

Republicanism and the Constitution of Opportunity

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Introduction

In arguing for an “Anti-Oligarchy Constitution”¹ and a “Constitution of Opportunity,”² Joseph Fishkin and William Forbath face a recurring problem: What does the Constitution have to do with their argument? They emphasize that public officials have a duty to promote an inclusive and broad-based middle class because this will help preserve democratic self-government.³ But why is this a *constitutional* obligation?

The theory of living originalism⁴ can help articulate the constitutional basis of their project. The purpose of this essay is to show how a commitment to a republican political economy follows from the constitutional text and from basic constitutional commitments to republican government.

I. The Anti-Oligarchy Constitution as a Constitutional Construction

Arguments for constitutional political economy are examples of *constitutional construction*. Constitutional constructions build out the Constitution’s basic framework where the text is silent, ambiguous, or vague.⁵ Judicial constructions are the most familiar forms of construction, but equally important are *state-building constructions*.⁶ Indeed, as I explain in *Living Originalism*, most judicial constructions respond to state-building constructions by the political branches.⁷ State-building constructions are therefore the primary case, not the exceptional case, of constitutional construction. Until well after the Civil War, the judiciary played a far smaller role in constitutional construction than it does today.⁸ And even

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1. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2017) (manuscript at 3–4) (on file with the Texas Law Review).

2. *Id.* (manuscript at 24, 28, 33, 46, 55, 59, 61–63, 67, 70, 77).

3. *Id.* (manuscript at 3–4).

4. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

5. *Id.* at 4–5, 14.

6. *Id.* at 5–6.

7. *Id.*

8. *See id.* at 317 (“[T]he development of federal judicial doctrine greatly accelerated after the Civil War—and especially during the twentieth century.”).

today, judicial constructions often respond to important state-building constructions, as we can see in the debates over Obamacare.⁹

In state-building constructions, the political branches assert claims about the Constitution's meaning; they flesh out the Constitution's obligations and exercise the Constitution's powers of government through the building of institutions that perform constitutional functions.¹⁰

The Anti-Oligarchy Constitution is a constitutional construction. It is an account of how best to make the Constitution work in practice. Fishkin and Forbath argue that implementing the Anti-Oligarchy Constitution is primarily a task of the political branches and only secondarily a task of the judiciary.¹¹ Along with a general statement of the Anti-Oligarchy Constitution, they offer an interlocking set of principles and assumptions about constitutional structure as a whole.¹²

What is the ground of this construction? Constitutional constructions must always be consistent with the basic framework.¹³ The basic framework includes the Constitution's text and its choice of legal norms—rules, standards, principles, and silences.¹⁴ But the constitutional framework also contains a small number of underlying principles that are not directly stated but that we infer from constitutional text and structure.¹⁵

What are those underlying principles? There are at least five: (1) separation of powers; (2) checks and balances; (3) federalism; (4) the rule of law; and (5) republicanism, or representative democracy.¹⁶ No construction of the Constitution can be faithful if it rejects these principles as part of the basic framework. Of course, because these are principles and not rules, they may be articulated in many different ways and take many

9. Jack M. Balkin, *The Court Affirms Our Social Contract*, THE ATLANTIC (June 29, 2012), <http://www.theatlantic.com/national/archive/2012/06/the-court-affirms-our-social-contract/259186/> [<https://perma.cc/MJT5-7Q5S>].

10. BALKIN, *supra* note 4, at 5; Jack M. Balkin, *Constitutional Interpretation and Change in the United States: The Official and the Unofficial*, 14 JUS POLITICUM 9 (2015) http://juspolicum.com/uploads/5709f15cf28c4-jp14_balkin.pdf [<https://perma.cc/C9CS-K8YP>] (describing a “dialectic of legitimation” featuring “a constant interaction between the constructions created by state officials in the political branches of the government premised on their claims about what the constitution permits or does not permit, and judicial constructions that legitimate or partially legitimate or hold unconstitutional these state-building constructions”).

11. FISHKIN & FORBATH, *supra* note 1 (manuscript at 3–4) (advocating a return to an earlier tradition of constitutional arguments that were “directed primarily to the political branches, and only secondarily to the courts”).

12. *See id.* (manuscript at 2) (offering a “structural constitutional argument[]” premised on the idea that “economics and politics are inextricable, and that our constitutional order rests on and presupposes a political-economic order”).

13. BALKIN, *supra* note 4, at 21–22.

14. *Id.* at 36.

15. *Id.* at 14, 259.

16. *Id.* at 259.

different forms. They do not determine the scope of their own extension, and they must be balanced against other considerations. Nevertheless, it would be unfaithful to the Constitution to argue that it does not contain a principle of federalism, for example, or a principle of representative democracy.

In fact, the principle of representative democracy is more than just an unstated underlying principle. It is mentioned in the Constitution in Article IV, Section Four, as a requirement that “The United States shall guarantee to every state in this Union a Republican Form of Government”¹⁷

The Guarantee Clause seems only to assert that *states* must be republican.¹⁸ But it follows from constitutional structure that the federal government must also be republican; a federal monarchy or oligarchy, for example, would be inconsistent with the guarantee of republicanism in the several states. Therefore, if the federal government must guarantee the states a republican form of government, it must also guarantee them that it will continue to be a republican form of government.

We should not consider the Guarantee Clause in isolation. The principle of republicanism reaches into many different elements of the Constitution, and the mere fact that this particular clause has been neglected does not mean that republican principles and ideals are not at stake in many other different clauses and parts of the Constitution. For example, the requirement of regular elections, the bans on titles of nobility and bills of attainder, the First Amendment’s guarantees of speech, press, assembly, and petition, and the Fourteenth Amendment’s guarantee of equal protection of the laws all speak to republican concerns.¹⁹

Note that the guarantee of republican government is not simply a suggestion. It is imposed as a *positive duty* on the United States. It falls on all three branches. Each branch must fulfill that duty in the ways that are most appropriate to its powers and institutional capacities. That means, among other things, that courts fulfill this duty by deciding cases and controversies, while the political branches fulfill the duty by passing laws and taking executive actions.

The Constitution does not specify how the guarantee of republican government should be carried out, except in the most extreme instance, as a

17. U.S. CONST. art. IV, § 4.

18. *Id.*

19. U.S. CONST. art. I, §§ 2–3 (requiring regular elections for Congress); U.S. CONST. art. I, §§ 9–10 (banning titles of nobility and bills of attainder); U.S. CONST. amend. I (guaranteeing speech, press, assembly, and petition); U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection of the laws).

duty to respond to insurrection or rebellion.²⁰ This particular specification makes perfect sense. Through their study of history, the framers were well aware that republics could be destabilized and could be toppled by antirepublican forces, leading to oligarchy or despotism.²¹ Thus, if an armed rebellion overthrew the government of Texas and installed a dictatorship or an oligarchy, the federal government would have a constitutional duty to restore republican government in the state. Otherwise, the Constitution does not specify when the duty to guarantee republican government arises or how it is to be fulfilled. These questions are left to the United States to decide.

To summarize: the Constitution imposes a duty—a guarantee of republican government. This duty is consistent with the underlying principle of representative democracy stated in constitutional text and implicit in constitutional structure. The Constitution does not specify how to fulfill this duty, leaving the question to all three branches of government, consistent with their institutional roles.

An aside: in *Luther v. Borden*,²² Chief Justice Taney argued that the guarantee of republican government was inherently political and therefore was not justiciable.²³ But the facts of *Luther* involved an insurrection in Rhode Island that occurred between 1841 and 1842, seven years before the case was finally decided in 1849.²⁴ The question was whether the Court would upset the President's determination of who was the lawful government of the state.²⁵ By the time the Court heard the case, order had long been restored and it would have been absurd to second-guess the President's decision and order the insurrectionist government—long since dissolved and scattered—restored to power.²⁶ Chief Justice Taney's language thus went much further than it needed to in order to decide the case. For example, he also asserted that how states choose to organize their

20. U.S. CONST. art. IV, § 4 ("The United States . . . shall protect each . . . [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

21. See THE FEDERALIST NO. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961) ("In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations.").

22. 48 U.S. (7 How.) 1 (1849).

23. *Id.* at 42–43.

24. *Id.* at 2.

25. *Id.* at 44.

26. Michael A. Conron, *Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEGAL HIST. 377, 380 (1967) ("These rival claims to power and sovereignty comprised the 'political question' confronting Taney in Luther's appeal But by then the issue was an academic one.").

electoral systems is also a political question in which courts can play no role.²⁷ That dictum has long been cast aside.²⁸

We cannot fairly read *Luther* to justify a general withdrawal of the judiciary from enforcement of Article IV, Section Four. This would be flatly inconsistent with the obligation of “The United States”—which includes all three branches of government—to guarantee republican government.

This point has only a minor effect on Fishkin and Forbath’s project, however, because they are primarily concerned with the duties of the political branches and with what I call state-building constructions.²⁹ But it does suggest that the judiciary also has a role in securing republican government, for example, in legitimating certain state-building constructions and in protecting certain rights that are important to republican government, like the rights to vote, hold office, and participate in political life.

II. What Is Republican Government?

I have argued that Fishkin and Forbath’s “Anti-Oligarchy Constitution” is a political construction of the requirement of republican government, which is both a positive duty mentioned in the text of the Constitution and an underlying principle of the Constitution. This requirement asserts that the political branches of the federal government have a constitutional duty to guarantee republican government. And because the guarantee would mean nothing if the United States were not republican, it also imposes a duty on the United States to maintain itself as a republican form of government.

But what do we mean by republican government? Today people often understand republicanism in contrast to pure or direct democracy.³⁰ For example, Randy Barnett’s new book, *Our Republican Constitution*, identifies republicanism with representative government that secures natural rights.³¹ More interestingly and controversially, he identifies the republicanism of the Founders with what is generally viewed as its

27. *Luther*, 48 U.S. at 46–47.

28. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (holding that state legislative districts must be roughly equal in population).

29. FISHKIN & FORBATH, *supra* note 1, at 3–4 (arguing that the constitutional duty to prevent oligarchy rests primarily with the political branches).

30. E.g., RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVERIGNTY OF WE THE PEOPLE* 18–19 (2016) (opposing “Republican” and “Democratic” conceptions of the Constitution).

31. See *id.* at 23 (“A Republican Constitution views the natural and inalienable rights of these joint and equal sovereign individuals as preceding the formation of governments. . . . The small subset of individuals who are empowered to govern . . . [are] the servants of the people.”).

complement or opposite—Lockean-inspired, natural-rights liberalism.³² But that is a subject for another essay.³³

The founding generation had a more capacious view of republics and republicanism.³⁴ We do not have to accept that view in all of its particulars, any more than we have to accept the adopters' views about the scope of the First Amendment or the Equal Protection Clause. Nevertheless, consistent with the premises of a living originalism, we can investigate historical understandings and historical articulations of principles to decide on the constructions that are most faithful to the Constitution today. This activity of historical reimagination attempts to keep faith with the Constitution as a transgenerational political project. Far from abandoning constitutional fidelity, historical investigation and reimagination seek the best way to continue the American constitutional tradition in our own time.³⁵

The Founders understood republicanism through an interlocking set of ideas and principles.³⁶

First, the Founders opposed republicanism not merely to direct popular rule, but also to monarchy, aristocracy, and oligarchy.³⁷ A republic is therefore an antimonarchical, antiaristocratic, and anti-oligarchical form of government.³⁸

32. See *id.* at 63 (“The text of the Constitution expressly acknowledges the underlying political theory of the Declaration, namely, its roots in the natural and inalienable right of individuals—that is, that first come rights and then comes government.”).

33. See Jack M. Balkin, *Which Republican Constitution?*, CONST. COMM. (forthcoming 2016) (manuscript at 2, 11), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761513 [<https://perma.cc/BRW4-CK2L>] (arguing that Barnett’s “republicanism” is actually a “sympathetic restatement of nineteenth century . . . classical liberalism” and that his book neglects the actual historical tradition of republicanism).

34. *Id.* (manuscript at 11, 14–15).

35. BALKIN, *supra* note 4, at 3–4, 268 (arguing that fidelity to the past requires historical reimagination of our commitments from the standpoint of the present).

36. The description of republican themes in the next twelve paragraphs is drawn from Jack M. Balkin, *Which Republican Constitution?*, *supra* note 33 (manuscript at 15–19).

37. E.g., RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION xi–xii (2009) (arguing that “the vast majority of the Founding Fathers” were republicans because “they had rejected monarchy and hereditary rule and had embraced unequivocally the idea of representative government” although they differed on the nature of representation); *id.* at 122 (noting that at the time of the Founding, “republican” meant opposition to “hereditary monarchy” and support for “some form of representative government,” but not “unmediated democracy”); Alan Gibson, *Ancients, Moderns and Americans: The Republicanism–Liberalism Debate Revisited*, 21 HIST. POL. THOUGHT 261, 286–88 (2000) (noting that the Framers rejected both pure democracy as well as social orders directed by official groups or memberships, favoring instead an extended republic with representation as the crucial element).

38. See THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) (“It is essential to [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.”); THE FEDERALIST

Second, republicanism implies the notion of a public interest. A republic is a *res publica*, a public thing that citizens have a duty to further and defend through their efforts in politics.³⁹ The notion of a public thing—a republic—presumes that there is a common good or public interest that is not identical with the private interest of any individual or group. People may disagree about what the public interest is—indeed, in a democracy they often do. But they should direct both their efforts and politics as a whole toward the realization of the public interest and the promotion of the *res publica*.⁴⁰

Because republicanism is grounded on a notion of common good and public interest, many republican rights include duties which are connected to the defense of the republic and republican values.⁴¹ The right to keep and bear arms is an example. A purely liberal conception of the right to keep and bear arms is a right of individual self-defense.⁴² But a republican conception of the right to keep and bear arms is a public duty of citizens to take up arms and, if necessary, to give their lives, to defend the republic against tyranny and corruption.⁴³

Third, republicanism includes a principle of civic equality. Because republicanism opposes monarchy, aristocracy, and oligarchy, all citizens are equal as citizens and the state may not elevate some special class of citizenry above the rest.⁴⁴ This idea was finally enshrined in the text of our Constitution during Reconstruction in the Thirteenth and Fourteenth Amendments, but it is implicit in the concept of republican government.⁴⁵ The prohibition against class and caste legislation, recognized in antebellum

NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the Constitution's ban on titles of nobility as "the cornerstone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people"). See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991) (describing how republicanism sought to disestablish monarchy and aristocracy in politics and culture).

39. Thomas Paine, *The Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution* (1791), in *COLLECTED WRITINGS* 565 (Eric Foner ed., 1995) ("RES-PUBLICA, the public affairs, or the public good; or literally translated, the *public thing* . . . refer[s] to what ought to be the character and business of government.").

40. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 55–56 (1969).

41. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 7–8 (2009).

42. Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 645–46 (1989).

43. *Id.* at 649–51.

44. WOOD, *supra* note 41, at 8.

45. Melissa Saunders, *Equal Protection, Class Legislation and Colorblindness*, 96 *MICH. L. REV.* 245, 254 (1997) (arguing that antebellum state courts believed that class legislation "threatened true republican government and with it, personal liberty").

state constitutional law as well as in the Fourteenth Amendment, follows from the republican commitment to the equality of citizens.⁴⁶

Fourth, republicanism also includes a principle against domination.⁴⁷ The republican conception of liberty includes formal freedom from restraint, but it also involves a requirement of nondomination.⁴⁸ Mere freedom from restraint does not guarantee nondomination either in civil society or in politics.⁴⁹ In republican ideology, people who are dominated by others are not free but slaves.⁵⁰ Slavery is the condition of lack of freedom and self-rule.⁵¹ The republican opposition of slavery to freedom is political as well as economic.⁵² Chattel slavery is only a special case of slavery.⁵³ As Sandy Levinson and I have noted in our work on the Thirteenth Amendment, the founding generation often spoke of the condition of the colonists as slavery because the colonists had no representation in Parliament.⁵⁴ The colonists were not arguing that they

46. See, e.g., FISHKIN & FORBATH, *supra* note 1 (manuscript at 25) (explaining that Jacksonians made equal protection arguments “before the Equal Protection Clause” by relying on “a constitutional principle . . . protecting the ‘many’ against class legislation that privileged the ‘few’”).

47. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 6, 12 (1997) (arguing that the distinctively republican conception of freedom is nondomination). Pettit is the most prominent defender of the classical tradition of republican liberty in contemporary political philosophy.

48. *Id.* at 21 (“[T]he conception of freedom as non-domination, not the negative conception of freedom as non-interference . . . was embraced among writers in the republican tradition.”); Philip Pettit, *Keeping Republican Freedom Simple*, 30 *POL. THEORY* 339, 340 (2002) (defining republican freedom as nondomination, not noninterference); see also Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 *COLUM. L. REV.* 1459, 1497 (2012) (noting “the founding generation’s view of slavery as antirepublicanism and unjustified domination”).

49. PETTIT, *supra* note 47, at 31 (“[T]here may be loss of [republican] liberty without any actual interference . . .”); see Balkin & Levinson, *supra* note 48, at 1475 (“If domination can exist within markets and welfare states alike, and can be reproduced even in social systems that promise formal equality, then domination will appear—and reappear constantly—in modern societies.”).

50. See, e.g., Balkin & Levinson, *supra* note 48, at 1484 (“The colonial vision that opposed slavery to republican liberty held that slavery meant more than simply being free from compulsion to labor by threats or physical coercion. Rather, the true marker of slavery was that slaves were always potentially subject to domination and to the arbitrary will of another person.”).

51. See, e.g., PETTIT, *supra* note 47, at 31–32 (arguing that republican liberty is premised on the distinction between free citizens and those persons, like slaves, who are subject to the arbitrary power of another).

52. *Id.* at 32–33, 71–72 (distinguishing political liberty from political slavery—dependence on others); see Balkin & Levinson, *supra* note 48, at 1484 (“Algernon Sidney’s *Discourses Concerning Government*, which was highly influential in eighteenth-century America and which especially influenced Thomas Jefferson, defined slavery as arbitrary government, in which people could not make laws for themselves.”).

53. Balkin & Levinson, *supra* note 48, at 1462–63.

54. *Id.* at 1462–63, 1481–88.

were chattel slaves; rather they argued that they lived under the domination of a distant government.⁵⁵

Fifth, republicanism includes a commitment to self-rule.⁵⁶ In order for the people as a whole to be free, the government must respect their freedom. But a mere grant of civil freedom at the sufferance of the state is not enough because it can be taken away. Therefore, in order for people to be their own masters, the government must respect the rights of the public and it must be responsive to the public's views over time.⁵⁷ Hence the principle of nondomination not only guarantees personal liberty, it also requires self-rule and a representative form of government.⁵⁸

Sixth, republicanism includes an anticorruption principle. Corruption is the central enemy of republics, and it is a feature of both individuals and political systems.⁵⁹ Corruption occurs when government officials lose their devotion to the public good and are no longer responsive to and dependent on public opinion. Then officials promote their private interest or the private interest of some elite faction or oligarchy over the public interest and the public good.⁶⁰

55. *Id.* at 1463, 1481–85.

56. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 759–60 (1994) (arguing that “[t]he central pillar of Republican Government . . . is popular sovereignty” and that the “deepest spirit of republicanism” is democratic self-rule).

57. See THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961) (“The genius of Republican liberty seems to demand on one side not only that all power should be derived from the people but that those entrusted with it should be kept in dependence on the people . . .”). The idea that the preservation of republican liberty requires popular control of government is not central to the classical republicanism of Machiavelli but developed in the eighteenth century with the rise of democracy. PETTIT, *supra* note 47, at 30–31. This is the republicanism of the American Revolution and of the American Constitution. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 278–81 (2005) (describing how republicanism was equated with popular sovereignty in late eighteenth-century thought).

58. See THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) (“We may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”).

59. See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 527 (1975) (“Virtue can develop only in time, but is always threatened with corruption by time.”); WOOD, *supra* note 38, at 105 (“Precisely because republics required civic virtue and disinterestedness among their citizens, they were very fragile polities, extremely liable to corruption.”); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009) (“The Constitution was intended to provide structural encouragements to keep the logic and language of society as a whole from becoming corrupt, representing a technical and moral response to what they saw as a technical and moral problem.”).

60. PETTIT, *supra* note 47, at 210 (explaining that in the republican tradition corruption occurs when people “make their decisions by reference not to considerations of the common good but rather to more sectional or private concerns”).

To maintain a viable republic, one must prevent the corruption of the political process. However, the problem of corruption is ever-present.⁶¹ As time goes on, people disregard the common good, strive for power, attempt to preserve and extend their status, and in general, invent ever-new ways to dominate each other.⁶² Therefore, in order to preserve a republic, citizens must be eternally vigilant in discovering the emerging sources of corruption within the political system and to nip them in the bud before they have a chance to undermine republican government. The best way to guard against corruption is to create institutions that will preserve and promote civic virtue and cause individuals to work for the common good.⁶³

Seventh, as a result, republicanism includes a principle against political self-entrenchment.⁶⁴ Today's majority must not be able to entrench itself so as to prevent the development of a future majority.⁶⁵ If

61. WOOD, *supra* note 41, at 8 (“[R]eliance on the moral virtue of their citizens, on their capacity for self-sacrifice and impartiality of judgment, was what made republican governments historically so fragile.”).

62. PETTIT, *supra* note 47, at 210–11 (arguing that the basic problem of republican governance is to promote resilience and stability in the face of continual sources of temptation and corruption).

63. *Id.* at 212 (noting that “however much it may have insisted on the importance of virtue,” the republican tradition “has embraced the need . . . for a regime of checks and balances”). The founding generation also emphasized the development of institutions of learning to promote republican virtue. WOOD, *supra* note 41, at 476–77. Dr. Benjamin Rush famously argued that education should “convert men into republican machines . . . to perform their parts properly in the great machine of the government of the state.” BENJAMIN RUSH, OF THE MODE OF EDUCATION PROPER IN A REPUBLIC (1798), *reprinted in* THE SELECTED WRITINGS OF BENJAMIN RUSH 88, 92 (Dagobert D. Runes ed., 1947).

64. BALKIN, *supra* note 4, at 243 (“The principle of republican government prohibits political incumbents and temporary majorities from trying to entrench themselves in power.”); *see also* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 114–16 (2000) (arguing that the Republican Government Clause is designed to prevent political self-entrenchment); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 44–45 (2004) (arguing that many different features of the Constitution are designed to prevent self-entrenchment).

65. Political self-entrenchment violates the republican principle of majority rule. *See* THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[A] fundamental maxim of republican government . . . requires that the sense of the majority should prevail.”); THE FEDERALIST NO. 58, at 361 (James Madison) (Clinton Rossiter ed., 1961) (describing majority rule as “the fundamental principle of free government”); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON: 27 MAY 1787–3 MARCH 1788, at 205, 212 (Robert A. Rutland et al. eds., 1977) (“[T]he republican principle . . . refers the ultimate decision to the will of the majority.”); Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), http://avalon.law.yale.edu/19th_century/jefinaul.asp [<https://perma.cc/2MZT-XLBC>] (“[A]bsolute acquiescence in the decisions of the majority [is] the vital principle of republics . . .”). In his *Vices of the Political System*, Madison argues that “[a]ccording to Republican Theory, Right and power being both vested in the majority, are held to be synonymous.” JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), *reprinted in* THE MIND OF THE FOUNDER 57, 59 (Marvin Meyers ed., rev. ed. 1981). But if a minority uses superior force and property, “one third only may conquer the remaining two thirds,” and “[w]here slavery exists the republican Theory becomes still more fallacious.” *Id.*

constitutional structure allows self-entrenchment, the system will be corrupted, and the people will cease to be their own rulers, violating basic principles of republican self-government.

To sum up: republicanism includes seven principles: (1) opposition to monarchy, aristocracy, and oligarchy; (2) duties to further the public good and act for the public interest; (3) equality of citizenship with no special classes, privileges, or disabilities that might create a new aristocracy; (4) freedom as non-domination; (5) individual and political self-rule; (6) a principle against corruption (including individual and systemic corruption); and (7) a principle against political self-entrenchment.

III. Political Design and Political Economy

Classical versions of republicanism also emphasized the importance of civic virtue.⁶⁶ Civic virtue involves a desire to work for the common good and to defend republican principles; it is important both for citizens and officials alike. Nevertheless, urging and educating people to be virtuous is unlikely to be sufficient to maintain a republic. People are always tempted by self-interest and clannishness. Somebody is always strategizing new ways to obtain power and privilege. Without good institutional design, people and government officials repeatedly stray from republican values. They attempt to cling to power, engage in various forms of political self-entrenchment, gain special benefits and privileges for themselves (and their allies), and seek to dominate others.

Without a set of background (legal and constitutional) arrangements, the pursuit of the public interest is overwhelmed by the struggle of individual and factional interests; individual and structural corruption enters the system, and the government loses its republican character.

Hence, the key to keeping a republic running is good institutions, practices, and laws.⁶⁷ In the context of a constitution, this principle means

66. See PETTIT, *supra* note 47, at 20 (arguing that historically republicanism has been characterized by “a regime of civic virtue, under which people are disposed to serve, and serve honestly, in public office”); *id.* at 245 (“[R]epublican laws must be supported by habits of civic virtue or good citizenship . . . if they are to have any chance of prospering.”); *id.* at 280 (“The laws that advance the aims of the republic, institutionalize its forms, and establish regulatory controls need to be supported by republican civil norms—need to be supported by widespread civic virtue, by widespread civility—if they are to have any chance of being effective . . .”); *cf.* James Madison, Speech at Virginia Ratifying Convention (June 20, 1788), in 11 THE PAPERS OF JAMES MADISON 158, 163 (Robert A. Rutland et al. eds., 1977) (“But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”).

67. See PETTIT, *supra* note 47, at 210–12 (expounding the classic republican themes of the potential corruptibility of human beings and the need for well-designed institutions to promote civic virtue); *cf.* THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961)

that a republic requires both a good constitutional structure and a good set of basic arrangements for politics, which will prevent domination, political self-entrenchment, and corruption.

Political economy is a necessary part of this structure. Political economy is not separate from constitutional design.⁶⁸ The separation of the economy from other structures of power, including politics, is a comparatively recent idea in human history.⁶⁹ What we call “the market” is an invention of states, developed in early modernity.⁷⁰

Preservation of republican governance among persons and within political practices must be maintained through the design of institutions. Early conceptions of republicanism assumed that free citizens could not be economically dependent on others, because such economic dependence would lead to loss of political freedom, domination, and corruption (by both dominators and dominated).⁷¹

This concern about dependence pushed in two different directions. In a conservative direction, it supported antidemocratic features of

(“The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*.”).

68. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 1) (“From the beginning of the Republic through roughly the New Deal, Americans vividly understood that the guarantees of the Constitution are intertwined with the structure of our economic life.”); *id.* (manuscript at 2) (“[A]rguments about constitutional political economy begin from the premises that economics and politics are inextricable, and that our constitutional order rests on and presupposes a political-economic order.”).

69. See ERNEST GELLNER, *SPECTACLES AND PREDICAMENTS: ESSAYS IN SOCIAL THEORY* 285 (1979) (“The really fundamental trait of classical capitalism is that it is a very special kind of order in that the economic and the political seem to be separated, to a greater degree than in any other historically known social form.”); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 74 (1944) (describing the separation of social life into economic and political spheres in modern capitalist societies).

70. See POLANYI, *supra* note 69, at 65 (“Deliberate action of the state in the fifteenth and sixteenth centuries foisted the mercantile system on the fiercely protectionist towns and principalities.”); *id.* at 68–76 (describing the invention of modern market systems in modernity); *id.* at 140 (“The road to the free market was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism.”); *id.* at 141 (“While *laissez-faire* economy was the product of deliberate State action, subsequent restrictions on *laissez-faire* started in a spontaneous way. *Laissez-faire* was planned; planning was not.”); see generally David Singh Grewal, *The Invention of the Economy* (unpublished manuscript 2015) (explaining the emergence of the modern market economy from the creation and policies of the modern state).

71. *E.g.*, 2 REPUBLICANISM: A SHARED EUROPEAN HERITAGE: THE VALUES OF REPUBLICANISM IN EARLY MODERN EUROPE 2 (Martin van Gelderen & Quentin Skinner, eds., 2005) (“[T]he exponents of republicanism [argued] . . . that slavery inevitably breeds slavishness; that those condemned to a life of servitude will find themselves obliged to cultivate the habits of servility.”); ERIC MACGILVRAY, *THE INVENTION OF MARKET FREEDOM 189–90* (2011) (“[C]ontemporary republicans agree with their predecessors in thinking that our character is fundamentally shaped by the social and political context in which we find ourselves, and that we are only free insofar as we are able to shape that context in turn. . . . [T]he presence of arbitrary power poses a threat to our freedom precisely because it has a corrupting effect on our character.”).

republicanism, including limiting political life to heads of households who ruled over women, slaves, and apprentices, as well as limiting suffrage or the right to hold political office to owners of substantial property, who were assumed to be economically independent.⁷² For this reason, many historians have pointed out that the republican tradition could and did produce very inegalitarian results by today's standards.⁷³ But the argument about dependence could be flipped and pushed in precisely the opposite direction. If economic dependence prevents citizens from truly ruling themselves, republicanism demanded that the state should work to facilitate a political economy in which fewer people were dependent on others and dominated by others.⁷⁴ Facilitating self-rule also required expansion of political freedom and suffrage so that fewer and fewer people were subject to political slavery.⁷⁵ Finally, it required that the rules of politics not be rigged to allow small groups to entrench their political and economic power.⁷⁶ The antidependence concern, in other words, is consistent with many different forms of social structure, depending on our other assumptions.

IV. The Debate Over Political Economy in the Early American Republic

The American republic begins with a continuous debate over what kind of political economy is necessary to maintain a viable republic.

72. See WOOD, *supra* note 41, at 8–9 (“Since owning property made this independence possible, all the states [at the Founding] retained some kind of property qualification for voting or for office holding.”); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1668 (1998) (“Patriarchy was comfortably compatible with classical republicanism: the head of the family represented the family (and its servants and slaves) in its relationship to the state.”).

73. See Kerber, *supra* note 72, at 1668–69 (noting republicanism’s many inegalitarian features); see also FISHKIN & FORBATH, *supra* note 1 (manuscript at 27) (observing that the Jacksonian republican tradition “wedded white farmers’ and workers’ democratic aspirations to the racist causes of southern slavery and Indian Removal Slaves’ and women’s productive work was not merely excluded from the Jacksonians’ generous conception of equality for the nation’s producers; racial and gender subordination were among the bases on which they rested their vision of the white man’s republican liberty and citizenly independence”).

74. See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 38–40 (1990) (describing exclusionary and inclusionary versions of republicanism, and identifying the inclusionary version with the early Republican Party); Balkin, *supra* note 33, at 3 (“The egalitarian version of republicanism, by contrast, has argued that government should work to dismantle hierarchies of domination and dependence and that government should create conditions for a broad base of middle-class voters who are financially independent and therefore could rule themselves.”); see also David Casassas & Jurgen De Wispelaere, *Republicanism and the Political Economy of Democracy*, 19 EUR. J. SOC. THEORY 283, 295 (2016) (“[R]epublican freedom requires a significant level of economic independence as a countermeasure against a capitalist economic sphere rife with domination.”).

75. See *supra* note 59; FISHKIN & FORBATH, *supra* note 1 (manuscript at 49–50) (noting arguments during Reconstruction that without the right to vote freedmen could not be protected from domination).

76. See *supra* notes 72–73 and accompanying text.

Fishkin and Forbath argue that the republican vision called for a broad middle class of Americans who could be economically independent and self-sustaining.⁷⁷ And it also called for greater inclusion so that more and more people would enjoy the blessings of republican liberty.⁷⁸ This makes sense given the familiar republican concern that economic dependence makes it impossible for citizens to be their own political masters.⁷⁹

The republican ideals of the American Revolution and the early federal republic coexist with Lockean liberalism. Indeed, the republicanism of the Founders has important differences from the classical republicanism of Machiavelli and Harrington and is a distinctively American and pragmatic blend of liberalism and republicanism.⁸⁰ Moreover, the Founders' republican vision became increasingly liberal in the nineteenth century, eventually turning into the liberal pluralism of the twentieth century.⁸¹

Nevertheless, key republican ideals and principles remain in the American political tradition, resurfacing in ever-new guises and adapting themselves to changing economic and social conditions. The seven principles identified above never go away; they simply reappear in new forms, leading to new debates over how to preserve republican ideals in changing conditions.

In the early Federal period, republicans identified oligarchy and aristocracy with the customs and trappings of the British Empire.⁸²

77. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 1–2) (“[W]e cannot keep our constitutional democracy—our ‘republican form of government’—without constitutional restraints against oligarchy and a political economy that sustains a broad middle class, wide open and broad enough to accommodate everyone.”).

78. See *id.* (manuscript at 4–7) (arguing that a “principle of inclusion” is central to the “democracy of opportunity” tradition that underpins the United States’s constitutional democracy).

79. See WOOD, *supra* note 41, at 8 (explaining that the Founding generation “took for granted that a society could not long remain republican if a tiny minority controlled most of the wealth and the bulk of the population remained dependent servants or poor landless laborers”).

80. See Balkin, *supra* note 33, at 14–15 (“Today most historians believe that the founding era was a pragmatic mix of both republican and liberal themes and that this ideological mixture was continually evolving throughout the Revolution and the early years of the republic.”); Gibson, *supra* note 37, at 261–62 (explaining that founding-era thought was a mix of republican and liberal elements); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540–41 (1988) (arguing that the Founders were “liberal republicans”).

81. See Balkin, *supra* note 33, at 15 (“Liberalism increasingly dominates as America moved into the nineteenth century, but republican ideas—like belief in the public good, opposition to oligarchy, and concerns about political corruption—have always remained in the American political and constitutional tradition.”); FISHKIN & FORBATH, *supra* note 1 (manuscript at 54–58) (marking the shift to liberal ideals in the late nineteenth and early twentieth centuries).

82. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 13) (“[T]he revolutionary generation . . . held it a constitutional essential for the new United States to avoid reproducing the hierarchies, titles, and aristocratic forms of privilege and elitism that the colonists hoped to leave behind.”); see generally WOOD, *supra* note 38 (showing how the revolutionary generation sought

Monarchical culture and all that came with it, it was believed, led to corruption and undermined republican government.⁸³

In Great Britain economic power was often connected to aristocratic lineage and privilege. Large landholding estates served as a key connection between the maintenance of aristocracy, political influence, and economic power.⁸⁴ For this reason, the Northwest Ordinance of 1787 was designed to reduce, if not eliminate, the sources of such power.⁸⁵ It banned both slavery and presumptive primogeniture in the new territories: “[T]he estates, both of resident and nonresident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child . . . in equal parts . . .”⁸⁶ This is an early regulation of the most powerful form of property—and therefore political influence—in the New World.

The ban on slavery prevented the growth of plantations with large numbers of slaves that would drive down the price of free labor and prevent the economic sustainability of independent, small farmers.⁸⁷ But the limitation on primogeniture was equally important. It also served republican ideals by discouraging the concentration of land ownership (and thus economic and political power) in hereditary successions.⁸⁸ Finally, the Northwest Ordinance also encouraged education as a method of uplift.⁸⁹

to distinguish itself from the culture of monarchy, aristocracy, and hierarchy associated with the British Empire).

83. See Teachout, *supra* note 59, at 349–50 (“The British monarch exercised influence over the representatives, using wealth and patronage to curry favor and to undermine Britain’s constitutional government. Moreover, the public culture of Britain had become wealth seeking, pandering, and self-serving, with a populace undeserving of the title of a republican citizenry.”).

84. See Michael Rush, *The Decline of the Nobility*, in *DEMOCRATIC REPRESENTATION IN EUROPE: DIVERSITY, CHANGE, AND CONVERGENCE* 29 (Maurizio Cotta & Heinrich Best eds., 2008) (“Ownership of land and, moreover, control of those who worked on the land gave the nobility immense economic power, but noble power and influence extended well beyond the economic sphere, intertwining with the social and the political.”).

85. See Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 *ARIZ. ST. L.J.* 409, 439 (2013) (“Because the rule allow[ed] for the breaking up of landed estates by equal distribution of land between descendants, it also promoted a more widespread distribution of land.”); *id.* at 440 (“The concern for property distribution in Section 2 of the Ordinance . . . reflected a desire to populate the new territories with a greater number of virtuous, freeholding republican citizens.”).

86. Northwest Ordinance of 1787, 1 Stat. 50, 51 (1789).

87. David Brion Davis, *The Significance of Excluding Slavery from the Old Northwest in 1787*, 84 *IND. MAG. HIST.* 75, 76–77, 79 (1988) (noting that the goal of the Northwest Ordinance was to encourage poorer white settlers to settle the territory and establish self-government without having to compete against “cheaper [and] more productive” slave labor).

88. See Festa, *supra* note 85, at 443, 458 (“[T]he Northwest Ordinance . . . was part of the general move toward a more republican conception of property” because it encouraged a “wider distribution of property”).

Gordon Wood notes that “all the states in the decades following the Revolution abolished both entail and primogeniture where they existed.” WOOD, *supra* note 41, at 498. The justifications

The Jacksonian Era brought increasing recognition that oligarchy and aristocracy arise not merely from official titles of nobility (although there was plenty of concern about this too) but from inequality of wealth and opportunity.⁹⁰ This shift in focus is a natural development. As the country shed the cultural influence of the British Empire, and everyone gave lip service to republican ideals of equal citizenship and disdain for aristocratic privilege, it became clear that the greatest threat to republicanism came from the developing political economy of the new country. It was capitalists and financiers, not necessarily highborn, who threatened to create a new aristocracy of wealth.⁹¹

Whigs and Jacksonians offered different diagnoses and solutions for these problems.⁹² Whigs argued for expanding opportunities to become owners of land and capital. They argued that being propertyless should be only a temporary condition, as long as the government created appropriate infrastructure and incentives for economic growth. Jacksonians, by contrast, opposed special privileges and federal investments in infrastructure as corrupting.

As we move through the twentieth century to the twenty-first, these ideas of anti-oligarchy and anti-aristocracy remain, although they take new forms. So too does the republican ideal that the government must be responsive to the people, that it must act in the public interest rather than in the private interests of elites, and that a current majority should be forbidden from entrenching itself to maintain political power.

The key question for constitutional theory is how to translate these ideas into new economic and political contexts that the founding generation never dreamed of. In this we are assisted, but not constrained, by the views

were republican. As the North Carolina legislature explained in a 1784 statute, these ancient legal doctrines worked “only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice.” *Id.* Reforming the laws governing the most important source of wealth at the time—ownership of land—would “tend to promote that equality of property which is of the spirit and principle of a genuine republic.” *Id.*

89. 1 Stat. at 52 (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

90. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 25–26) (describing Jacksonian opposition to laws that would create “inequalities of wealth and influence” and “enable an emerging oligarchy—the ‘moneyed aristocracy’—to amass economic and political power over the ‘middling and lower classes’”).

91. See Andrew Jackson, Seventh Annual Message (Dec. 7, 1835), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1787–1897, at 164, 165 (James D. Richardson ed., 1897) (“Lavish public disbursements and corporations with exclusive privileges would be . . . the means by whose silent and secret operation a control would be exercised by the few over the political conduct of the many Wherever this spirit has effected an alliance with political power, tyranny and despotism have been the fruit.”).

92. See FISHKIN & FORBATH, *supra* note 1 (manuscript at 25–26, 28–29, 36) (describing the contrasting programs of Jacksonians and Whigs).

of later Americans, including the great social movements of Jacksonianism, abolitionism, labor, civil rights, feminism (in both its first and second waves), consumer rights, and gay rights.

Each generation has to decide for itself how to make sense of these republican ideals. They may disagree among themselves about their application and about who is being most faithful to them in the present. As Fishkin and Forbath point out, the Jacksonians and Whigs had different visions of how to honor the republican commitment to a broad-based middle class that was economically self-dependent and therefore able to promote the public interest.⁹³ Whigs insisted that only a powerful federal government could make the investments necessary to allow people to become economically self-sufficient; Jacksonians argued that the power of finance threatened a new aristocracy of wealth and political oligarchy.⁹⁴

Ironically, however, the Jacksonian embrace of slavery brought its own form of political corruption. The antislavery advocates who founded the Republican Party argued that the “Slave Power”—often defended by Jacksonian politicians—was the most dangerous form of oligarchy and aristocracy and that it was inherently corrupting to the values of republicanism.⁹⁵ It is therefore no accident that the new party called itself Republican. The reason was not because its members preferred representative government to direct rule—it was because they wanted to preserve republican ideals of self-rule, anti-oligarchy, and anticorruption.⁹⁶

93. *See id.* (manuscript at 29–30) (describing Jacksonians’ and Whigs’ contrasting visions of political economy, in which Whigs were not “unduly troubled by growing inequality of wealth” as long as there was an opportunity to rise in society, whereas Jacksonians “hewed to the old republican precept that a rough ‘equality in the actual condition’ of the citizenry was essential to republican constitutions”).

94. *Id.* (manuscript at 28–29) (contrasting the Whigs’ activist conception of national government with the Jacksonians’ defense of federalism, agrarianism, and decentralized development).

95. *See* ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 9–10 (reprt. ed. 1995) (explaining Republican concerns that a “conspiratorial ‘Slave Power’ . . . had seized control of the federal government and was attempting to pervert the Constitution for its own purposes”); HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 6–7 (2014) (noting that Founders of the Republican Party feared that a small number of plantation owners, who owned almost all of the wealth in the region through their control over land and slaves, would attempt to use their economic and political power to impose a new oligarchy on Americans).

96. *See* FONER, *supra* note 95, at 40 (explaining Republicans’ belief that the South had undermined freedom and democratic values because of its “irrevocably fixed hierarchical” class structure “dominated by an aristocracy of slaveholders”).

V. Ideological Drift and the Central Problem of Maintaining Republican Government

The intimate connections between Jacksonian democracy—which claimed to stand for republican values in the 1830s—and the Jacksonian defense of the Slave Power is a key example of the problem of maintaining a healthy republican form of government under continuously changing circumstances. No assertion of republicanism in American history is pure; each is compromised by its situation and by its political allies. Therefore, it is often the case that both sides of a political dispute can invoke republican ideals on their behalf and plausibly accuse the other side of undermining or betraying those ideals.

Equally important, the opponents of oligarchy and aristocracy in one generation are easily tempted and co-opted into becoming the defenders of new forms of antirepublican arrangements in later years. This is an example of what I have called “ideological drift.”⁹⁷

I noted earlier that time is the great enemy of republics, because as time goes on and circumstances change, corruption finds ever-new ways of entering the system, weakening the institutions and practices that ensure republican government.⁹⁸ The causes of corruption, however, are not simply human frailty and fallenness. They also arise from social, demographic, and technological changes. These alter the meanings and practical effects of older social arrangements, offer ever-new opportunities for attaining and entrenching power, and thus present ever-new problems for maintaining self-rule. This means that republicanism, if it is to have a coherent and enduring set of political commitments, cannot be identified with a permanently fixed set of arrangements. Time and political contestation continuously produce ideological drift, turning the republican stalwarts of an earlier era into the defenders of self-entrenchment and corruption in the next.

As we have seen, republicanism is deeply connected to political economy. But political economy is always changing due to changes in technology and culture, demographic shifts, political conflict, and war. Therefore, a commitment to republicanism requires a perpetual reanalysis of the political economy of a republic. Even if basic laws do not change quickly, economic arrangements are always changing, and people are always struggling with each other to turn existing legal arrangements to their advantage. If we trace the development of American inequality in the

97. See generally J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870 (1993) (defining ideological drift as the changing valence of moral, political, and theoretical arguments “over time as they are applied and understood repeatedly in new contexts and situations”).

98. See *supra* notes 59–63 and accompanying text.

last fifty years, we will discover that it arises not only from changes in economic conditions and technology, but also from determined efforts by groups to change the tax code, administrative regulations, antitrust law, labor law, and constitutional doctrine to entrench their economic and political power.⁹⁹

The questions in every generation are the same: Who are the new aristocrats? Who are the new oligarchs? What is the source of their power and what form does oligarchy take? How is structural corruption entering the political system? People disagree about these questions today even as Jacksonians and Whigs disagreed. Liberals think they know where the sources of corruption arise. But the conservative base of the Republican Party identifies oligarchy and aristocracy with well-educated secular elites, especially on the left. They fear a cultural and educational oligarchy dictating the terms of American life to them. Because the conservative base of the Republican Party views the question this way, they have found themselves in a coalition with business conservatives and national security hawks. As we have seen in the past year, this coalition has become increasingly unstable, as members of the base recognize that their own coalition partners are part of the problem, not the solution.¹⁰⁰

Because of ideological drift, older forms of anti-oligarchy rhetoric can be captured by new aristocracies and oligarchies to defend their interests. The Jacksonian ideas of opposition to class legislation and the antislavery ideals of Free Labor were captured by Gilded Age conservatives in the late nineteenth century and turned to the defense of bare-knuckled capitalism.¹⁰¹ Ideological drift is always in operation because each generation adapts the most successful ideas of past debates opportunistically and for its own concerns and interests.¹⁰²

This helps explain the ideological drift of the First Amendment. Earlier in the twentieth century, it was used to defend labor unions, antiwar

99. FISHKIN & FORBATH, *supra* note 1 (manuscript at 69–71); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 99–101 (2010) (describing use of deregulation and tax reform to politically entrench and further enrich a wealthy minority).

100. See David Frum, *The Great Republican Revolt*, ATLANTIC (Jan./Feb. 2016), <http://www.theatlantic.com/magazine/archive/2016/01/the-great-republican-revolt/419118/> [<https://perma.cc/V8KA-J3HE>] (discussing the growing instability of the contemporary Republican Party coalition and its effects on the 2016 election).

101. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 25–26 (2004) [hereinafter Balkin, *Digital Speech and Democratic Culture*]; Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. REV. 375, 383–84 (1990) [hereinafter Balkin, *Some Realism About Pluralism*]; Joseph Fishkin & William E. Forbath, *The Great Society and the Constitution of Opportunity*, 62 DRAKE L. REV. 1017, 1029 (2014).

102. See, e.g., Balkin, *supra* note 97, at 871 (describing the “gradual and partial reversal” of conservative and liberal positions on the libertarian conception of free speech).

activists, and advocates of contraception and women's equality.¹⁰³ But once the First Amendment become central to the pantheon of civil liberties, it was also possible to adapt it to new ends.¹⁰⁴ By the early twenty-first century, the First Amendment has become the most powerful antiregulatory tool in the information age, especially in a world in which information and information goods are central to markets.¹⁰⁵

Fishkin and Forbath tell the story of change and co-optation of Jacksonian and free-labor ideals during the late-nineteenth century.¹⁰⁶ Republican progressives like Theodore Roosevelt understood that a powerful national state was necessary to protect republican ideals in the age of huge corporations and trusts.¹⁰⁷ The New Dealers, led by Franklin Roosevelt, argued against economic royalism, and for the promotion of a more just conception of economic liberty as nondomination. To this end they advocated collective bargaining rights, investments in infrastructure, and the beginnings of the modern conception of social insurance.¹⁰⁸ In this way, the New Dealers borrowed ideas from both the Jacksonians and the Whigs of the antebellum period.¹⁰⁹

This constant borrowing and reconfiguration of constitutional themes is necessary in order to deal with changing circumstances. And it is crucial to the survival of republicanism. Because people's actions within an economic and political system are constantly changing, and because the effects of existing laws change over time, the problem of oligarchy and aristocracy is constantly mutating. So too is the problem of maintaining republican government.

103. Balkin, *Some Realism About Pluralism*, *supra* note 101, at 383–84 (noting “the historical connections between left politics and free speech” in the United States).

104. *Id.* at 384 (“Business interests and other conservative groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the first amendment by using the very same absolutist forms of argument offered by the left in previous generations.”); *id.* at 392 (“[A]s liberals in the 1930s and 1940s gained power, they . . . replaced the previous era’s faith in an abstract concept of economic freedom with a pluralist faith in an abstract concept of expressive freedom.”).

105. Balkin, *Digital Speech and Democratic Culture*, *supra* note 101, at 25–27.

106. FISHKIN & FORBATH, *supra* note 1 (manuscript at 54–55).

107. Theodore Roosevelt, Address at Providence, R.I. (Aug. 23, 1902), in ADDRESSES AND PRESIDENTIAL MESSAGES OF THEODORE ROOSEVELT 1902–1904, at 11, 15–16 (1904) (“The great corporations which we have grown to speak of rather loosely as trusts are the creatures of the State, and the State not only has the right to control them, but it is in duty bound to control them . . .”).

108. FISHKIN & FORBATH, *supra* note 1 (manuscript at 58–60).

109. *Id.* (comparing Roosevelt’s political program to the ideas of both the Jacksonians and the Whigs).