not immediately clear exactly what F & F mean by this demand on us to get clear of the idea of a Constitution outside of and constraining politics. On what might seem the plainest meaning to give to that idea, F & F as dualist (*constitutional*) democrats would be hoist on their own petard.

No doubt there can be renditions of the idea of a Constitution/politics division that F & F would be most anxious to have us reject. Here is one: When Chief Justice Marshall declares it "emphatically the province and duty of the judicial Department to say what the law is,"[56] we take him to mean that addresses to the Constitution (a law) are *not* the business of anyone else—*emphatically* are not, to a point where Constitutional reason-giving in congressional or executive deliberations (save in the form of legal advice where a lawsuit may impend) is out of line, a breach of decorum, to be given no heed. F & F undoubtedly do reject *that* line on a Constitution/politics divide. That can't, however, be the line they are out to purge from the thought of liberals and progressives or anyone else, because it is not a line that anyone takes. Well, yes, some monist-majoritarian extremist, or someone really, really down on the Constitution we have, might go around urging everyone to stop from even mentioning the damn thing, anywhere at any time, but that would not be to claim the Constitution's mandate as exclusively a juridical (and so never permissibly a "political") concern. We need to look elsewhere for what F & F are targeting as pernicious embrace of a divide of the Constitution from politics.

So we try out next the idea of the Constitution as laying down a mandatory plan or "framework" for government. As framework, the Constitutional plan stands apart from that which it frames, that is, government. Government encompasses determination from time to time of aims and directions for public policy and legislation. The Constitution, qua framework, sets the institutional and procedural arrangements for those determinations but stays aloof from the substance ("politics") of them—*except for* determinations of a selected few topics touching on what are deemed parts of the framework itself, as with infringements on speech, association, and conscience, and political isolation of discrete and insular minorities. For those few framework-touching topics, special provision is made for Constitutional coverage, leaving all the rest to politics—in a word, "footnote 4."[57]

And then here is my point: F & F in *TAOC* are fully on board with the Constitution-as-mandatory-framework idea. Their argument there is firmly bound to the idea of the Constitution as a mandatory prescript, at a framework level, for the conduct of our government.[58] They have important stipulations to tack on, but those arise *within* that basic idea, not in opposition to it. A first stipulation is for detection in our Constitution

55 *Id.* at 425.

56 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

57 *See* note 40, *supra*, and accompanying text.

58 *See supra* Part III.

of a framework term on political economy—parallel, we could say, to its framework terms on expression, association, and religious profession—thus making political economy a mandatory consideration in governmental determinations affecting economic structure. A second stipulation is for resolution of time-to-time disagreements over the content of our Constitution's framework term on political economy to be treated as a matter for deliberation in extrajudicial venues. Neither of those stipulations contradicts—rather both of them, each in its way, confirm—the idea of the Constitution as framework for—thus, as "separate from"—politics. *That* cannot, therefore, be the idea of a Constitution/politics separation that F & F would have us repudiate—subscribing to it, as they do, themselves.[59] We need to look still further for what they have in mind.

But we needn't look far. The thing we seek is already right there before us. It is that stipulation of F & F for the primacy of political venues—not courts!—in arriving at the authoritative resolutions we will need, from time to time, of disagreement over the substance of the American Constitution's framework term on political economy. A paradox, there, of sorts. A Constitution, necessarily conceived as distinct (so "separate") from a politics it is there to instruct, leaves to determination by politics the meaning of its instruction to politics.

But then how, you ask, can that be a coherently maintainable proposition? By reason, I answer, of an equivocation (not vicious) on "politics." The equivocation is slight, bordering on the microscopic, not readily noticed: "politics" used to name an activity of choice of direction for government policy versus "politics" used to name an institutional venue for resolution of disagreements over constitutional meaning. In the view urged upon us by F & F, politics in the field-of-choice sense is under constraint from a Constitution (which must, then, lie outside it), even as the applied meaning of that constraint is subject to resolution by the same bodies of officials and voters who also will act as the choosers thereby constrained.

We arrive at a coherent, if complex, combination of results: (i) governmental policy choice conducted with due regard for a higher directive on political economy,[60] but with (ii) the substance of that higher directive to be resolved in political venues,[61] but also (iii) debated there as a responsible, accountable, publicly defended inference from the actual constitutional history of this country including but not restricted to its initial

59 A further point to note about this Constitution-as-framework version of a Constitution/politics divide is that its implication is usually taken to be one of restrictive definition of the remit of the Supreme Court. (The bible for this version would be JOHN HART ELY, A THEORY OF JUDICIAL REVIEW (1980).) That is a deployment to which F & F should have no objection. They are not (nuttily) clamoring to have the Court bestir itself to order up anti-oligarchy enactments or promulgations from the political branches, only for it to have a due regard for anti-oligarchy as right and proper business for the latter, in a Constitutional perspective. *See id.* at 427–29.

60 *See supra* Part III.

61 *See id.*

Constitutional blueprint.[62] *Popular constitutionalism*, may we say, in nutshell! F & F end up teaching us a lesson in the refinements and intricacies of that idea (although they only a few times in passing give it mention by that name);[63] I have not anywhere seen a richer development of what it entails.

VI. CONSTITUTIONALISM AND ANTI-OLIGARCHY: INDEPENDENT OR CO-DEPENDENT VALUES?

Was that some part of F & F's objective for *TAOC* (aside, I mean, from predictions of where it might lead in the way of partisan political outcomes), or has that happened only incidentally and secondarily to a strategy for restoring to American politics a capacity to meet a looming dire threat to democracy here? (Get things moving in the urgently required direction of anti-oligarchy economic and other public policy. Tap, for that purpose, into civic-identitarian longings[64] and passions of constitutional patriotism.[65] Do so by the means of a reminder to your audience of how, over the long haul of our history, claims of a *constitutional* anti-oligarchy commitment have been pressed to good effect in the daily courses of our politics.)

I suppose you could say that this question of motivation, for what is in any case a splendid, eye-opening treatise on historic American political usage, is none of my business. I think, though, that the question, these days, of where and among whom the idea of constitutional democracy finds its friends and supporters is one as crucial to prospects for the survival and advance of just and legitimate government across the globe as are the questions of domination and subordination that also are at stake in the anti-hierarchy political cause.[66]

Suppose we could conclude that F & F have neither shown nor professed to show that (re)elevating issues of economic-structural policy to constitutional pitch will surely result, in the United States, in a decisive turn toward progressive policies of government administration. That would be some indication that support of constitutional democracy (as it were, for its own sake) is not averse—maybe is not entirely collateral—to their hopes for the impact of their book. Such in fact is the guess to which I have been inclined.[67]

62 *See supra* Part IV.

63 *See* Fishkin & Forbath, *supra* note 1, at 69, 140, 361.

64 "Constitutional politics is . . . one of the central ways Americans forged and fought about national identity. . . . Unusually among constitutions, ours became a deep root of national identity." *Id.* at 4–5.

65 Progressive constitutional argument "mobilizes the impulse of constitutional patriotism; it shows how the Constitution can undergird, rather than impede, core commitments to a broad distribution of power and opportunity that progressives see as essential to a democratic society." *Id.* at 6.

66 *See generally* Frank I. Michelman & Alessandro Ferrara, Justification by Constitution: A Dialogue on Political Liberalism (2021).

67 *See supra* Part I(E).

It cannot be a sure conclusion, though, because I see the case, too, for believing that *once you have got the political-economy question back into the place of an identity-defining, patriotic commitment* (as opposed, that is, to a mere partisan preference competing with others no less sincerely held), a decisive advantage toward democracy-of-opportunity must swing into place. It is, after all, hard (for us liberals and progressives, anyway) to see how a Constitution serving as a platform for national identity—common purpose, mutual commitment—could call for anything less.