

BOOK REVIEW

Joseph Fishkin and William E Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy*. Cambridge, Massachusetts, London, England: Harvard University Press, 2022, pp. 632, ISBN: 9780674980624, US \$39.95 (hardback).

This book review examines Joseph Fishkin's and William E. Forbath's *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (2022). The authors maintain that the American Constitution and other documents associated with the formation of America were based on a tradition of anti-oligarchy. They argue that there are three strands to this tradition: restraints against oligarchy, a political economy that sustains a strong middle class, and a constitutional provision of inclusion that tackles issues such as sexism and racism. Their point of departure is that democracy of opportunity is not so much an economic, social, and political issue but most importantly lies at the heart of the American Constitution. They claim that democracy of opportunity is an ideal that has never been achieved in America. Their book is concerned with examining the dialectic between oligarchy and the Constitution, how oligarchy has supplanted democracy, and what needs to be done to return America to the vision of those who founded the republic. In doing so, they examine almost 250 years of American history, employing a political economy approach that combines conceptual and intellectual insights from law, history, politics, and economics.

The United States of America is a nation that prides itself on having been founded in opposition to tyranny, more specifically to the 'absolute tyranny' of George III of Great Britain, and 'a history of repeated injuries and usurpations' (Fishkin and Forbath, 2022). On 4 July 1776, America issued its famous Declaration of Independence. Most of it comprises a long list of how George III exercised his tyranny. It also contained words that proclaimed a republican government.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed (Declaration of Independence).

Note that the role of government is 'to secure [the] rights . . . [of] Life, Liberty and the pursuit of Happiness'. What is the meaning of the term 'happiness' contained in the Declaration of Independence? In *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (2022), Fishkin and Forbath cite William Manning, a Massachusetts farmer and author, who defined happiness as

a person . . . enjoying the goods of his own labors, and feeling that his life and liberties (both civil and religious) and his property are safe and secure; not in an abundance he possesseth, nor in expensive . . . grandeur, which have a tendency to make other men miserable (Manning in Fishkin and Forbath 2022, p. 43).

Fishkin and Forbath add, Manning held the view that the ‘Government had [a] duty . . . to prevent the wealthy from accumulating property to a degree that deprived the poor of their natural inheritance in available land and resources. Enabling “the pursuit of happiness” was not just an aspiration; it implied a rich set of obligations of government’ (p. 43).

The same obligations of government are contained in the Preamble to the American Constitution, ratified on 21 June 1788. It states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America (The Constitution of the United States).

Fishkin and Forbath see America, its Constitution, and other documents associated with its formation as being opposed to the tyranny of oligarchy; that the Constitution is an anti-oligarchy document. On their opening page, they write that

the elected branches of the federal government face an immediate crisis . . . that has laid bare and exacerbated a slower burning crisis of growing economic and political economy. Most Americans understand, if sometimes in an inchoate way, that this crisis of inequality threatens our democracy. When too much economic and political power is concentrated in too few hands, what you have is not democracy but oligarchy (p. 1).

Their point of departure is that they do not so much see ‘too much economic and political power [being] concentrated in the hands of the few, [as] not just an economic, social, or political problem, but a *constitutional* problem’ (p. 3, emphasis in original). Their book is concerned with examining the dialectic between oligarchy and the Constitution, how oligarchy has supplanted democracy, and what needs to be done to return America to the vision of those who founded the republic.

Fishkin and Forbath examine almost 250 years of American history. They employ a political economy approach that combines conceptual and intellectual insights from law, history, politics, and economics. Both long-term legal scholars, their work combines unparalleled breadth and depth of knowledge concerning America and the disparate forces that push and pull it in different directions. This is a book that needs to be read slowly to absorb the nuances and insights of the multifarious strands of their narrative and analysis.

Fishkin and Forbath build their analysis around what they call ‘the democracy-of-opportunity tradition’. They claim that it ‘is as old as the republic itself’; even though the phrase was first coined in a 1936 speech by President Franklin Delano Roosevelt. According to them, Roosevelt

argued it was a constitutional necessity to overthrow the “economic royalists” and build “a democracy of opportunity” for all Americans in the economic *and* the political spheres. Arguments in the democracy-of-opportunity tradition hold, 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 that (3) a constitutional principle of inclusion - across lines such as race and sex - is inseparable from the first two requirements, and equally necessary for sustaining the political economy that republican government demands (p. 3, emphasis in original).

The authors argue that a robust middle class ‘cannot coexist with oligarchy. There can be no republic composed of wage slaves and their overlords’ (p. 8). They employ the notion of ‘middle class’ in the sense of ‘ordinary Americans’; it encompasses those who in other contexts would be described as working class, farmers, and artisans. For them, the middle class

denotes a set of social baselines . . . as an “American standard” of material comfort and security, along with the wherewithal and opportunities to make a life with value in one’s own eyes. The more Americans can reach such a standard – in objective terms and from their own point of view – the better. There must be ample room and opportunity for all (p. 9).

Later on, they draw out the three threads of the ‘democracy-of-opportunity’ tradition and how it cannot succeed when they are separate and isolated.

Racial inclusion tends to become thinned out in the absence of a broad, secure, and wide-open middle class. As the middle class becomes hollowed out, efforts at racial inclusion tend to run into a buzzsaw of racial resentment, which thwarts efforts to address either racial inclusion or class inequality. Meanwhile, protecting a broad and open middle class is difficult if not impossible under conditions of oligarchy. It is politically and economically impossible to carve out a space for a broad and open middle class when a smaller, wealthier elite has too much economic and political power (p. 353, emphasis in original).

‘Democracy-of-opportunity’ is an ideal that has never been achieved in America. Fishkin and Forbath point out that the precepts ‘We the People’ and the self-evident truth ‘that all men are created equal’ did not include women and African Americans/slaves and other minorities. These fine-sounding egalitarian notions were reserved for White men. Women did not receive the right to vote until the passage of the Nineteenth Amendment, ratified in 1920. They were not afforded the same legal rights as men until 1971 when Ruth Bader Ginsburg, following insights developed by Pauli Murray, in *Reed v Reed* (1971; Rosenberg, 2017) convinced the Supreme Court to end sex-based discrimination.

Fishkin and Forbath provide numerous examples of how government and the people via the formation of political parties (Populists, Progressives, and Socialists) and collective organisations (unions, farmers alliances, and minority-based organisations organised around race, gender, and class) attempted to pursue the democracy-of-opportunity tradition. They maintain that governments, and the people, need to reassert these past constitutional struggles.

They link the democracy-of-opportunity tradition to not being dominated: ‘freedom from both private and public overlords’ (p. 32). Some chapters of *The Anti-Oligarchy Constitution* are mainly concerned with battles between Federalists and Anti-Federalists over what role and powers should be afforded to a central government, the issue of slavery, the Civil War, the Second Founding, and its subsequent undermining and abandonment.

Fishkin and Forbath comment that during the Gilded Age, ‘The country witnessed violent class struggle on the railroads, and in the streets, factories, mines and mills . . . [and] a startling set of class conscious, pro-corporate constitutional decisions from the Supreme Court’ (p. 138). Courts struck down legislation that unions obtained to provide workers with protections and rights against the power of corporations and employers, more generally. When unions initiated strikes or boycotts, corporations sought injunctions from courts to stop such actions and applications which were invariably granted. The American Railway Union ignored such an injunction, and one of its officials was found

to be in contempt of court and served six months in jail. In handing down its decision, the Supreme Court said that ‘the redress of all wrongs are through the courts and the ballot box’ (*Re Debs*, 158 US 564, at 599 (1895)). Fishkin and Forbath comment: ‘It was rich for the Justices to relegate . . . movements [of farmers and workers] to the courts and ballot box, when the courts were striking down labour legislation and railroad rate regulation won by the votes of farmers and workers’ (p. 162).

The most famous case of this era was *Lochner v New York* (198 US 45 (Lochner v New York, 1905)) where the Supreme Court struck down a law that stipulated the maximum number of hours a baker could work as interfering with the contract of employment. The Court was not concerned with issues of the inequality of bargaining power between parties. Fishkin and Forbath refer to this as ‘Lochnerism’ which they see as the major ‘constitutional’ opponent to the democracy-of-opportunity tradition.

The 1929 stock market crash and the depression of the 1930s wrought economic and social devastation on America. In a 1936 speech, where Democrat President Franklin Delano Roosevelt coined the term democracy-of-opportunity, he claimed that

[in ways] undreamed of by the fathers [of the Constitution the] economic royalists [used] corporations, banks and securities, new machinery of industry and agriculture of labour and capital [to construct a] new despotism wrapped in the robes of legal sanction . . . if the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place (p. 285–86).

The Supreme Court initially ruled against early examples of New Deal legislation. After President Roosevelt threatened to ‘stack’ the Court, it changed course and allowed the New Deal to proceed. In terms of the democracy-of-opportunity tradition, the most significant piece of legislation was the 1935 *National Labor Relations Act* (or Wagner Act) which encouraged the formation of unions and collective bargaining in settling industrial disputes. This together, with America’s entry into World War II, involved a more active or ‘positive’ role for (especially the federal) government and a subsequent ‘evening up’ of income distribution in the third quarter of the twentieth century.

The New Deal, however, did not fulfil the third thread of the democracy-of-opportunity tradition and inclusion. Legislative changes and programmes dealt out African Americans, due to opposition from Dixiecrats who wanted to keep them, and poor Whites, in their place and preserve their traditional hold on power. Moreover, after World War II, Democrat Dixiecrats and Northern Republicans entered into an alliance and started the long process of dismantling the New Deal; the former was mainly due to reasons of race and the latter opposition to unions.

The major lesson of the New Deal for Fishkin and Forbath is that the government, and through them The People, was the major force in pursuing the democracy-of-opportunity tradition. The Supreme Court had ‘got out of the way’ of the government fulfilling its constitutional responsibility. The above paragraph indicates how the rug was being pulled from under the feet of New Dealers. Democrat Dixiecrats and Northern Republicans were not concerned with democracy-of-opportunity. The immediate period after World War II was associated with the Cold War, the terror of McCarthyism and the purging of so-called communists and radicals. Fishkin and Forbath note that ‘talk of political economy with any Marxist or socialist undertones . . . was banished . . . from the universities, governments, the mainstream of American politics, and even the mainstream of organised labor’ (p. 373).

Many, if not most, New Dealers lost their zest for continuing the struggles they had been involved with in the 1930s. Moreover, there was an important change in the intellectual weapons employed by New Dealers and liberals. The New Deal was concerned with redistributing political and economic power. In 1817, David Ricardo had written that ‘To

determine the laws which regulate . . . distribution, is the principal problem in Political Economy' (Ricardo, 1817, 1966 edition, p. 5).

Fishkin and Forbath note that after World War II, economics replaced political economy (p. 364). Macroeconomics, as understood since John Maynard Keynes, was concerned with growth and output (Gross Domestic Product), and microeconomics with efficiency. Whereas in the past, various supporters of the democracy-of-opportunity tradition had expressed opposition to trusts over fears that concentrations of economic power would have political implications which endangered republican government: the issue now was whether their operation would harm or lead to increases in consumer prices. What was even 'Worse, economics aspires to be a value-free "science"' (p. 365). As Fishkin and Forbath comment:

economic experts in the second half of the twentieth century offered up technocratic solutions to economic problems that had the advantage of seeming essentially apolitical, and were at best only tangentially connected to questions of distribution (p. 379).

Fishkin's and Forbath's most damning criticism of New Dealers and liberals is that since the 1950s they have ceded responsibility on constitutional issues to the Supreme Court. The explanation for this is linked to two major cases: *Brown v Board of Education of Topeka* (347 US 83 (1954)) which brought about an end to racial discrimination in public schools and *Roe v Wade* (410 US 113 (1973)) which established women's abortion rights (It was subsequently overturned in *Dobbs v Jackson Women's Health Organization*, 597 US_ (2022)). Both these decisions fit in with the third strand of the democracy-of-opportunity tradition. Fishkin and Forbath claim that the importance of *Brown* and *Roe* is that because these decisions were attacked by conservative opponents 'Liberal constitutional politics became and remains heavily about defending the Court and its precedents *from* politics' (p. 403, emphasis in the original). Conservatives, however, learnt a different lesson.

These were issues that pitted liberal courts – above all, the Supreme Court – against the political opinions of socially conservative voters. Anti-Court constitutional politics became a powerful glue . . . the lesson . . . was the need to recruit different and more conservative judges who would cease imposing liberal values and instead impose conservative values ostensibly found in the Constitution (p. 402–03).

The latter part of the 1960s/early 1970s was 'the beginning of a new offensive by organised capital to destroy organised labour's economic and political clout' (p. 408). Fishkin and Forbath refer to a 'famous memo' by lawyer Lewis Franklin Powell, who subsequently served on the Supreme Court from 1972 to 1987, bemoaning the lack of influence that American businesses and corporations had in government. He called for "a full-court press by business in politics, universities and the media, and the courts 'for the preservation [of free enterprise] itself'" (p. 409, emphasis in original).

Powell's call was picked up by wealthy conservative donors in the early 1970s (p. 413).

They looked for ways to build a lattice of lawyers, law professors, and ultimately judges, who could rebuild on new foundations of the old claims of Lochnerian constitutional political economy (p. 415; see MacLean, 2017).

Fishkin and Forbath conclude they have been successful in this quest in that courts have increasingly embraced neoliberalism in their rulings. They also point out to modern-day progressives 'that the Justices are not umpires. They are, as often as not, specialised

players on the opposing team' (p. 426). They lament that liberals have forgotten the political economy lessons of their progressive forebears and have opted out of the constitutional political economy and ceded the ground to the Supreme Court which has been captured by conservatives. They comment

it has become obvious that the United States does not have a Court that sits separate from politics, constraining politics, setting the boundaries of politics. Instead, we have a Court that is openly engaged in a branch-transcending struggle in partisan constitutional politics (p. 422).

They go on to say

The American Constitution is the constitution of a republic, not an oligarchy. It can continue to function as such only if Americans prevent would-be oligarchs from accumulating excessive political and economic power. Americans also need to maintain a broad, open, and racially inclusive middle class. To do that, it is necessary to restore the political power of ordinary workers, as represented by labour, as a counterweight to wealth and capital. It is also necessary to build and maintain pathways to political office for those who can win popular support but not the support of wealthy would-be oligarchs. These are not merely constitutionally permissible goals. They are constitutional necessities. Legislators and citizens who hope to halt the slide from a republican form of government into oligarchy need to take these arguments down from the shelf, revise them, and deploy them to help rebuild the democratic foundations of our republic (p. 441).

In their final chapter, Fishkin and Forbath canvass a variety of issues and provide 'guidelines' or suggestions on how this can be achieved. They start with recommendations for how to reform the Court which are available to Congress. They then move on to a raft of issues, such as overcoming Lochnerian interpretations of the First Amendment, campaign finance, constitutional roadblocks on Congress's power to spend (such as Obamacare), labour law and the rise of the gig economy, race, voting, contracting out of legislative rights, wealth tax, social insurance, social welfare, antitrust, and corporate law. The key for Fishkin and Forbath is that the legal (and political) battles that lie ahead in prosecuting all of these issues should be linked to the democracy-of-opportunity tradition embedded in the American Constitution.

The United States of America, and its Constitution, is an ongoing experiment in republican government. Can a people be self-governing, or will they succumb to the rule of oligarchy? The Civil War was an attempt to allow African Americans to be included in this experiment. The opportunities opened up for them were set back by Jim Crow. It is difficult to argue against the proposition that they, and other minorities, don't have the same rights as White males. It took until the 1970s for females to be afforded the same rights as White men. Oligarchs ruled America in the Gilded Age. This was reversed by the New Deal which ushered in a levelling up in the distribution of wealth after World War II. Oligarchy has reasserted itself in the last half-century, the extent of which is probably greater than at any time in American history.

This may serve to indicate that the American experiment with republicanism, of government by *We the People*, is coming to an end, or has been a failure. Alternatively, there needs to be a fundamental paradigm shift, of New Deal dimensions, for it to be revived. The prospects for this to occur do not look promising. Joseph Fishkin and William Forbath's *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* provides a masterful account of these historical struggles in America, and the likely contours of the struggles and the various fronts on which they will be fought in the years,

decades, to come. Their book is a tour de force, a thoroughly researched and insightful account of a people that pledged itself to develop a society based on the principle of a democracy-of-opportunity.

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Funding. The author received no financial support for the research, authorship, and/or publication of this review article.

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