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America's Post-Crash Constitution

How the Great Recession rewrote our laws.

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Gun control, LGBT rights, abortion, school prayer. In the past four decades, widespread consensus emerged that the most significant, politically charged constitutional issues are cultural. But with each passing year, the Supreme Court hears new cases that shape the distribution of wealth in this country and determines whether the economically powerful also wield political power. At the same time, economic debates on inequality, mobility and corporate power are back at the forefront of public affairs.

Constitutional debates over culture war issues are not going to disappear altogether. But with economic anxiety still high after the Great Recession and generational changes in attitudes, culture war issues are less and less likely to be the single defining feature of the next era in constitutional debate. Although prediction is always risky, it appears that a new era of constitutional debate is emerging, one in which the critical battles will be increasingly fought over economic issues. This shift could—arguably should—affect the qualities and expertise a president seeks when selecting the next justice.

While virtually everyone has picked over Thomas Piketty's bestseller, Capital in the Twenty-First Century, the book has an unexpected insight for those interested in constitutional law. His basic argument is that the postwar boom years were economically exceptional. Before then, economic inequality was severe, with economic gains flowing mainly to the wealthiest people in the United States and Europe. Two world wars and the Great Depression wiped out much of the one percent's wealth, ushering in an age of unprecedented economic equality, broad-based economic growth, and relative economic stability. Piketty also shows that since the 1970s, economic wealth has once again become increasingly stratified. Unless there are public policy actions taken to shift course, he predicts that the 21st century will look more and more like the Gilded Age.

Piketty's economic story parallels the rise and fall of economic debate in constitutional law. Prior to the mid-20th century, one of the central themes in constitutional law was the persistent struggle over economic power. Soon after the Constitution was adopted, Alexander Hamilton and James Madison clashed over the constitutionality of the National Bank, with Madison and

his allies worried that commerce would erode republican government. The vitriolic debate replayed itself a generation later, with Andrew Jackson famously saying that the National Bank eroded democracy by "mak[ing] the rich richer and the potent more powerful."

By 1900, industrialization had transformed America from an agrarian society to an economic powerhouse. But with power comes its abuse, and the battle over the economic constitution continued as Progressives pushed to regulate industrialization's worst excesses. Legally, debates over the democratic control of industrial power came to be symbolized by Lochner v. New York. In that 1905 case, the Supreme Court struck down a New York maximum-hours law. The court concluded that the New York legislature could not infringe on the economic power of willing employees and employers in order to protect workers from being exploited. In a famous dissent, Justice Oliver Wendell Holmes wrote that the Constitution "is not intended to embody a particular economic theory" and he condemned the majority for importing laissez-faire economic philosophy into a constitutional doctrine.

The Great Depression marked a decisive turning point in the economic battles over the Constitution. In the midst of his campaign, Franklin Roosevelt framed the economic debate in constitutional terms: "The task of government in its relation to business is to assist the development of an economic declaration of rights, an economic constitutional order." Roosevelt's New Deal took unprecedented action in economic, financial, and social policy, only to face a hostile Supreme Court. By 1936, the national outcry over the court's laissez-faire view of the Constitution was so significant that Congress considered over 100 proposals to curb the powers of the court. After his landslide victory in the 1936 election Roosevelt introduced his infamous "court packing" plan to increase the size of the Supreme Court and dilute the voting power of the old guard.

Of course, the Supreme Court changed course before court-packing could take place. But the "switch in time that saved nine" was a critical moment, a constitutional revolution that marked the start of a new consensus. For the next six decades, the Supreme Court almost always ratified Congress's power to regulate the economy, regardless of the nature of the challenge. The new consensus declared that democratically elected officials had the power to craft economic regulations as they saw fit. If powerful economic interests lost battles in Congress, they could no longer assume the Supreme Court would bail them out.

With the victory of the New Deal regulatory state, debates over economic power became far less prominent. Partly a function of progressive success, economic debates largely left the constitutional realm and increasingly took on a technocratic flavor, with economic battles shifting to the decisions of government agencies. There were still some constitutional debates on economic issues during this period, but they can hardly be said to have defined the era.

With consensus at the constitutional level and a Cold War backdrop that emphasized the importance of liberty and justice, Americans turned their attention to issues of fundamental

rights. The first generation of constitutional lawyers after the Second World War took up issues of civil rights and criminal justice, leading to some of the most famous cases of the Warren Court. The second generation debates were over the so-called "culture wars." Gun rights, LGBT equality, reproductive rights, prayer in schools, physician assisted suicide, marijuana legalization. These issues have defined popular constitutional debates for most of the last generation.

According to Piketty, economic stratification slowly started increasing in the 1970s, and the constitutional story changes at that moment too. Two months before he was appointed to the Supreme Court in 1971, Lewis Powell wrote a memo to the U.S. Chamber of Commerce. "[T]he American economic system is under broad attack," his manifesto declared. Powell advised that the courts are a "vast area of opportunity for the Chamber" because "the judiciary may be the most important instrument for social, economic and political change."

Over the next four decades, groups such as the Chamber of Commerce and members of the Heritage Foundation, Cato Institute and Federalist Society increasingly advanced an economic vision that took aim at the New Deal consensus. Sophisticated scholars like Randy Barnett, David Bernstein and Richard Epstein have attempted to rehabilitate pre-New Deal constitutionalism. Lawyers have brought cases to test and overturn New Deal-era precedents. And popular movements have questioned the constitutionality of federal agencies and even advocated for a return to the gold standard.

Opposition to the New Deal consensus is only one reason why debates over the economic Constitution are increasingly fierce. The 2008 financial crash brought decades-long trends of economic power and inequality to the forefront of public attention. Since the 1970s, globalization, technology and deregulation have fundamentally reshaped American economic and political life. Working families have been increasingly squeezed by flat wages and rising expenses, even as the wealthiest are seeing their incomes rise. Inequality in economic power means inequality in political power. Campaign spending, lobbying, personnel in government—across the board, economic elites have more access and influence on shaping public policy. For those on the losing end of the economy, this imbalance of power is stark – and it isn't just among progressives. According to a recent Pew survey, 48 percent of steadfast conservatives believe the "economic system unfairly favors [the] powerful" – and 71 percent of steadfast conservatives believe "too much power is concentrated in the hands of a few large companies."

The re-emergence of economic issues is also a function of the rising power of progressives and changing generational attitudes. With the election of President Barack Obama came some of the most significant economic legislation in decades. The Dodd-Frank Act. The Affordable Care Act. President Clinton's policy efforts in the 1990s led to some of the first challenges to the economic consensus, but the "New New Deal" has further elevated these issues. These policy trends also connect to changing generational attitudes. For the first time, according to Pew Research, young people have higher rates of unemployment and poverty and lower levels of

wealth than the two previous generations had at the same age. And while Millennials' views are similar to older generations for some culture war issues, like abortion and gun control, many culture war issues hardly qualify as major debates. Millennials support marriage equality at almost a 70 percent rate. They strongly support legalizing marijuana and are more likely to favor a path to citizenship for undocumented immigrants. Millennials are also the least religious generation.

To some extent, this transition toward an emphasis on economic issues is already taking place in debates over court cases and judicial appointments. In campaign finance reform, Citizens United and last year's McCutcheon case figure most prominently. But the challenges to Obamacare are perhaps the best examples of how the new era of conflict over economic issues shows up in surprising ways.

When the Supreme Court upheld the Affordable Care Act as an exercise of Congress's taxing power, the decision was widely seen as a victory for liberals and for the Obama administration. But just as important was Chief Justice John Roberts' discussion of the commerce clause. From 1937 to 1995, the Supreme Court never once struck down legislation as outside of Congress's power under the commerce clause. Then, in two cases that many see as part of the culture wars, the Rehnquist Court struck down the part of the Violence Against Women Act and the Gun Free School Zones Act. The consequence was to crack the armor of the commerce power. Then the Roberts Court created another crack: In National Federation of Independent Business v. Sebelius, five justices agreed that Congress has limited regulatory authority under the commerce power for an industry that amounts to 17 percent of GDP.

Earlier this year, Obamacare was back. *Burwell v. Hobby Lobby Stores*—the case in which the high court allowed a for-profit business to opt out of the Affordable Care Act's contraceptive mandate on religious grounds—sits right at the boundary between the culture wars and economic power. Although it concerned a federal law, rather than the Constitution, the case involved religious freedom claims. Under the Affordable Care Act, employers have a choice between paying a tax and providing health care to their employees. If employers choose to provide health care, their plans must cover a variety of preventive services, including birth control. Hobby Lobby claimed that its owners' freedom of religion is burdened by the mandate to cover birth control and that it should therefore be exempt from following the law.

So is Hobby Lobby a corporate power case or a culture wars case? Justice Samuel Alito's majority opinion goes to great pains to argue that this ruling cannot circumvent civil rights laws and other laws, suggesting it really is just about birth control. But in dissent, Justice Ruth Bader Ginsburg disagreed, stating that the majority's decision opens the door to "commercial enterprises … opt[ing] out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." On her reading, it is at least partly about whether corporations can evade regulation. Hobby Lobby thus stands at the threshold between the last era and the next.

Judicial appointments are another example. It is often noted that Roosevelt's New Deal justices were picked to decide economic cases but that civil rights issues ended up defining their careers. Perhaps the opposite is true now. Over the last few decades, the conventional wisdom is that presidents chose judicial nominees in part over their views on hot-button civil rights and cultural issues—first school desegregation, then abortion.

But look at the composition of the courts. In a speech last June to the American Constitution Society—a progressive counterweight to the conservative Federalist Society—Democratic Massachusetts Sen. Elizabeth Warren noted the "striking lack of professional diversity" on the federal bench. Citing a 2008 study of 162 judges listed in the Almanac of the Federal Judiciary, she pointed out that 85 percent had worked in private practice, many for large corporate law firms. In contrast, only five judges—a total of 3 percent—had "substantial legal experience working for non-profit organizations." Fewer still had experience in consumer protection and representing low income Americans. Troubled by this data, Warren criticized the growing "corporate capture of the federal courts."

Not all lawyers who work for corporations have the same views as their clients, of course, but personnel is often policy. Professors Lee Epstein, William Landes and Judge Richard Posner (a Reagan appointee to the federal court of appeals) have shown, for example, that Chief Justice Roberts and Justice Samuel Alito are the most pro-business justices since World War II, and that all five of the conservative judges on the Supreme Court are in the top 10. In this new era of constitutional debate, judges' economic worldviews will become increasingly important: If they are skewed in either direction, can there really be equal justice under law?

"The great object of terror and suspicion to the people of the thirteen provinces was Power," Henry Adams wrote in 1870. "[N]ot merely power in the hands of a president or a prince … but power in the abstract, wherever it existed and under whatever name it was known." Six years after the crash, the role of powerful economic actors in our society is increasingly relevant to constitutional law. As generational attitudes toward social issues change, economic inequality rises, and political power shifts toward a smaller and smaller group of elites, we may be entering a new era in our constitutional history—an era defined not exclusively by the culture wars, but also by the role of economic power in our society.