



## Oligarchies, Monopolies, and the Constitution

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**[00:00:00] Tanaya Tauber:** Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, Senior Director of Town Hall Programs. Last week we hosted a program about a new book called *The Anti-Oligarchy Constitution*, which makes the argument that the framers of the US Constitution set out to prevent political and economic power from being too concentrated. The book's co-authors, Joseph Fishkin of UCLA and William Forbath of the University of Texas, joined us to discuss the history of the oligarchies, monopolies and the Constitution throughout American history, and explain why we should reinvigorate what they call the democracy of opportunity tradition.

**[00:00:49]** Our panel also included Katharine Jackson of the University of Dayton, and Adam White of the American Enterprise Institute. Jeffrey Rosen, President and CEO of the National Constitution Center, moderated this conversation. The conversation was streamed live on July 18th, 2022. Here's Jeff to get the conversation started.

**[00:01:10] Jeffrey Rosen:** Hello, friends. Welcome to the National Constitution Center, and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. This is the last of our summer programs, and we have so many great programs coming up, as well as a whole bunch of wonderful *We the People* podcasts, as always. So, please check those out, and can't wait to reconvene in September.

**[00:01:35]** Thank you so much for joining us, Joseph Fishkin, William Forbath, Katharine Jackson and Adam White. I'm excited to discuss Willie and Joey, as I'm gonna call them with their permission, their great new book, *The Anti-Oligarchy Constitution*, and really use today's conversation to discuss this strain throughout American history of what you both call the anti-oligarchy Constitution or the Constitution of opportunity. And I want to move through as the book does each of the major eras in American Constitutional history: the founding, the antebellum era, Reconstruction, the Gilded Age, the Progressive era, the New Deal and, taking things up to the present, and just ask of you to help us understand this forgotten history; tease out the strains of anti-oligarchy constitutionalism. And then you can debate it and discuss its relevance.

**[00:02:29]** Willie Forbath, let's begin with you. In your chapter on the founding, you quote Noah Webster on the constitution of opportunity, who says the basis of a democratic and republican form of government, a fundamental law favoring an equal or rather a general distribution of property, and he insisted an equality of property is the very soul of a republic. While this continues, the people will inevitably possess both power and freedom; when this is lost, power departs, liberty expires and a commonwealth will inevitably assume some other form.

**[00:03:02]** You discuss how these ideas came from constitutional thinkers in England like the English thinker James Harrington, who said, "Equality of the states causeth equality of power, and equality of power is the liberty not only of commonwealth, but of every man," and you say that John Adams, Webster's friend, embraced Harrington's maxim that power always follows property. A long windup, but an important question. Tell us about the significance of this Harringtonian egalitarian strain of thinking in the early republic.

**[00:03:33] William Forbath:** Well, first of all, thank you, Jeff, and thank you to all the folks at the National Constitution Center. It's really an honor and a pleasure to be here. So, diving right in, the idea that a roughly equal division of property among a citizenry was an indispensable basis for a republican form of government was widely shared among the Revolutionary and founding generations. It hailed back to 17th century England, as Jeff mentioned, but it was the coin of the realm from fairly s-, if we can talk about stodgy revolutionaries, Noah Webster and John Adams, as much as they were squarely on the side of pushing back and ultimately declaring independence from Great Britain, they were not the rabble-rousers or the radicals in the Revolutionary era.

**[00:04:33]** Nevertheless, they shared with the whole suite of revolutionaries and constitution-makers in the early republic this idea that politics and economics were inextricably knitted together, and that only a certain kind of economy, or as they would have said, a certain kind of political economy, 'cause they were so inextricable in the thinking of this era and for a century further. But they didn't think of political science as over here and economics as over here. It's political economy.

**[00:05:10]** And the idea that everyone who counted as a citizen, and obviously in that era that was a remarkably broad swath of people, but they all were white men; they were abolitionists among the founders, and there were no small number of friends of women's equality, but overwhelmingly, this was an idea about the economic standing of white men, and it had to be roughly equal, which is striking. That idea in turn led a great swath of these sort of broad citizenry to be very skeptical of the new national constitution when it was brought forward by the gentlemen in Philadelphia. So, this idea finds clear textual expression in the state constitutions that preceded the constitution that was made at Philadelphia.

**[00:06:15]** And this idea helped animate a broad critique of what was being fashioned and what was brought forward in Philadelphia on the ground that, as Anti-Federalists put it, right, this new constitution for reasons we can unpack, but the short of it was this new constitution would empower a new central political elite who would use its political power to undermine the

egalitarian economic order that was meant to be the heart of a republican form of government. So, that worry, which first animated the Anti-Federalists, goes on almost sort of overnight when the constitution is ratified.

**[00:07:07]** What had been a critique, an egalitarian critique, of the proposed constitution becomes instead part and parcel of one interpretation of what the Constitution meant and required, so that many of the most egalitarian ideas about the economic foundations of our republic begin life in significant measure as a critique from the point of view of these first state constitutions, which were radically democratic for their day: a critique of the kinds of power that seemed to be taken away by the new constitution. But overnight, instead of a critique it becomes an interpretation, and then the foundation of our- our- our first major mass party, the Democratic Party, and with that I'll stop.

**[00:07:59] Jeffrey Rosen:** Thanks for that great introduction to the thesis. And Adam, you think it's right, as Willie puts it, there was a strong egalitarian strain to the thinking of all the major founders, both Adam, who's getting it from the 17th century, Whig thinkers, and Madison, who proposes a anti-corporate-power amendment to the Constitution that's never adopted. And then as he puts it, once the Constitution is in place, this egalitarian thinking is the basis for the rise of the Democratic Republican Party against the property-owning Federalists. Do you agree, Adam, that all the major founders, Federalists like Adams, as well as the Anti-Federalists, and future Democratic Republicans like Madison and Jefferson, all had strains of this anti-oligarchy thinking? Or do you think it's overstated?

**[00:08:52] Adam White:** I definitely agree, and let me just say off the bat, Jeff, thanks for inviting me here today. Thanks to Willie and Joey for writing this book. I'm so glad to be here with Kate for an opportunity to discuss it. I certainly agree that the spirit that Willie just sketched out really was the spirit of the age. Of course, by pointing out that the founders more or less across the board felt it in various different ways, I think it reminds us that sometimes it's difficult to see exactly what that spirit points to as a matter of policy as true in our time as in the founding age.

**[00:09:24]** But in earlier books such as Gordon Wood's historical treatment of the era, and now on to this new book, we see certainly that the founders felt a republican spirit, a spirit of greater equality and greater obligations, but also rights as citizens. Of course, not all Americans of the era, needless to say, had access to the rights of citizenship in the same way, and the American story is a story of fixing that over time. But I certainly agree with the basic point that this republican spirit and also the recognition of a republican-spiritedness and the need for republican virtue really did inform the founders in a special way.

**[00:10:06]** I'd point out that Madison, of course, in getting ready for the Philadelphia convention is reflecting upon what's happening in the states, what's been facilitated by the weak federal government, and the need for a stronger federal government to help better embody the spirit of the age: not just a national spirit, but also a republican spirit. And on this point about economic inequality in the founding era, I go back often to Federalist 10, which college students read over and over again for- for the discussion of faction. But I'll just point out that Madison himself

emphasized in that famous essay the role of economic inequality in the exacerbation of faction. He wrote, quote, "The most common and durable sources of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society." So, he knew this was a timeless issue.

**[00:11:02]** And then he says just a few lines later, "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit and faction in the necessary and order... ordinary operations of government." So, right there you see Madison recognizing the challenge. But faction driven by economic inequality, in addition to all the other sources of faction, would be a focus of legislation, a primary focus of legislation. But at the same time, the structure of government, the separation of powers, would need to itself recognize the challenges of faction, and government itself would need to be built to both incorporate the factions in the government, but then also ensure that you couldn't have a dominant faction at the federal level.

**[00:11:46]** And just one last thing, Jeff, if I can. I'd say the Bank of the United States debates, which Willie and Joey cover in their book, is a prime example of this. Take Hamilton and Madison, who agreed so much just a few years earlier at the founding of the Constitution. You see Madison profoundly worried that the Bank of the United States is a threat to that republican spirit, that it would create moneyed interests, it would centralize power. But Hamilton and the Federalists believed just as firmly that institutions like the Bank of the United States were necessary to preserve the soundness of money that would itself be a foundation for the kind of republican spirit that they saw. And for what it's worth, I'm more sympathetic to the Hamiltonian argument there, although as always, Madison makes good points.

**[00:12:34]** So, I enjoyed the opening chapters of the book, because I do think they tee up these founding debates very well.

**[00:12:39] Jeffrey Rosen:** Thank you very much for that, and for foregrounding the initial debate between the more Hamiltonian and Madisonian strands that of course become so much more prominent in the antebellum era and the debate over the bank, which we'll talk about in a bit.

**[00:12:53]** Joey, I'd love you if you would to talk about the egalitarian sources of the phrase "the pursuit of happiness." I'm writing a book on this, on the ancient wisdom that inspired the founders' quest for the good life, and you describe how it was an Aristotelian idea of cultivating happiness in a, in a situation of economic equality that the founders had in mind in the state constitution. Tell us about the response to Shay's Rebellion. Jefferson famously says, as you note, "I like a little revolution now and then." Madison wants to quell it 'cause he favors order, but while still maintaining an equality of conditions. And I guess if it's not too much [laughs] to do it all in one answer, tell us how by the end of the founding era, what had been a consensus about the need for economic equality calcifies in the rise of the Federalist and Republican Democratic Party into a party that's more openly in favor of producers and farmers and economic equality, and one that's more in favor of property owners in the form of the Federalists.

**[00:13:51] Joseph Fishkin:** Thank you so much for these rich questions, which would invite us to spend so much of this, of this time discussing all of the richness of the story in the book. I guess I'll say a couple things. There's a... So, part of what you said, it is a really important shift that we go through in much finer grain in the book, from the idea of life, liberty and property as the three things that the government is formed to protect to life, liberty and the pursuit of happiness, which is partly an idea that we can see reverberating down through traditions of American thought about equal opportunity, and that what we need is not just a wide distribution of property, but a wide openness to people from ordinary positions in life finding their way to, you know... Later we would talk... start talking about the middle class, but really just to, kinds of lives that are valuable and that people can participate in politics, and that they can participate in the life of the community. It's a really rich idea that Jefferson and others are grabbing hold of.

**[00:15:15]** The, I want to say one thing about the kind of argument that this book is making, because there's a very common... Just because we're talking about this founding era, there's a common kind of constitutional argument that basically takes the form, "Well, the framers of the Constitution fought X, and so that is then the authoritative answer to our present questions." That's not actually the kind of argument that this book is. Our claim is that there are some major, important strains of thought and traditions that stretch from the founding all the way through much of our Constitutional history to the present, and that this idea that the distribution of property and economic opportunity and political economy generally matters to our republican form of government is one such strain of argument. But this doesn't mean therefore there's one authoritative judicial interpretation that has to go our way.

**[00:16:18]** In fact, most of the Constitutional interpretation in the book, and this is what I thought I'd say in response to your last part of your question, most of the Constitutional interpretations that we're describing are not done in courts. They are Constitutional interpretations in politics, and that emerges and actually justifies the creation of the initial American system of political parties, which, you know, Adam was referring earlier to the sort of leering of faction that many in the founding generation, not just Madison, thought could be a real problem to undermine a republic. And so, if you're gonna be creating a political party, you're gonna have a heavy burden of justification of what you're doing there, 'cause it sounds like basically you're organizing a faction, which is what we don't want.

**[00:17:09]** And so, the sort of thinkers who were central to creating the Democratic Republican Party thought that it was different here because they had a constitutional vision, and that constitutional vision needed advocates in politics. If we were gonna save the republic, we needed to have a constitution that instead of concentrating all the money in New York the way the Federalists, you know, were going to do, would instead make sure that the political economy distributed that wealth out to the hinterlands. And so, those constitutional disagreements formed the foundation of our entire system of political parties. The idea was that you would argue your constitutional case out in politics. People would agree, because ultimately the people are the ones whose constitutional views matter the most, and then through electing people to office you would enact that constitutional program. This idea I think today is very unfamiliar because of our highly judicialized way of thinking about the Constitution, but I think it's worth recovering.

**[00:18:22] Jeffrey Rosen:** It is indeed worth recovering, and it's such a fascinating point you made, that we think of Madison and Jefferson as the founders of the very political parties they had denounced when in the Constitution era they didn't like faction, but as you point out, for them there was no inconsistency 'cause there's an exception for groups that are trying to defend the egalitarian constitutional order itself. So, it's a wonderful point.

**[00:18:45] Kate,** you've heard this great discussion, and I wonder how you want to help us make sense of the founding era. Is it too simplistic to say that it ends with a clash between the pro-property Federalists and the, and the pro-farmer, Democratic Republicans, and that in fact we see this egalitarian strain really in both parties in the founding era? Or does the debate over the national bank, which is gonna be the transition to our next era, the antebellum era, does that really calcify the camps in ways that pit the pro and anti-egalitarian constitution people against each other?

**[00:19:20] Katharine Jackson:** Well, I think when I think about the debate surrounding the national bank, I can't help but think about what the founders thought about marrying legal, political and economic power generally. Now, we know that they were very anti-corporate. They did not like business corporations. It's a bit of an anachronism. They associated them with monopoly, they associated them with people political power, using the power of the state to accumulate more wealth and accumulate more power. And I think I see that theme, you know, not only in the debate across the, you know, the Federalist-Anti-Federalist, but one that continues later. And also a commitment that when wealth should be used or used for public purposes, it should be publicly accountable, right? And so, any major, massive, big economic project should at least be public, right? And also hopefully in... public in a way that is democratically accountable. So, we see the first corporations back then be used for public purposes. I'm thinking roads and canals back in the founding era.

**[00:20:31]** So, I guess the end of the day I find this conversation to be very clunky and anachronistic, because what we associate with wealth and power and politics today is so very different. You know, back then it was where did wealth come from? You know, okay, war bonds and Wall Street and land, right, in the South. And I don't know. It's like when we talk about the political economy and the Constitution oligarchy, I would just counsel a little bit of hesitancy of, dragging that arguments from the past, as if they're completely relevant today without thinking these things through.

**[00:21:07] Jeffrey Rosen:** Well, hope to explore the contemporary relevance toward the end, but simply just recovering this fascinating history is so rich that I'm excited to continue it. Willie, you in your chapter on the antebellum Constitution, talk about... At the rise of Jacksonian democracy you say both the Whigs and the Jacksonians alike shared the belief that when it came to constitutional political economy, they the legislators, including the President in the exercise of his legislative role, were the primary interpretive actors or expositors of the Constitution. Both the Jacksonians and the Whigs interestingly have egalitarian strains in them. Tell us about the emergence of two new visions of constitutional political economy built around the rival systems of labor and production, free labor and slavery.

**[00:21:58] William Forbath:** So, the Federalists, right, the party, right, that sort of, you know, Washington and Adams and Hamilton and... is... are the last party that openly, you know, avows and champions rule by elites, the rights of the economic and social elites of the nation, to rule. And they are laid low by the Jeffersonians, who as Joey says, justify the creation of what the [inaudible 00:22:29] sort of Federalist papers, as Adams suggested, right, condemn as organized political factions. They say you cannot have a republic, a mass republic, a republic in which all the citizenry, albeit only white men for the time being, participate without parties, because otherwise the economic ruling class will use its wherewithal to run the government. The only way to counter the power of concentrated wealth as it was emerging in the new nation was to, right, mobilize the ordinary citizens against it. That was the... That was not simply a matter of, "We want economic justice." No, this is, "We want to save the republican Constitution from sliding into an oligarchy."

**[00:23:24]** This was their language, not just Joey's and mine. And they became the champions of a Jacksonian vision of a decentralized regime in which the national government had strictly limited powers. This is sort of the birthplace of strict construction. And their rivals took shape as the Whig Party, and no surprise; the Whig Party mimicked the Jacksonians in creating a permanent party organization. And defending their economic policy agenda on the grounds that the Jeffersonians and Madisonians had set out, and that Jackson had made militant: opportunity, real opportunity for the ordinary working people of the nation.

**[00:24:12]** They said, "We can do that better with a much more centralized political economy, and with Congress, as Kate gestured toward, and with Congress more, you know, fully empowered to create corporations. Sure, corporations they said would create wealth, or for shareholders, but that would in turn mobilize capital to build the canals, to build the transportation systems, to tee up credit systems that would enable penniless beginners, as Abe Lincoln put it in his days as a young Whig star. Abe Lincoln would say, "This is, this... These corporations," and don't forget, Lincoln was himself a kind of proto-corporate lawyer. But in his vision at that time, this was consistent with a broad distribution of wealth and enabling ordinary, as he put it, "penniless beginners" to get their start.

**[00:25:11]** What emerges in the '30s, '40s, '50s is a growing — This takes us to your, you know, to your flagging slavery and the political economy of slavery, as part of what the second chapter is about — There emerges a growing antipathy on the part of both Northern Whigs and North Jacksonians to what they called the slave system and the slave power, and what they see as the irreconcilable conflict between a political economy and a republic. They say a republic can't ultimately rest on a slave economy, that ultimately, it must be, as Lincoln put it, either all free or all slave. And their sort of premier issue in the sort of antebellum era is, what will become of the nation's Western territories? Will they be given over to a slave economy, or will they be preserved as a sort of place where a growing white working class... And make no mistake, most of this new first Free Labor and then Republican Party were not abolitionists and not, partisans of Black equality, although some most certainly were, but they were fiercely opposed to slavery.

**[00:26:47]** And they take some of the key Whig ideas. The Whigs were as it were the kind of fashioners, the pioneers of an idea that runs as a bright thread throughout, that there are

Constitutional duties on Congress and the political branches to enact institutions to implement the Constitution as an ongoing project, which of course looks clunky if you think that what the... what Lincoln had in mind, or the other founders of the party, of the Republican Party, had in mind as a free labor economy in the mid-19th century has any bearing on what kinds of political economy we need today. That's not the point of the book.

**[00:27:34]** The point of the book is to show how deeply ingrained and worth retrieving are the basic ideas; not Lincoln's or Henry Clay's ideas about what kinds of transcontinental railway we need, for Lord's sake, but rather the idea that Congress and the political branches and the voters are ultimately the expositors of the Constitution. That's what we sorely need today if ever again we're going to have a political economy that doesn't slide into oligarchy.

**[00:28:03] Jeffrey Rosen:** Thank you so much for that, William, and for highlighting that crucial theme in the book, as you say, that, so much of the Constitutional debates of the 19th century and the 20th too were about Constitutional duties on Congress, not just interpretive guides for courts. Adam, I'm learning so much from this slow and deep approach to Constitutional history, but I think we might want to put the Reconstruction era on the table as well. But what I want to ask you is what I've heard so far is that the real debates in the battle between the Jacksonians and the Whigs and between the Reconstruction Republicans and the post-Civil-War Democrats are not about equality, because both in the Jacksonian era Willie says are moving toward an anti-slavery position, it's about national power. And they're disagreeing about whether the Congress should or shouldn't be empowered, or whether states' rights should be preserved.

**[00:28:57]** Is that too simplistic? That the... basically the egalitarian strain continues in the antebellum and Reconstruction period, but the parties increasingly divide over national power? Or would you put it another way?

**[00:29:08] Adam White:** No, that's very insightful. The great irony of the antebellum era is that the programs of the Federalists going on as the National Democrats and the Whigs, they were scorned as oligarchic, we could say, by their critics; again, the Bank of the United States. But it's those things, internal improvements, banking and so on, that actually gives the federal government the backbone necessary to destroy the worst and most oligarchic aspects of American history: slavery and the entrenched powers of the South. So, the great irony is that it... I guess it takes an oligarchy, so to speak, to beat an oligarchy. But it reminds us that these things rise and fall, and sometimes you need one powerful part of government to defeat another.

**[00:29:56]** And when we get into the Reconstruction era, I don't know if you want to get into it here, Jeff, or I can... I could just say the greatest argument I think, the greatest era in American political history after the founding, everything that Lincoln and the Republicans do. Building on the examples of the Whigs and the American system, and building it out to things like the Morrill Act, the land-grant universities act, in 1862. The intercontinental... the transcontinental railroad, the Pacific Railway Act of 1862. The Homestead Act, the National Bank Act. Over and over again with Lincoln, and then leading into the Reconstruction, and culminating with the Civil Rights Act of 1875. Over and over again, the Republicans of the era, and the name is perfect



because it reflected the the founding republican spirit, they're looking for ways to create opportunity, much broader opportunity, and equality, and they did it primarily through building institutions and program that would help raise all Americans and create more opportunity for more Americans. And so, it's the greatest moment in our history.

**[00:31:04] Jeffrey Rosen:** Beautifully put. Joey, why don't we put, Reconstruction on the table. You argue in your chapter on the second founding, a Brief Union of Three Precepts, that the second founding was a high-water mark for the democracy of opportunity tradition, which is what you call it. This time the inclusionary principle in terms of race was at center, and that the thrust of the Civil War amendments wasn't simply to abolish slavery, but to make freedom national. Tell us about those three conceptions which so powerfully show how for the first time national power is squarely aligned with the egalitarian vision, and how it plays out during the Reconstruction era.

**[00:31:43] Joseph Fishkin:** The story in this book is a story of a tradition, and when we talk about this democracy of opportunity tradition, we are looking at it that way because its practitioners themselves drew on the rounds of previous thought and argument in building their own case for how in their era to bring about a broad distribution of opportunity and wealth. So, the three principles that we see as central to this tradition which come together in the Reconstruction Republican ideas kind of for the first time are first, what we've been talking about, this old idea that you can't have a republic if you have oligarchy, which is too much concentration of economic and political power, and that those economic and political, it kind of goes together. So, first, anti-oligarchy.

**[00:32:40]** Second, you need a broad middle class, broad enough that anyone can have a path into it. And this is exactly what Adam is bringing up when talking about the land-grant universities, and you can also talk about the distribution of Western lands and how they should be, you know, homesteads and not just sold off to the wealthiest speculators. All of these Republican Party ideas had to do with, like, in their time how to build a broad middle class. I really take, by the way, Kate's point earlier that these ideas about how to manage your political economy, they don't directly apply in the present, but what you do is you think about what were the goals, what were the Constitutional arguments about what we needed to do. And here, anti-oligarchy, a broad middle class.

**[00:33:33]** And then, of course, the Reconstruction Republicans bring into our Constitution and to our Constitutional text through the amendment the idea of racial inclusion. And something that I think is important about the way these ideas fit together for the Republicans, they are, especially for the, for the radical Republicans, these are truly inseparable ideas, and also alternate ways of thinking about what is wrong with the Southern slave system. Both obviously this is a massive system of racial oppression and exploitation, and the racial inclusion idea is that we need to end that, but it's also a system of economic dispossession and exploitation that's concentrating land and power in the hands of a small class of slaveowners who these Republicans referred to as oligarchs, because they were. They were too powerful for a republic over all the land and people that they controlled.

[00:34:35] And so, when you get to the sort of moment of Congress wresting control of Reconstruction from President Johnson, who was not really that inclined to pursue changes to the economic structure of the South what the leading Congressional Republicans were trying to do in implementing both the Reconstruction amendments and their Civil Rights Act was to not just give freed slaves a kind of limited set of economic rights, but also they hoped to transform the system of economic... of political economy of the South from an oligarchic system into a republican one, and they saw all three of these principles coming together as the way to do that.

[00:35:27] **Jeffrey Rosen:** Fascinating. Thank you for that. Kate, take us from Reconstruction through the Progressive era, and just... We always end on time here, so we have about 20 minutes-

[00:35:38] **Speaker X:** [inaudible 00:35:39]

[00:35:38] **Jeffrey Rosen:** ... to both get up to the present and talk about contemporary relevance. But in... But, what I'm interested in is, help us explain at the end of the Civil War the Republicans are the party of pro-national power and of ending slavery. During the Gilded Age, they become the defenders of economic privilege and property rights against the Progressive backlash, while the Democrats become not interested in racial equality, quite the opposite, but squarely defending the- the populist middle class and the consumers, and so the par-... just sum it up. The...

[00:36:10] **Katharine Jackson:** Okay.

[00:36:10] **Jeffrey Rosen:** ... Democrats are the party of states' rights and popular economic empowerment, and the Republicans are the national power end of property rights. Is that right? [laughs] Or help me understand that transition [inaudible 00:36:22].

[00:36:22] **Katharine Jackson:** Well, I want to put an asterisk on that last statement. You know, the Democrats during the New Deal era, you know, the champions of the working class, anti-oligarchs, but also still quite racist, and I'll have to point to all the wonderful work Ira Katznelson has done on this. As far as all of these party realignments and how things have shifted or shifted between, you know, 1820 and 1920, I guess... And I want to pick up on the theme of this wonderful book, is that constitutional thinking is not just about the courts, it is more like a grammar of politics that we use as citizens. Not just in our... Like, in our legislative branch, like Congress, but not just in our federal government. We see constitutional politics manifest itself in our state governments.

[00:37:11] And I'll guess I'll take you through this timeline by telling a story about the business corporation, which is what I study. So, we see in the founding era a suspicion of business corporations because of their oligarchic tendencies. And then in the Jacksonian era with, you know, the typical American experimentalism and wanting, you know, to discover new ways of doing things, we decide to embrace incorporation. But we don't give it out to special people; we start general incorporation, right? So, anyone with 50 bucks can go down to the state house and

form a corporation. And that seems to be the egalitarian kind of populist way to handle power, the power that the corporate form and wealth the corporate legal form gives you.

**[00:37:54]** You know, fast-forward past the Civil War, our corporations are much bigger. We were undergoing some industrialization, some state building, some market building, and suddenly we see corporations asking for and receiving rights under the Constitution thanks to the Reconstruction amendments. So, these amendments that were passed, you know, to liberate former slaves were used by corporations for protections to assert rights against the government. And it's example of... a good example of how the courts can work orthogonally, against the values of equal liberty and equality within the Constitution.

**[00:38:34]** Now, when we get to [laughs] the New Deal era, we're understanding, and this goes back to the points that were mentioned before about maybe this is just a fight between, you know, federal power versus state power. I don't think you can lift the separation of powers in federalism from the equalities argument as such. Why? It's because when you have power, big private power, you need big public power to counter it, whether the states are doing a race to the bottom in terms of deregulation. So, we see state building and state capacity-building after industrialization and all the upheavals that happened during the Depression and the Gilded Age. We need a federal government to be the counterpower, the only kind of counterpower that can face that down.

**[00:39:20]** Yeah. And so, and then we you know, we develop the state capacity with all of our agencies in order to do it, and that is the bargain that America made. You know, there was fascism, there was communism, and laissez-faire wasn't working, so we came up with this New Deal kind of experiment. I don't want to get into the party realignment though, in interest of time.

**[00:39:42] Jeffrey Rosen:** This may be the final round of interventions. So, rather than trying to script you too much, I'll ask you to offer what closing thoughts you will. But Willie, I am really interested, in addition to having you take us up from the New Deal to the present in terms of the shifts in the parties in the balance between national and state power and devotion to the anti-oligarchy Constitution or not, we're now seeing what some have called a- a new originalist Constitutionalism on the Supreme Court, which is an effort to roll back many strains of New Deal Constitutionalism, both the regulatory state and the parts of the Warren Court that had been more egalitarian. How does that fit into your narrative, and what does your narrative tell us about how to think about that?

**[00:40:27] William Forbath:** The New Deal, as Kate nicely distilled, is a public response to massive nation-spanning private centers of power in the form of big corporations. And it's a project that, you know, that was in... part of the vision of earlier progressives, but only finds realization in the crisis of the Great Depression and the kind of authority that lends to political actors once the business elites are thoroughly discredited, as they were with the Great Depression and their inability to repair the economy. So, the New Deal is a moment of constitutional politics par excellence waged against the Court. The Court is defending a failed elite and a failed economic order of laissez-faire, as Kate says, and the New Dealers seize the moment to build up what the Court and the economic, you know, the business elites and corporate elites had

successfully thwarted, which is what she calls building state capacity, which in, you know, in other terms is building up federal agencies.

**[00:41:41]** Fast-forward to the last day of the term of the Supreme Court, you know, this June, and you have a Court reaching back to the sort of battle against the New Deal and the battle against building up a national government capable of repairing our economy and running it in the interests of ordinary people, and then you have that Court vainly, as it turned out, trying to crush the sort of administrative state-building of that era. Even that Court did not but once have the temerity to say that Congress can't confer on the administrative state and its agencies broad regulatory authority, that it can't use broad general language to say, "This agency shall protect worker safety. This agency shall protect the clean environment. This agency shall ensure the safety and purity of our food and drugs."

**[00:42:51]** The Court chiefly tried to say there has to be some judicial review, and there has to be some due process in the agencies. And at the end of the day, the Court stepped back and Congress crafted the ground rules for how we run our administrative agencies and our administrative state in the Administrative Procedure Act. And there was much more legalism and due process than most other nations' administrative states, and that was an artifact of how court-centered we are.

**[00:43:24]** At the same time, what happens in the period, Jeff, that we've sort of left out between today and the New Deal, and that rich moment of legislative and executive branch Constitutional interpretation and building, was what Joey and I call a great forgetting, of the idea that Congress and the executive branch are equal and in many ways primary Constitutional interpreters and builders because they're accountable to the people, and the idea that the economy is a subject of Constitutional concern. That sort of is all forgotten as the nation, right, as liberals and progressives understandably fall in love with the Warren Court, and understandably defend the Warren Court against the assaults of racist politicians who are insisting on a popular constitutionalism. Popular constitutionalism gets a terrible rap in this moment in which the Warren Court is being opposed by racists who want to reassert states' rights against racial equality.

**[00:44:39]** We liberals and progressives need to wake up from our long mourning for the Warren Court. We need to re-grasp the primacy of the polity as the space for realizing our constitutional principles, and we need to push back against the really wacky notion that the Court, as opposed to Congress, can determine the breadth and depth of the administrative state's authority. Once Congress has conferred power, the Court has no business saying, "We don't like the extent of the power this agency is commanding," as long as the agency is authorized by the statutes that first constructed it. So, we have a Court that is trying to reach back to some of the wildest ideas of the anti-New Deal era, ideas that the Court itself long ago realized were unworkable, all in the name supposedly of private freedom, which is really a biting irony by a Court that said there is no private freedom, you know, for a woman to choose to have an abortion, but there is a private freedom of corporations to choose, you know, whether or not to control their carbon emissions.

**[00:45:56] Jeffrey Rosen:** In the brief time that we have, I'm gonna ask for each of your final thoughts on the relevance of this. Adam, Willie just made the broad claim, if I can summarize it, that the current backlash to the administrative state on the Court is anti-originalist in the sense he called it a throwback to the wackiest ideas of pre-New Deal constitutionalism, ignoring the overwhelming anti-oligarchy strains in our constitutionalism from the founding all the way up to the present that point in the other direction. Is he right, and what do you think the relevance of this anti-oligarchy history is for modern Constitutional debates?

**[00:46:29] Adam White:** Well, here is where I do disagree with him certainly. I think the last century, thinking through the themes of this book, we see in the last century two big changes. One is a change from focusing on distribution to redistribution, and of course that's just part of the fact that there's no more frontier left to distribute and so on, but the move to redistribution becomes much more divisive and politically explosive. But second and most important for the point we're on now, the focus on administration and especially centralized administrative power at the federal level. It becomes I think at odds with a lot of the themes of the republican spirit of the founding and of even the Reconstruction era.

**[00:47:11]** The... Some of the cases that Willie was castigating a moment ago, the non-delegation cases of almost a century ago, we should remember that *Schechter Poultry* was a case about Congress delegating power to the President to work together with business interests to set the law. I think that that decision striking down that law was a great small-R republican anti-oligarchic law, and I think that in our own time one of the challenges of thinking through what we should... how we see things today is we need to worry about the accumulation of power in private hands and also the accumulation of power in government hands, especially the... in the centralization of administrative agencies, which Louis Brandeis was opposed to and for good reason.

**[00:47:53]** And we ought to remember that in our own time often concentrated power in public and private hands work together in ways that really undermine the republican spirit of the founding, of the Reconstruction era, and other best moments in American history. And I want to point out one last, since I alluded earlier to the Civil Rights Act of 1875. The Civil Rights Act of 1964, maybe the greatest piece of legislation of the 20th century, one of our greatest moments, in our own time becomes much more challenging as it goes from the legislative sphere into the administrative sphere. And I think it's a cautionary tale.

**[00:48:30] Jeffrey Rosen:** Joey, Adam makes a strong point that for... Louis Brandeis opposed the curse of bigness in business as well as in government, and he defended the interests of the producing classes by opposing centralized power. Has the modern Democratic Party lost that suspicion of bigness, and how does it interact today with your efforts to resurrect the anti-oligarchy Constitution?

**[00:48:59] Joseph Fishkin:** Well, I think the story of the... what do we do about the expansion of private power in the form of large corporations from a century ago, this is a story where all arguments from all sides have relevance in the present. In particular, I think we have forgotten completely that antitrust law, the point of which was to break up concentrations of private power.

This was viewed by Progressives a century ago as a constitutionally central project, that you needed to break up these large concentrations of private power and wealth if we were going to preserve a republic.

**[00:49:40]** Now, there also were Progressives who took the view that sometimes you can't break up the concentrations of private wealth. You need to build up public power to be a commensurate counterweight, and this is how we got the regulatory state that Adam is arguing has, you know, gone too far. The idea was that we need to build up sufficient public, democratically-accountable power so that the state, the federal government is ultimately what you need; if you have national corporations, it needs to be the national government, regulating and opposing them. The state governments are too weak and small to even do the work.

**[00:50:32]** And so, I think that argument, it was right then and it's probably even more true today. The way that the system of American capitalism has changed since a century ago, I think looks... raises many alarms [laughs] for the proponents of the tradition that we are sketching in this book and the way that... I mean, where I will meet Adam part way is that the interaction among the largest private concentrations of power and the governments that are sometimes captured by them, that is a real problem for... That is part of what Progressives a century ago worried about when they worried about large national corporations and thought we should break [laughs] them up through antitrust when they become sufficiently powerful.

**[00:51:26]** So, I guess I would say the story of the anti-oligarchy tradition in the present I think is partly a story about inequality and redistribution, but I would sort of maybe challenge a little bit the premise that there's much... ever have been much of a separation between distribution and redistribution in the arguments of opponents of redistributing the nation's wealth. The federal income tax, which has done so much to reduce inequality in this country, was initially opposed by corporate and business interests and by wealthy Americans as an unconstitutional form of redistribution that violated equal protection of the laws, and it took a political fight against the Court's interpretation of the Constitution. Ultimately that one resulted in an Article V amendment, but there have been other parts of the fight against that interpretation that resulted in just ultimately the courts backing off and capitulating.

**[00:52:33]** Those fights about how much can the federal government do to redistribute economic opportunity and the chance to pursue happiness so that it's not too hoarded by the few, I mean, that's a central problem of our time, and that's why I think the Progressive era becomes such a useful starting point for thinking about what we need to do today, and why I am, like Willie, very concerned that the Supreme Court [laughs] appears to be resurrecting some of the ideas that the Court that was politically defeated in that era was trying to advance.

**[00:53:16] Jeffrey Rosen:** Kate, last word in this great discussion is to you. So much to sum up, but just a little bit of time. There was a... some talk recently about a coalescence of the anti-oligarchy Constitution among Josh Hawley, populist Republicans and Elizabeth Warren, populist Democrats, but the mainstreams of both parties seem instead focused on other things; equality and opportunity for the Democrats, and, individual liberty and economic freedom for the

Republicans. Is that too simplistic, and how would you sum up the contemporary relevance of the powerful book we've just been discussing, the Anti-Oligarchy Constitution?

**[00:53:57] Katharine Jackson:** Well, I would have to say that what I bring from this book is that we should free ourselves to be creative when it comes to finding solutions politically to the problem of inequality, both in economics and politics, and how they work together. And Americans have always been creative in this way. We shouldn't, you know bind ourselves to any one solution. So, one solution that folks bind themselves is to a very robust notion of antitrust, where every big business is bad business and we should bomb our economy back into the 18th century. That's not the only solution, right? We can have big businesses plus unions plus regulation, maybe some stakeholder representation on the board. Like, there are other ways to talk about this. As long as we stick to the same grammar of politics who care about equality, we care about one person, one vote, we care about not letting wealth lets you get a leg up over others.

**[00:54:56]** And this is where administration can give us some interesting tools. So, for example, during the Reconstruction era, you know, before we shamefully abandoned it administration served as a focal point for democratic organization in the South. You know, maybe your local politicians weren't doing anything for you, but the federal government came down and there were bureaus and things that you could go to and ask for help, to ask for money, to ask for roads, right? And we should use these agencies, consider them as just another tool in our toolkit, to cash out the promise of a Constitution dedicated to treating each and every one of us as equals, as equal authors of the laws that bind us.

**[00:55:40]** So, stay creative.

**[00:55:42] Jeffrey Rosen:** Stay creative indeed. Thank you so much, Willie Forbath, Adam White, Joey Fishkin and Kate Jackson for a rich, deep and historically informed discussion of this important strain in American Constitutional history, The Anti-Oligarchy Constitution. Thanks to all of you friends for taking an hour out in the middle of your day to learn and grow together. It's so meaningful to have these conversations with you, and I'm so grateful to you for joining.

**[00:56:06]** Thanks to all. Have a wonderful August, and look forward to reconvening America's Town Hall in September. Till then, thanks again. Goodbye.

**[00:56:19] Tanaya Tauber:** Today's show was produced by John Guerra, Melody Rowell, Lana Ulrich and me, Tanaya Tauber. It was engineered by Dave Stotz. Research was also provided by Elliott Peck and Lana Ulrich. For a list of resources mentioned throughout this episode, visit [constitutioncenter.org/debate](http://constitutioncenter.org/debate). We'll be taking a break for the rest of the summer, so now is your opportunity to catch up on older episodes of Live at the NCC, or watch the videos of our town halls in our media library at [constitutioncenter.org/constitution](http://constitutioncenter.org/constitution). We'll be back here in September, so be sure to subscribe to the show wherever you get your podcasts so you won't miss an episode.

**[00:56:59]** On behalf of the National Constitution Center, I'm Tanaya Tauber.