
THE AMERICAN LIBERTY LEAGUE AND THE RISE OF CONSTITUTIONAL NATIONALISM

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This Article launches a project to identify constitutional nationalism—the conviction that the nation’s fundamental values are embodied in the Constitution—as a recurring phenomenon in American public life that has profoundly affected both popular and elite understanding of the Constitution. It does so by examining the nearly lost story of the American Liberty League and its failed campaign to defeat the New Deal as an un-American and unconstitutional aberration. Like today’s Tea Party movement, the American Liberty League of the mid-1930s generated massive media coverage by vilifying the President as a radical socialist who sought to foist un-American policies of “collectivism” on an unwilling public. In 1936, the Roosevelt reelection campaign made the strategic choice to focus the campaign on the American Liberty League because it made the perfect foil for Roosevelt to present the New Deal constitutional philosophy. Neglected in the large body of scholarship on the New Deal constitutional revolution, the fight between the Liberty League and Roosevelt should be recognized as a central episode of popular constitutionalism, in which the American people were asked to choose between competing constitutional philosophies, both of which were asserted to embody the nation’s true values.

The Liberty League utterly failed to topple the New Deal—in fact, it may have helped to generate a consensus in favor of the New Deal constitutional philosophy. Yet the Liberty League crystallized the rhetoric and philosophy of constitutional nationalism that has been at the core of a long line of political movements that have challenged the modern state as fundamentally contrary to American values. The American Liberty League is the prototype of later constitutional nationalist movements, from the John Birch Society of the 1950s, Barry Goldwater Republicanism of the 1960s, the Posse Comitatus movement of the 1970s and 1980s, the militia movement of the 1990s, and the Tea Party movement today, all of which have proclaimed as their central goal the return to what each particular movement identifies as the nation’s true constitutional values and to reject all other values as dangerously foreign.

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INTRODUCTION

From its rather sudden creation in February 2009, the Tea Party movement has been hailed as something new under the sun: a grassroots political movement focused not on a single issue but on the Constitution itself.¹ Tea Party supporters believe that the nation is facing disaster because it has abandoned the true meaning of the Constitution, and they declare that their central mission is to “take back the country” to restore the Constitution.² Even liberal law professors who disagree with Tea Party ideology have tended to welcome the movement because it encourages public engagement with the Constitution, which they consider good for constitutional democracy.³

Far from novel, however, the Tea Party movement is merely the latest in a long line of movements that have proclaimed the goal of returning to the nation’s true constitutional values and rejecting all other values as dangerously foreign. In ideology and rhetoric, the modern prototype for these movements was the American Liberty League of the 1930s, the first group to challenge the administrative state as an unconstitutional and un-American aberration.⁴ Like the Tea Party movement, the American Liberty League generated massive media coverage by vilifying the President as a radical socialist who sought to foist un-American policies of collectivism on an unwilling public.⁵ Little remembered today, the Liberty League was recognized by the generation after its demise as “the root movement of . . . modern conservatism.”⁶ Its rhetoric and philosophy show it to be the direct antecedent of Barry Goldwater Republicanism, the John Birch Society, the Patriot movement, and today’s Tea Party

1. See, e.g., Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 193 (2011) (describing how the Tea Party uses the Constitution as “the foundation stone of a campaign designed to right the direction of a country believed to have gone astray”); Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300, 302 (2011) (illustrating how arguments adopted by the Tea Party movement stem from Constitutional mandates).

2. See, e.g., DICK ARMEY & MATT KIBBE, GIVE US LIBERTY: A TEA PARTY MANIFESTO 66 (2010) (“First and foremost, the Tea Party movement is concerned with recovering constitutional principles in government.”); JOSEPH FARAH, THE TEA PARTY MANIFESTO: A VISION FOR AN AMERICAN REBIRTH 27 (2010) (arguing that the Tea Party’s primary goal is to ensure that the constitutional limitations on the federal government are strictly adhered to); *About*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/about> (last visited Oct. 14, 2013) (declaring in its mission statement that the federal government must be limited to what has been enumerated in the Constitution).

3. See, e.g., ANDREW E. BUSCH, THE CONSTITUTION ON THE CAMPAIGN TRAIL: THE SURPRISING POLITICAL CAREER OF AMERICA’S FOUNDING DOCUMENT 8 (2007) (“All other things being equal, more constitutional rhetoric is better than less.”); Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, at WK1 (discussing how the Tea Party movement has centered the spotlight of public discourse on the Constitution).

4. See generally GEORGE WOLFSKILL, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE 1934–1940 (1962); Frederick Rudolph, *The American Liberty League, 1934–1940*, 56 AM. HIST. REV. 19 (1950).

5. See, e.g., Carl W. Ackerman, The Test of Citizenship (July 16, 1935), in AM. LIBERTY LEAGUE DOCUMENT No. 61, at 4 (declaring that the “object [of the New Deal] is a new social order based on governmental control”); Raoul E. Desvermine, The Principles of Constitutional Democracy and the New Deal (July 11, 1935), in AM. LIBERTY LEAGUE DOCUMENT No. 52, at 19 (“[The New Deal] is alien and foreign to our constitutional philosophy. It destroys our American system and substitutes the European system.”).

6. Eric F. Goldman, *All Against That Man*, N.Y. TIMES, Feb. 11, 1962, at 6.

movement.⁷ Like these later groups, the Liberty League argued for a return to what the movement identified as the fundamental national values of self-reliance, individualism, hard work, property rights, and freedom from government—values the movement believed identified with the Constitution.⁸

What unites movements from the American Liberty League to the Tea Party movement is an ideology best characterized as *constitutional nationalism*, the conviction that the Constitution defines and embodies the nation's fundamental values. It is a form of nationalism because it identifies a characteristic—adherence to principles said to be found in the Constitution—that the movement declares define what it means to be part of the national community.⁹ Just as ethnonationalism defines the national community by membership in an ethnic group,¹⁰ constitutional nationalism defines the national community as those committed to the principles of the Constitution.¹¹ Constitutional nationalism is recognizable as a variety of civic nationalism, in that it defines what it means to be a member of the national community by reference to a common set of civic ideals, in contrast to ethnonationalism, religious nationalism, and racial nationalism, which define the national community by other criteria. To be sure, the conviction that the Constitution embodies what it means to be American is widely shared.¹² Constitutional nationalists, however, take this notion to an extreme. Constitutional nationalism can be understood as the political analog of originalism: just as originalists posit that constitutional meaning was fixed at the time of the Constitution's adoption, constitutional nationalists assert that American national identity and values were forever fixed then too.¹³ To constitutional nationalists, those who do not sufficiently adhere to the fixed set of national values are un-American, and

7. See KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* xi–xii (2009) (tracing the history of conservative opposition to the New Deal from the American Liberty League to the 1980s); Goldman, *supra* note 6, at 6 (describing the Liberty League as the “ancestor of Taft and Goldwater Republicanism”).

8. See *infra* Part I.B for a discussion of the Liberty League's ideology.

9. See, e.g., MICHAEL BILLIG, *BANAL NATIONALISM* 37 (1995) (defining “nationalism” as “the ideology by which the world of nations has come to seem the natural world”); ELIE KEDOURIE, *NATIONALISM* 1 (4th ed. 1993) (describing the nationalist doctrine to hold that the only “legitimate type of government is national self-government”); ANTHONY D. SMITH, *THEORIES OF NATIONALISM* 20–21 (2d ed. 1983) (illustrating some of the core fundamentals of nationalism as identity with a nation and overriding loyalty to a nation).

10. Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 *HARV. INT'L L.J.* 287, 315 (2000).

11. See Melvin I. Urofsky, Book Review, 20 *LAW & HIST. REV.* 429, 431 (2002) (explaining Justice John Marshall Harlan's view of constitutional nationalism as “the notion that a principle aim of the Framers had been to weld the nation together, and that therefore the constitutional law had to be the same for all people at all times”).

12. President Obama repeated this familiar dogma in his second inaugural address, declaring: “We recall that what binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea,” an idea embodied in the Declaration of Independence and the Constitution. Barack Obama, Inaugural Address by President Barack Obama, Washington, D.C. (Jan. 21, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

13. See Urofsky, *supra* note 11, at 431 (explaining Justice John Marshall Harlan's view of constitutional nationalism as “the notion that a principle aim of the Framers had been to weld the nation together, and that therefore the constitutional law had to be the same for all people at all times”).

the policies they support are unconstitutional.¹⁴

This Article launches a project to identify constitutional nationalism as a recurring phenomenon in American public life. It does so by telling the nearly lost story of the American Liberty League and its campaign to defeat the New Deal. Although the American Liberty League has become little more than a footnote in most accounts of the New Deal, the fight between the Liberty League and President Franklin D. Roosevelt should be recognized as a central episode of popular constitutionalism, in which the American people were asked to choose between competing constitutional philosophies, both of which were asserted to embody true American values. Examination of the public contest between the American Liberty League and the Roosevelt reelection campaign helps illuminate the American people's role in the revolution in constitutional philosophy associated with the New Deal, a subject that has divided scholars for more than a generation.

Section I tells the story of the Liberty League's campaign to save America from the New Deal. Section II tells how the Roosevelt campaign made the strategic choice to make the American Liberty League, and not the Supreme Court or the Republicans, the central focus of the 1936 reelection campaign.¹⁵ The League made the perfect villain in the constitutional drama of 1936. It was the unabashed voice of corporate America at a time when big business was widely blamed for causing the Great Depression.¹⁶ Roosevelt argued that the Liberty League and its leaders were not merely wrong about the Constitution but were villains whose constitutional philosophy was a ruse to protect their power and wealth.¹⁷

The Liberty League has received little attention in the massive scholarship that has sought to explain the constitutional revolution associated with the New Deal, in which the Supreme Court adopted a much more expansive view of government powers. As Section III explains, the public dispute between the Liberty League and Roosevelt helps to clarify how the New Deal constitutional philosophy won public acceptance. In what has become the dominant narrative, put forward most prominently by Bruce Ackerman, President Roosevelt responded to the Supreme Court's decisions striking down New Deal laws by campaigning against the Supreme Court, and Roosevelt's 1936 landslide reelection shows that the American people endorsed the New Deal's broad conceptions of federal power and rejected the Supreme Court's narrow construction.¹⁸ Other scholars reject this narrative, arguing that the 1936 election results cannot be understood to express a public endorsement of the New Deal constitutional philosophy because Roosevelt did not actually make the Court's

14. See Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 846–48 (2011) (discussing the constitutional nationalism of the Tea Party movement).

15. See JAMES A. FARLEY, *BEHIND THE BALLOTS: THE PERSONAL HISTORY OF A POLITICIAN* 294 (Greenwood Press 1972) (1938) (“[T]he . . . first ‘battle-order’ was to ignore the Republican Party and to concentrate fire on the Liberty League.”).

16. *Id.* at 295.

17. See WOLFSKILL, *supra* note 4, at 210 (describing the Democratic Party's tactics of painting the Liberty League members as “disgruntled politicians” and “apostles of greed”).

18. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 280, 311 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

constitutional rulings a campaign issue.¹⁹ The fight between the American Liberty League and President Roosevelt shows that Ackerman's critics are correct that Roosevelt did not actually campaign against the Court, yet Ackerman nonetheless is right that the election focused centrally on the Constitution. Unlike Ackerman's account, the American people were not asked to choose between the President and the Supreme Court. Nor were they asked to resolve the meaning of the Constitution's text. Instead, the competing public campaigns of Roosevelt and the American Liberty League fundamentally asked the American people to decide who they were, and this question of national identity was expressed in constitutional terms.

I. THE AMERICAN LIBERTY LEAGUE'S CAMPAIGN TO SAVE AMERICA

It is hardly surprising that in the mid-1930s a group of prominent businessmen tried to organize a movement to oppose substantial new business regulations imposed under New Deal laws.²⁰ It is also not surprising that, in the midst of the Great Depression, the movement failed miserably to convince the American people to give millionaires unrestricted freedom to run their businesses and to reject newly won protections for laborers, the elderly, and the unemployed.²¹ What is remarkable, however, is that the movement employed a distinctly constitutional and nationalist rhetoric, which depicted the New Deal not just as bad policy but as contrary to core American ideals as expressed in the Constitution.²² The Liberty League utterly failed to topple the New Deal—in fact, as Section II suggests, it may have helped generate a consensus *in favor* of the New Deal.²³ Yet the League crystallized the rhetoric and philosophy of constitutional nationalism that has been at the core of a long line of political movements challenging the modern American state ever since its defeat.

A. “*Defending the Faith of the Fathers*”: *The Creation of the American Liberty League*

In August 1934, the American Liberty League was established by many of the nation's most prominent business owners, who had come to believe that the New Deal was destroying the foundations of American life.²⁴ This group included Pierre, Irénée, and Lamot du Pont, leaders of one of the nation's most powerful corporate families; Alfred P. Sloan, president of General Motors (GM); Edward F. Hutton, chairman of

19. See William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2077–79 (1999) (summarizing the “barrage of objections” raised by Ackerman's critics).

20. See Rudolph, *supra* note 4, at 21–22 (listing the prominent business owners that were involved with the American Liberty League).

21. See *id.* at 26 (describing how the American Liberty League ultimately failed due to the lack of response from the American public).

22. See *id.* at 22, 30–31 (discussing how the League centered its ideology on the Constitution and the American values that they believed stemmed from it).

23. See *infra* Section II for a discussion of the Roosevelt campaign's use of the League as a foil to present the New Deal constitutional philosophy—a tactic that ultimately led to Roosevelt's landslide victory in the 1936 election.

24. Rudolph, *supra* note 4, at 21–22

General Foods; and J. Howard Pew, president of Sun Oil.²⁵ It included the 1924 and 1928 Democratic presidential candidates, as well as two former chairmen of the Democratic Party.²⁶ These men saw the proliferation of New Deal regulatory programs as an assault on the core American values of limited government, individualism, liberty, and hard work.²⁷ They believed that Americans would rise up against the New Deal if only they realized that it was a radical, socialist, un-American form of tyranny, and they hoped the American Liberty League would become the vehicle to awaken America.²⁸

Recent experience gave these men good reason to believe that the American people could be roused to rise up against federal tyranny. The founders of the Liberty League had led the Association Against the Prohibition Amendment (AAPA), which had played a leading role in the fight to repeal Prohibition.²⁹ The AAPA employed a distinctly constitutional rhetoric, declaring that its mission was much grander than merely making booze legal: it sought nothing less than “to preserve the spirit of the Constitution of the United States.”³⁰ To the leaders of the AAPA, Prohibition represented an unprecedented expansion of federal power that deprived the people of their liberties, most especially the liberty of businessmen and consumers to choose what to buy and sell.³¹ Prohibition, the AAPA declared, represented a repudiation of the principles laid out by the Founding Fathers.³² The AAPA disbanded soon after the

25. *Id.* at 21.

26. JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 109–10 (2010); Rudolph, *supra* note 4, at 22.

27. *See, e.g.*, J. Howard Pew, *Which Road to Take?* (July 12, 1935), in *AM. LIBERTY LEAGUE DOCUMENT NO. 53*, at 3 (“Our country plainly faces a decision whether it will adopt a Planned Economy or will continue on the course of individualism, equal opportunity, liberty of initiative, and constitutional democracy.”); Walter E. Spahr, *The People’s Money* (July 10, 1935), in *AM. LIBERTY LEAGUE DOCUMENT NO. 51*, at 7 (“[T]his nation was established for the specific purpose, above all others, of enabling our people, in the stimulating atmosphere of such freedom, to climb by their individual and ingenious efforts to any heights to which human beings might reasonably aspire.”).

28. *See, e.g.*, Demarest Lloyd, *Fabian Socialism in the New Deal* (July 9, 1935), in *AM. LIBERTY LEAGUE DOCUMENT NO. 50*, at 16 (expressing hope that the American people will “awaken now to find the Roosevelt administration has virtually tricked them, and substituted the Socialist Party platform instead”); *Raskob to Expand Liberty League*, *N.Y. TIMES*, Feb. 1, 1936, at 2 (quoting letter written by John J. Raskob in which he declared that the League is “doing everything possible to root out the vicious radical element that threatens the destruction of our government”).

29. *See* WOLFSKILL, *supra* note 4, at 37–55 (describing the AAPA’s efforts to repeal prohibition).

30. *Id.* at 50.

31. *See Prohibition and the Bill of Rights: How the Constitutional Guarantees Disappear Under the Dry Regime*, *MINUTE MAN*, Mar. 22, 1923, available at http://libraries.uky.edu/libpage.php?lweb_id=474&lrib_id=13<ab_id=898 (depicting how prohibition takes away the liberties guaranteed by the Bill of Rights).

32. Jouett Shouse, the president of the AAPA, explained that the organization was founded “primarily and wholly for a constitutional principle,” to take a “police statute” from the federal power. WOLFSKILL, *supra* note 4, at 46. In addition to their constitutional concerns, leaders of the AAPA may also have been motivated by their personal interests, in that they believed that corporate and personal income taxes could be eliminated if Prohibition were repealed and beer and liquor were taxed instead. *See, e.g.*, *ASS’N AGAINST THE PROHIBITION AMENDMENT, COST OF PROHIBITION AND YOUR INCOME TAX* 11 (1929) (comparing regulatory costs and lost tax revenue associated with Prohibition with personal income tax paid to the federal government); DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 50 (2d ed. 2000) (“[Under prohibition] the right of local self-government is torn from the individual states, whose people are made subject, even in the

adoption of repeal, but it declared that its leaders would continue to meet and might form a new group that “would in the event of danger to the Federal Constitution, stand ready to defend the faith of the fathers.”³³

It did not take long for the former leaders of the AAPA to decide that the New Deal posed an even greater threat to the “faith of the fathers” than had Prohibition.³⁴ Like Prohibition, the New Deal deprived business owners of the liberty to operate as they chose, centralized power in Washington, and interfered with states’ rights.³⁵ But while Prohibition deprived business owners of the liberty to sell one kind of product, the New Deal imposed federal commands on almost every aspect of business life.³⁶ Not only did New Deal regulations take away businessmen’s rights to liberty and property, New Deal relief programs undermined employees’ incentives to work hard.³⁷

In March 1934, R.R.M. Carpenter, a retired DuPont vice president, expressed the gist of these concerns in a letter to John Raskob, the former chairman of GM.³⁸ Carpenter believed that the New Deal sapped the American work ethic: “Five negroes on my place in South Carolina refused work this Spring . . . saying they had easy jobs with the government. . . . A cook on my houseboat at Fort Myers quit because the government was paying him a dollar an hour as a painter.”³⁹ Carpenter wondered whether anything could be done to save America.⁴⁰ Raskob replied that he agreed that the New Deal was undermining the entrepreneurial spirit.⁴¹ Raskob felt that a new organization was needed to “protect society from the suffering which it is bound to endure if we allow communistic elements to lead the people to believe that all business men are crooks.”⁴² Raskob suggested that perhaps the du Ponts could take the lead because “there is no group, including the Rockefellers, the Morgans, the Mellons, or any one else that begins to control and be responsible for as much industrially, as is the

small routine affairs of their daily lives, to those living in far distant localities and under other conditions.”) (quoting AAPA President William H. Stayton)); WOLFSKILL, *supra* note 4, at 48 (quoting AAPA position that a tax on beer “would enable the federal government to get rid of the burdensome corporation taxes and income taxes and to take the snoopers and spies out of offices and homes”).

33. WOLFSKILL, *supra* note 4, at 54.

34. *Id.* at 55.

35. See Jouett Shouse, The Constitution Still Stands (Feb. 12, 1935), in AM. LIBERTY LEAGUE DOCUMENT NO. 16, at 13–14 (discussing the “[I]jesson[s] of Prohibition” for the New Deal and declaring that “[t]here could be no more certain way to destroy the perpetuity of our institutions than to establish now a strongly centralized Federal Government which in the writing of our Constitution was forbidden”).

36. See, e.g., Fitzgerald Hall, The Imperilment of Democracy, (July 18, 1935), in AMERICAN LIBERTY LEAGUE DOCUMENT NO. 58, at 3 (asserting that the New Deal “is attempting to consolidate and concentrate in Washington power over the most intimate affairs in the life of every individual”).

37. See, e.g., Frederick H. Stinchfield, The American Constitution—Whose Heritage? The Self-Reliant or Those Who Would Be Wards of the Government? (Jan. 18, 1936), in AM. LIBERTY LEAGUE DOCUMENT NO. 90, at 6 (“I inquire whether the Constitution was established for the increase of self-reliance, or to develop the spirit of dependency?”).

38. See *The Carpenter and Raskob Letters*, N.Y. TIMES, Dec. 21, 1934, at 2 (expressing Carpenter’s concern that many businessmen could not find enough laborers due to the abundance of easy government jobs).

39. *Id.*

40. See *id.* (“Who can possibly give employment to labor if wealthy men and capital are eliminated[?]”).

41. *Id.*

42. *Id.*

du Pont company.”⁴³ As Raskob put it, the du Ponts were “in a position to talk directly with a group that controls a larger share of industry . . . than any other group in the United States.”⁴⁴

GM and DuPont executives soon met at the Empire State Building office of Al Smith, former New York governor and 1928 Democratic presidential candidate, to discuss the formation of a new group modeled on the AAPA and devoted to challenging the constitutional validity of the New Deal.⁴⁵ Alfred Sloan of GM suggested calling the new group the “Association Asserting the Rights of Property.”⁴⁶ Jouett Shouse, former Democratic Party chairman, suggested the “National Property League,” and E.F. Hutton suggested the “American Federation of Business.”⁴⁷ John W. Davis garnered a consensus with the more neutral sounding “American Liberty League.”⁴⁸ Raskob, Sloan, Irénée du Pont, and others immediately donated \$40,000 to launch the new organization.⁴⁹ Shouse, who less than a year earlier had stepped down as president of the AAPA, was appointed to serve as the League’s president.⁵⁰

On August 22, 1934, Shouse held a press conference to announce the establishment of the American Liberty League.⁵¹ Shouse described the League as nonpartisan and declared that, as its acronym “ALL” suggested, the League spoke for *all* of the American people, whose liberties were under attack by the New Deal.⁵² The League declared that its central mission was the preservation of the nation’s constitutional values:

[The American Liberty League] is a non-partisan organization formed . . . to defend and uphold the Constitution . . . [to] teach the necessity of respect for the rights of persons and property as fundamental to every successful form of government . . . to encourage and protect individual and group initiative and enterprise, to foster the right to work, earn, save and acquire property, and to preserve the ownership and lawful use of property when acquired.⁵³

John Raskob invited “all liberty-loving citizens to join the American Liberty League, . . . which is doing everything possible to root out the vicious radical element that

43. *Id.*

44. *Id.*

45. See ROBERT F. BURK, *THE CORPORATE STATE AND THE BROKER STATE: THE DU PONTS AND AMERICAN NATIONAL POLITICS, 1925–1940*, at 134–38 (1990) (describing the American Liberty League’s founding members’ deliberations concerning the objectives and title of the Liberty League).

46. *Id.* at 138.

47. *Id.*

48. *Id.* at 141–42.

49. WOLFSKILL, *supra* note 4, at 26.

50. BURK, *supra* note 45, at 138.

51. WOLFSKILL, *supra* note 4, at 20–21; *League Is Formed to Scan New Deal, ‘Protect Rights,’* N.Y. TIMES, Aug. 23, 1934, at 1.

52. See SHESOL, *supra* note 26, at 110–11 (stating that the Liberty League was hoping to “be known by the egalitarian acronym ‘ALL’”); *Shouse Elected by Liberty League*, N.Y. TIMES, Sept. 7, 1934, at 5 (discussing Shouse’s statement that the Liberty League was neutral with regard to the New Deal and had no political party affiliation).

53. Jouett Shouse, President, Am. Liberty League, Statement Made at Time of the Announcement of the Formation of the American Liberty League (Aug. 23, 1934).

threatens the destruction of our government.”⁵⁴ Leaders of the Liberty League were optimistic that they would quickly gain widespread support.⁵⁵ At the first news conference, Shouse predicted that within a year the League would have two to three million members.⁵⁶ The next week Shouse declared that the “response from all parts of the country to formation of the league has been astounding,” with thousands of pledges already arriving.⁵⁷

Money from the du Ponts and like-minded businessmen flowed in. In its first year, the Liberty League raised half a million dollars, giving it unprecedented resources to carry out this campaign.⁵⁸ By January 1936, the League had resources that exceeded those of the Republican Party.⁵⁹ It had more cash than the Republicans and operated from a centralized headquarters in Washington, which occupied thirty-one rooms and had more than fifty full-time staff members—almost triple the size of the Republican Party offices and staff.⁶⁰ That year, Shouse was the nation’s highest paid political operative.⁶¹

It was not merely their success in defeating Prohibition and the vast resources at their disposal that made leaders of the American Liberty League optimistic that they could succeed in toppling the New Deal. When the League was formed, it was widely believed that Roosevelt’s prospects for reelection in 1936 were dim.⁶² In 1934, there appeared to be definite signs that the American people were turning against Roosevelt.⁶³ Roosevelt’s popularity had been falling since February 1934, reaching a low of fifty percent in September 1935, according to the public surveys of the day.⁶⁴ Unemployment and poverty rates remained stubbornly high—notwithstanding the proliferation of expensive federal programs sold to the public as the solution to the Depression.⁶⁵ The Republicans, meanwhile, had largely capitulated to Roosevelt and

54. *Raskob to Expand Liberty League*, *supra* note 28, at 2.

55. See WOLFSKILL, *supra* note 4, at 29, 56 (discussing how members of the American Liberty League and the *New York Times* predicted that many Wall Street leaders, bankers, brokers, employees, and workers would join).

56. *League Is Formed to Scan New Deal, ‘Protect Rights,’* *supra* note 51, at 4.

57. *Pledges Pour In at Liberty League*, N.Y. TIMES, Aug. 29, 1934, at 2.

58. WOLFSKILL, *supra* note 4, at 62–63 (explaining that the American Liberty League was “really healthy” given the nearly 1.2 million dollars it raised during its six-year history).

59. See *Liberty League Income Equals Major Parties’*, WASH. POST, Jan. 3, 1936, at 9 (reporting that in 1935 the American Liberty League raised \$483,275, while the Republican Party raised \$407,454).

60. WOLFSKILL, *supra* note 4, at 57.

61. See *Liberty League Pays Shouse Top Salary*, N.Y. TIMES, Mar. 17, 1936, at 7 (reporting that the American Liberty League paid Shouse \$36,000 per year with \$18,000 for expenses—the highest of any individual working for a political organization).

62. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 7 (1960) (discussing the decline in the President’s popularity); SHESOL, *supra* note 26, at 158 (stating that since February 1934, Roosevelt’s approval rating dropped about one percent per month).

63. SHESOL, *supra* note 26, at 158.

64. *Id.* at 158.

65. See WOLFSKILL, *supra* note 4, at 10–11 (stating that “[d]espite definite and encouraging signs of recovery the country was still in trouble” and that critics of the President were critical of the expensive agricultural relief and labor programs).

offered no comprehensive program to compete with the New Deal.⁶⁶

With enormous resources to make it the leading opposition to Roosevelt, American Liberty League leaders believed that the group was bound to attract widespread attention and public support.⁶⁷ They were half right. The League generated enormous media attention, but it always remained the pet project of a small group of corporate leaders.⁶⁸ The League never caught on with the American people.⁶⁹ At its peak, the League claimed 150,000 members, and even that claim itself was highly exaggerated.⁷⁰

B. The Constitutional Rhetoric and Philosophy of the American Liberty League

Leaders of the American Liberty League believed that the 1936 election would determine whether the Constitution and the American way of life would survive.⁷¹ Asserting that President Roosevelt had betrayed his oath to defend the Constitution, the League declared that the election would resolve whether “we are to continue to enjoy a government of laws and not of men, or shall have foisted upon us an Americanized copy of Old World dictatorship.”⁷² To save America, the American Liberty League launched a massive campaign to educate the American public on the evils of the New Deal and thereby defeat Roosevelt.⁷³

The Liberty League’s chief weapons were pamphlets, newsletters, speeches, and radio addresses. In 1935 and 1936, the League published 135 pamphlets and a monthly newsletter, which were distributed across the country to millions of homes and thousands of libraries.⁷⁴ The League also sponsored dozens of speeches broadcast on the national radio networks, many of which it later reprinted in pamphlet form.⁷⁵ Some

66. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT, THE COMING OF THE NEW DEAL* 484 (1959) (stating that in 1934 conservatives increasingly felt the need for an organization through which they could carry on their fight for American principles because the Republican party was identified with “misrule and defeat”); SHESOL, *supra* note 26, at 161 (asserting that the Republicans “had nothing to offer by way of an alternative to the New Deal” and that “[o]n the right, the real vitality belonged to the American Liberty League”).

67. See, e.g., Rudolph, *supra* note 4, at 21 (“At a time when the Republican party was bankrupt of leadership and purpose, the American Liberty League became the spokesman for a business civilization, and a defender of that civilization from the attacks of the administration in Washington . . .”).

68. See WOLFSKILL, *supra* note 4, at 56 (stating that the League made headlines almost daily for more than two years); *id.* at 62–63 (explaining that the American Liberty League lacked a “broad base of popular support” but received much of its support from less than two dozen bankers, industrialists, and businessmen).

69. See *id.* at 62 (stating that eleven months after the American Liberty League’s formation it had only 36,055 members and at its strength in the months leading up to the 1936 election it had 124,856 members).

70. See *id.* (stating that the League’s membership peaked at 124,856); Arthur Krock, *Liberty League Is Distinctly Pro-Landon*, N.Y. TIMES, Aug. 7, 1936, at 18 (stating that the League claimed 150,000 members).

71. See, e.g., *Assert President Betrayed Oath*, N.Y. TIMES, Jan. 26, 1936, at L37 (declaring that the issue in 1936 was “not whether the Constitution shall be amended but whether it shall be destroyed”).

72. *Id.*

73. See WOLFSKILL, *supra* note 4, at 65 (explaining that the campaign aimed to improve the public’s opinion of the League to support its “great moral issue”).

74. *Id.* at 65–66. The pamphlets published by the American Liberty League can be found at the Special Collections at the University of Kentucky Libraries and are available at <http://kdl.kyvl.org/catalog/xt7wwp9t2q46/guide>.

75. WOLFSKILL, *supra* note 4, at 65.

of the League's pamphlets addressed specific New Deal legislation, with titles such as *The AAA Amendments: An Analysis of Proposals Illustrating a Trend Toward a Fascist Control Not Only of Agriculture but Also of a Major Sector of Manufacturing and Distributing Industries* and *The Bituminous Coal Bill: An Analysis of a Proposed Step Toward Socialization of Industry*.⁷⁶ Most of the pamphlets took on the New Deal as a whole, bearing provocative titles like *Is the Constitution for Sale?*, *Americanism at the Crossroads*, and *What Is the Constitution Between Friends?*⁷⁷

The Liberty League reached the American public not only by distributing millions of pamphlets and sponsoring radio broadcasts but also through extensive news coverage of its activities. As Jeff Shesol has written, perhaps with some exaggeration, “[e]very pamphlet—whether another denunciation of the New Deal or a comparison of FDR to Hitler, Mussolini, Stalin, and George III (all in a single pamphlet)—was news.”⁷⁸ While it is not literally true that every pamphlet attracted national attention, the American Liberty League quickly became a media sensation. In its two main years of operation—from Shouse’s announcement of the creation of the League in August 1934 to November 3, 1936, the day of the 1936 election—the *New York Times* ran over 400 stories that mentioned the League, the *Washington Post* published over 600 articles, and the *Chicago Tribune* published over 350.⁷⁹ By the start of the 1936 election campaign, the American Liberty League had become an unavoidable part of the political landscape. Politicians and commentators of all kinds responded to it. Sinclair Lewis attacked it.⁸⁰ John Dewey sought to explain it.⁸¹ The Assistant Attorney General debated its leaders.⁸² By all accounts, President Roosevelt himself took the

76. THE AAA AMENDMENTS, AM. LIBERTY LEAGUE DOCUMENT NO. 30 (Apr. 1935); THE BITUMINOUS COAL BILL, AM. LIBERTY LEAGUE DOCUMENT NO. 32 (Apr. 1935).

77. William H. Stayton, *Is the Constitution for Sale?* (May 30, 1935), in AM. LIBERTY LEAGUE DOCUMENT NO. 40; Raoul E. Desvernine, *Americanism at the Crossroads* (Jan. 15, 1936), in AM. LIBERTY LEAGUE DOCUMENT NO. 88; James M. Beck, “What is the Constitution Between Friends?” (Mar. 27, 1935), in AM. LIBERTY LEAGUE DOCUMENT NO. 22.

78. SHESOL, *supra* note 26, at 161–62. Examples of news coverage generated by Liberty League pamphlets can be seen in various national newspapers. *Assails New Deal Record*, N.Y. TIMES, May 28, 1936, at L2 (discussing Liberty League pamphlet on National Recovery Act); *Guffey Predicts Roosevelt Sweep*, N.Y. TIMES, Aug. 24, 1936, at L6 (reporting on Liberty League pamphlet on the “appalling” growth of the federal bureaucracy); *New AAA Law Hit by Liberty League*, N.Y. TIMES, Mar. 9, 1936, at L8 (summarizing Liberty League pamphlet attacking the Agricultural Adjustment Act); *New Taxes Assailed as Dictatorship Step*, N.Y. TIMES, July 20, 1936, at L5 (summarizing Liberty League pamphlet on 1935 and 1936 revenue acts); *Plans to Share Wealth Called Quack Schemes*, WASH. POST, Feb. 10, 1936, at 2 (discussing Liberty League statement attacking a “Utopian scheme for [] redistribution”); *‘Socialization’ Held Goal of Power Drive*, N.Y. TIMES, June 15, 1936, at L3 (summarizing American Liberty League pamphlet arguing that the Tennessee Valley Authority is unconstitutional).

79. Search of ProQuest Historical Newspapers database.

80. See S.J. Woolf, *It Won’t Happen Here, Lewis Believes*, N.Y. TIMES, Oct. 4, 1936, at SM3 (calling organizations like the American Liberty League “economic royalists” with closed minds).

81. See John Dewey, *A Liberal Speaks Out for Liberalism*, N.Y. TIMES, Feb. 23, 1936, at SM3 (explaining that the spokesmen of the American Liberty League believe that any governmental action that interferes with individualism “is an attack upon liberty itself”). Historian Charles Beard also chided the League for misunderstanding constitutional history. *Dr. Beard Asks Broader View of Constitution*, WASH. POST, Jan. 14, 1936, at 5.

82. See *Social Weal Held Guiding Public Aim*, N.Y. TIMES, May 10, 1936, at L39 (reporting that the Assistant Attorney General participated in a round-table conference debating means of achieving economic

American Liberty League seriously.⁸³

Notwithstanding the widespread attention the League received, scholars generally have not taken the Liberty League's ideology seriously, frequently characterizing the League's constitutional claims as a ruse to obscure the League's true purpose of protecting its founders' wealth and power.⁸⁴ Writing in 1937, Max Lerner said that Liberty Leaguers made a "fetish" of the Constitution, invoking the "sanctity of the Constitution . . . in a coldly instrumental way for their own purposes."⁸⁵ In 1950, historian Frederick Rudolph similarly characterized the League's patriotic and constitutional rhetoric as "[t]he cloak in which the Liberty League dressed itself in order to promote its position and its program."⁸⁶ Historian Arthur Schlesinger agreed, declaring that "[a]t no point on record did the American Liberty League construe 'liberty' as meaning anything else but the folding stuff," that is, money.⁸⁷ More recently, Jeff Shesol declared that the League used constitutional rhetoric to hide its founders' true goals because "[t]he American people, it could safely be assumed, were unlikely to respond to a call to let the rich get richer."⁸⁸ In charging that the Liberty League used constitutional rhetoric to obscure the movement's true agenda, these scholars simply restate President Roosevelt's own critique that the League sought to "hide behind the flag and the Constitution."⁸⁹

Unquestionably, the League considered strategic goals in placing its focus on the Constitution. William H. Stayton, founder of the AAPA and one of the League's founders, declared that opposition to the New Deal could attract public support only if it were presented as "a moral or an emotional issue," and no issue "could command more support or evoke more enthusiasm among our people than the simple issue of the 'Constitution.'"⁹⁰ Stayton urged the League to make the Constitution central because, as he put it, "there is a mighty—though vague—affection for it. The people, I believe, need merely to be led and instructed, and this affection will become almost worship and can be converted into an irresistible movement."⁹¹

Yet it is a mistake to dismiss the Liberty League's constitutional message as empty rhetoric even if the League used constitutional rhetoric to put a patriotic shine on its probusiness message. The League's constitutional message must be examined to understand how constitutional issues were presented to the public in 1936. Moreover, the League may have been the loudest and most prominent, but it was part of a broader movement of corporate and elite forces that challenged the New Deal as anathema to

security for citizens with the chairman of the lawyers' committee of the American Liberty League).

83. WOLFSKILL, *supra* note 4, at 56.

84. Only historian George Wolfskill gave the Liberty League's ideology any serious consideration, declaring that the League's pamphlets "represented perhaps the most concise and thorough summary of conservative political thought written in the United States since *The Federalist* papers." *Id.* at 65.

85. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1305 (1937).

86. Rudolph, *supra* note 4, at 22. This rhetoric, Rudolph explained, "was made of respectable generalities, partial self-delusion, intense sincerity, and frequently embarrassing hypocrisy." *Id.*

87. SCHLESINGER, *supra* note 66, at 488.

88. SHESOL, *supra* note 26, at 108.

89. *Text of Roosevelt Address*, N.Y. TIMES, June 28, 1936, at 25.

90. WOLFSKILL, *supra* note 4, at 111 (quoting William H. Stayton).

91. *Id.* (quoting William H. Stayton).

foundational American principles.⁹² In 1934, Herbert Hoover wrote that the New Deal was “the most stupendous invasion of the whole spirit of Liberty that the nation has witnessed since the days of Colonial America.”⁹³ Like the Liberty League, Hoover believed that the New Deal had created a totalitarian state with “daily dictation by Government in every town and village every day in the week, of how men are to conduct their daily lives.”⁹⁴ Hoover charged that the New Deal was sapping America of the rugged individualism that he believed defined its national character.⁹⁵ Hoover and other conservatives believed that the New Deal threatened the basis of national identity and feared that unless the New Deal were reversed, “America will cease to be American.”⁹⁶

Regardless of whether it was empty rhetoric adopted solely as a matter of marketing, Liberty League pamphlets and speeches reveal a comprehensively articulated philosophy of constitutional nationalism, in which adherence to a set of libertarian ideals simultaneously defines both what the Constitution requires and what it means to be American.⁹⁷ As discussed *infra* in Parts I.B.1–3, the Constitution plays a prominent role in the League’s philosophy but less as a legal text to read and interpret than as the embodiment and symbol of American values.⁹⁸ The League’s philosophy emphasized three related points. First, the League sought to explain and defend what it called *Americanism*—the fundamental values and way of life of the United States. Second, the League perceived the New Deal to be a radical, alien force based on collectivism rather than individualism, and which therefore ran directly contrary to the

92. Several other groups—the Southern Committee to Uphold the Constitution, the Sentinels of the Republic, the Farmers’ Independence Council of America—made broadly similar claims. See J. RICHARD PIPER, *IDEOLOGIES AND INSTITUTIONS: AMERICAN CONSERVATIVE AND LIBERAL GOVERNANCE PRESCRIPTIONS SINCE 1933* 70 (1997) (stating that the American Liberty League “occupied the central role in the conservative propaganda campaign” in the period leading up to the 1936 election); WOLFSKILL, *supra* note 4, at 231, 239, 241–42 (discussing the wide variety of anti-New Deal organizations that the American Liberty League supported).

93. HERBERT HOOVER, *THE CHALLENGE TO LIBERTY* 85 (1934); see also Edward S. Corwin, Book Review, 44 *YALE L.J.* 546, 547 (1935) (stating that Hoover’s book “was ostensibly written to show that the New Deal has imperiled American liberty”).

94. HOOVER, *supra* note 93, at 85.

95. See *id.* at 1 (declaring that the New Deal amounted to an attack on “the whole philosophy of individual liberty”); SCHLESINGER, *supra* note 66, at 475–476 (stating that Hoover felt the New Deal faded a local community’s independence, and with it the “sense of community responsibility,” turning instead “to greed for Federal money”). Moreover, during the 1934 midterm election campaign, the Republican Party likewise made the claim that the New Deal amounted to an attack on American individualism, declaring that “[i]n place of individual initiative [Roosevelt and his advisors] seek to substitute government control of all agricultural production, of all business activity.” *Id.* at 481.

96. HOOVER, *supra* note 93, at 5; see also SCHLESINGER, *supra* note 66, at 475 (“[M]any conservatives earnestly believed that the New Deal was destroying the historic pattern of American life—a pattern of local initiative and individual responsibility.”). Hoover himself declined the invitation to join the Liberty League, declaring that he had “no more confidence in the Wall Street model of human liberty, which this group so well represents, than I have in the Pennsylvania Avenue model upon which the country now rides.” HERBERT HOOVER, *THE MEMOIRS OF HERBERT HOOVER—THE GREAT DEPRESSION 1929–1941*, at 454–55 (1952).

97. See Rudolph, *supra* note 4, at 20 (“The Liberty League represented a vigorous and well-stated defense of nineteenth century individualism and liberalism, a more explicit and determined elaboration of that position than will be found elsewhere in American history.”).

98. See *infra* Parts I.B.1–3 for a discussion of the League’s constitutional philosophy.

principles of Americanism. Third, the League believed that the New Deal posed an existential threat to the nation: acceptance of the New Deal meant the end of the American way of life. The League's pamphlets and speeches endlessly repeated these three points.

1. In Defense of Americanism

The American Liberty League professed itself devoted to protecting Americanism, a broad term encompassing what the League identified as the nation's fundamental values.⁹⁹ Liberty League pamphlets claimed that the nation prospered as long as it stayed faithful to the fundamental values of Americanism.¹⁰⁰ To the Liberty League, Americanism most centrally entailed a commitment to individual liberty, and the most important liberty was the ability to make choices in economic matters, what one League pamphlet called the people's "fundamental right of using their own private property and of running their individual farms and businesses in the manner which seems to them best."¹⁰¹ Government power must be limited to avoid interfering with the economic liberties that are at the heart of an individual's ability to choose his own path.¹⁰² The League thus took a strict libertarian position, under which all government regulations were considered forms of tyranny.¹⁰³

99. Desvernine, *supra* note 77, at 4–5, 18–19 (discussing President Roosevelt's attempts to increase the federal government's power and claiming that it goes against what the Framers envisioned and is incompatible with the concept of "Americanism"); William H. Ellis, *The Spirit of Americanism* (Apr. 26, 1935), in *AM. LIBERTY LEAGUE DOCUMENT NO. 59*, at 4–5 (discussing how the expansion of federal government goes against the concept of limited enumerated powers).

100. See Jouett Shouse, *Democracy or Bureaucracy* (Feb. 4, 1935), in *AM. LIBERTY LEAGUE DOCUMENT NO. 14*, at 19 (claiming that the Constitution has enabled the United States to help spread the wealth among all of its people, made the country great, allowed for assimilation of millions of foreigners, and has given every citizen his right to life, liberty, and the pursuit of happiness); see also Stayton, *supra* note 77, at 3 (claiming that obeying the Constitution in the past caused great prosperity and neglecting it has led to distress and unemployment).

101. Hall, *supra* note 36, at 4; see also Shouse, *supra* note 100, at 20 ("[H]uman rights and property rights are inseparable and [] the right to own property is among the most important of human rights."). As another pamphlet declared, "this nation was established for the specific purpose, above all others, of enabling our people, in the stimulating atmosphere of such freedom, to climb by their individual and ingenious efforts to any heights to which human beings might reasonably aspire." Spahr, *supra* note 27, at 7. Americanism likewise means "[r]espect for the sacredness of an individual's personality and of his right to develop it to the limit of his capacity." *Id.*

102. See, e.g., Ackerman, *supra* note 5, at 10 ("Economic freedom is the foundation for all other liberties."); Desvernine, *supra* note 77, at 7 (stating that prevention of concentration of power in one political branch through checks and balances is crucial to the concept of "Americanism").

103. As John Davis, the 1924 Democratic presidential candidate, declared, "Regulation is a term behind which every form of tyranny, great and small, can hide itself." John W. Davis, *The Redistribution of Power* (Jan. 24, 1936), in *AM. LIBERTY LEAGUE DOCUMENT NO. 93*, at 15; see also Albert C. Ritchie, *The American Form of Government—Let Us Preserve It* (Jan. 18, 1936), in *AM. LIBERTY DOCUMENT NO. 92*, at 6–7 (identifying restrictions on government power, federalism, and separation of powers as key elements of the "American form of government").

2. The Conflict Between Americanism and the New Deal

The League's defense of Americanism was stridently nationalist, its leaders repeatedly declaring that they were "bitterly and aggressively opposed" to any "alienism."¹⁰⁴ The Liberty League assessed the New Deal to be of alien nature because it imposed substantial regulations on business and thereby limited individual freedom.¹⁰⁵ In the League's words, New Deal protections against low wages and relief for the unemployed and elderly were based on a philosophy of collectivism that conflicts with the principle that individual merit should determine a person's fate.¹⁰⁶ As one League pamphlet declared, "the weak should not be artificially maintained in wealth and power. . . . Each individual must rise or sink to the level for which he is fitted by the quality of his tissues and of his soul."¹⁰⁷ By offering protections for the weak, Roosevelt had rejected individualism and thereby "repudiate[d] the Constitution and declare[d] war on the whole system of American freedom."¹⁰⁸

In standing up to the New Deal, the American Liberty League declared that it was standing up for the Founding Fathers. Stayton roused Liberty Leaguers by reminding them that "he who takes the 'Constitution' for his battle-cry, has as his allies the Fathers of old."¹⁰⁹ Roosevelt, the League repeatedly claimed, had abandoned the Founding Fathers in favor of the philosophies of European communists, socialists, and fascists.¹¹⁰ Shouse charged that Roosevelt sought to replace a government built upon

104. R. E. Desvernine, Letter to the Editor, *Position Defined*, N.Y. TIMES, Oct. 11, 1936, at E9.

105. See, e.g., Ritchie, *supra* note 103, at 9 (claiming that the measures and policies under the New Deal will destroy the American form of government); James W. Wadsworth, The Blessings of Stability (July 12, 1935), in AMERICAN LIBERTY LEAGUE DOCUMENT NO. 54, at 10 (declaring that the New Deal represents "an appalling change in the American conception of liberty. It deprives the individual of his freedom of choice as to the means by which he shall pursue happiness, and thus runs directly contrary to the ideal expressed in the Declaration of Independence."); *Shouse Upholds Revolt in Party*, N.Y. TIMES, June 21, 1936, at L27 (quoting Shouse as characterizing the New Deal as "wholly alien to the American concept of government").

106. See Stinchfield, *supra* note 37, at 5–6 (discussing how New Deal legislation like the Social Security Bill and the Labor Relations statute take the country away from the principle of self-reliance and towards paternalism).

107. *Id.* at 14 (quoting ALEXIS CARREL, MAN, THE UNKNOWN 298–99 (1935)).

108. G. W. Dyer, "Regimenting the Farmers" (May 5, 1935), in AM. LIBERTY LEAGUE DOCUMENT NO. 33, at 5; see also Desvernine, *supra* note 5, at 19 (declaring that the New Deal is "alien and foreign to our constitutional philosophy. It destroys our American system and substitutes the European system."); Lloyd, *supra* note 28, at 7 (declaring that the New Deal had been revealed to have "a startling purpose, the scrapping of the American political and industrial systems and the substitution of a thoroughly alien order"). Al Smith thus charged that the New Deal was spending tax money "to train young men to go out and preach communism, to preach the gospel of 'down with property, down with capital, down with government, down with church, yes, down with God.'" F. Raymond Daniell, *Smith Links Reds with Roosevelt*, N.Y. TIMES, Nov. 1, 1936, at 42.

109. WOLFSKILL, *supra* note 4, at 112.

110. See, e.g., THE AAA AND OUR FORM OF GOVERNMENT, AM. LIBERTY DOCUMENT. NO. 80, at 2 (Dec. 1935) (asserting that the New Deal represents "a vicious combination of Fascism, Socialism and Communism" that conflicts with the American form of government). Al Smith—the former Governor of New York and 1928 Democratic presidential candidate—broke with Roosevelt and supported the Liberty League, asserting that Roosevelt had chosen Karl Marx over Thomas Jefferson. See Alfred E. Smith, The Facts in the Case (Jan. 25, 1936), in AM. LIBERTY LEAGUE DOCUMENT NO. 97, at 14 (suggesting that Democrats support the ideology of Marx and Lenin over that of Jefferson); Marvin V. Ausubel, *The Rise and Fall of Martin Thomas Manton*, N.Y. ST. B.A.J., March/April 2010, at 28, 33 n.19 (indicating that Smith was an unsuccessful presidential

“the philosophy of Thomas Jefferson” with “a totalitarian government, one which recognizes no sphere of individual or business life as immune from governmental authority and which submerges the welfare of the individual to that of the government.”¹¹¹ Indeed, the League said that Roosevelt and his brain trusters “sneered” at the Founding Fathers.¹¹²

A key Liberty League charge was that Roosevelt and his advisers were secret socialists who sought to foist their alien program on the nation without the American people’s consent.¹¹³ Although Roosevelt had won the election in 1932, the League maintained that the American people had never supported the New Deal.¹¹⁴ They voted for Roosevelt because he promised voters to protect capitalism, not destroy it.¹¹⁵ It was only after the election that Roosevelt revealed his agenda of instituting European-style socialism upon an unsuspecting American public.¹¹⁶ Once the American people recognized what was happening—in the words of one Liberty League pamphlet, once they “awaken[ed] . . . to find the Roosevelt administration has virtually tricked them, and substituted the Socialist Party platform” for the Democratic Party platform—the people would surely vote Roosevelt out and restore Americanism.¹¹⁷ Showing the American people the truth about the New Deal was precisely what the Liberty League sought to do.

Although the American Liberty League called on the American public to rise up against the New Deal, it was far from a populist movement. Instead, it staunchly supported elite control and called on the people to put their faith in judges, not the

candidate in 1928 and that he was the governor of New York for three terms). Smith said that Roosevelt merely pretended to follow the founders of the Democratic Party: “It is all right with me if they want to disguise themselves as Norman Thomas or Karl Marx, or Lenin, or any of the rest of that bunch, but what I won’t stand for is allowing them to march under the banner of Jefferson, Jackson or Cleveland.” Smith, *supra*, at 14.

111. *Shouse Upholds Revolt in Party*, *supra* note 105, at L27.

112. Hall, *supra* note 36, at 5.

113. One Liberty League pamphlet described Roosevelt as a Fabian Socialist who “studiously avoids mention of Socialism [but] wants to do it by propaganda and political action in the name of something else of gentle sound, such as ‘Better Social Order,’ ‘Social Justice,’ (pious phrase that) . . . and—by Jove, I almost forgot—‘New Deal!’” Lloyd, *supra* note 28, at 4; *see also* Desvermine, *supra* note 5, at 13 (“The worst indictment which can be made against the present Administration is these indirect and subtle attempts to change the fundamental principles of our constitutional system in such a manner as to conceal their true purpose from the people and thereby deprive the people of their sovereign right to determine the substance of their government.”).

114. *See, e.g.*, Jouett Shouse, “Breathing Spells” (Sept. 16, 1935), in AM. LIBERTY LEAGUE DOCUMENT NO. 65, at 4 (noting that no New Deal elements had been suggested during Roosevelt’s campaign and asserting that if they had, Roosevelt would not have been elected president).

115. *See, e.g.*, James M. Carson, The Constitution and the New Deal (Dec. 16, 1935), in AM. LIBERTY LEAGUE DOCUMENT NO. 89, at 3 (discussing the President’s “failure to carry out the pledges of the Democratic platform” and the New Deal’s “subtle and undercover attack upon the Constitution of the United States”); Lloyd, *supra* note 28, at 13 (“How, then, did such a man get elected to the Presidency? Answer: By the voters relying upon his specific promises and those contained in the Platform upon which he ran.”).

116. *See, e.g.*, Shouse, *supra* note 114, at 4 (asserting that if the New Deal “had been put frankly before the American people Mr. Roosevelt would not have been elected President”).

117. Lloyd, *supra* note 28, at 16.

President, to apply the principles of Americanism established in the Constitution.¹¹⁸ The meaning of the Constitution, League supporters continually warned, was not subject to the whims of popular opinion.¹¹⁹ Notwithstanding the League's antipopulist ideology, it saw an important role for the people, calling on them to stand up for the Constitution against the machinations of the New Deal, which had perverted the true meaning of the Constitution.¹²⁰ As one Liberty League pamphlet put it: "Every great constitutional debate in the history of this country . . . has, in the last analysis, had to be taken to the people themselves, and that must be true in any country where the people are the ultimate sovereigns."¹²¹

3. The New Deal's Threat to National Existence

The Liberty League warned that the New Deal was not just misguided but it threatened to "destroy the essential features of our government" and "substitute Americanism with Totalitarianism."¹²² The Liberty League warned again and again that the existence of the United States was threatened by the New Deal.¹²³ If the New Deal continued, one Liberty League pamphlet warned, it would "mean the defeat of the American theory of democracy."¹²⁴ As League supporters saw it, the New Deal was succeeding in undermining the American spirit.¹²⁵ "We used to be a virile, self-reliant

118. Raoul Desvernine, the Chairman of the Lawyers Committee, declared that "it would seem wisdom and experience to continue to entrust them [the courts] with the working out of this problem." Desvernine, *supra* note 5, at 11. The League frequently criticized Roosevelt for attempting to undermine the judiciary's role as protector of the Constitution. *See, e.g.*, Carson, *supra* note 115, at 14 ("You can trust your courts. . . . You can not let the Executive pass on the constitutionality of his own acts, nor can you let the Congress pass on the constitutionality of theirs."); Charles I. Dawson, *The President Has Made the Issue* (Jan. 25, 1936), *in* AM. LIBERTY LEAGUE DOCUMENT NO. 95, at 13 ("Usurpation and perversion of the Constitution by judicial construction is the plan of the present Administration."); Shouse, *supra* note 114, at 9 (declaring that the League "stands ready, with every resource at its command, to do all it can to defend the power of the Judicial branch of our government").

119. As League supporters argued, Roosevelt sought to undermine the true meaning of the Constitution by appointing justices who agreed with him. Judge Dawson asked,

Does any man or woman within the sound of my voice doubt that the President hopes, if re-elected, he will have the opportunity within the next four years to place upon the Supreme Court enough judges holding his own constitutional views to change the whole current of constitutional construction in this country?

Dawson, *supra* note 118, at 13–14.

120. Former Solicitor General James Beck explained that the Liberty League was necessary because "[t]hose who love the Constitution must join forces in its defense." Beck, *supra* note 77, at 11.

121. Carson, *supra* note 115, at 4.

122. Desvernine, *supra* note 77, at 13.

123. *See, e.g., id.* at 12 (declaring that "[o]ur individuality, our independence is being merged into and subordinated to a superstate"); Stinchfield, *supra* note 37, at 6 (cautioning that the result of the New Deal "will be the destruction of self-reliance in every citizen of the United States").

124. Albert C. Ritchie, *The American Bar—The Trustee of American Institutions* (June 29, 1935), *in* AM. LIBERTY LEAGUE DOCUMENT NO. 48, at 4. In another League pamphlet, Nicholas Roosevelt—the President's cousin—warned that the New Deal "means substituting an economic dictatorship for a political democracy. I, for one, regard this as a threat to the very foundations of our civilization." Nicholas Roosevelt, *Two Amazing Years* (July 8, 1935), *in* AM. LIBERTY LEAGUE DOCUMENT NO. 49, at 14.

125. *See, e.g., Ritchie, supra* note 124, at 4 (cautioning that the New Deal puts the "spirit of individual American freedom" in danger).

people,” one pamphlet explained, “[w]e were at one time willing to ascribe our misfortunes to our own lack of wisdom and self-control, to tighten the belt, and to repair our own shortcomings.”¹²⁶ No longer. The American people were unwilling to take personal responsibility for their misfortunes and deal with the Depression by tightening their belts because the New Deal had replaced American individualism with a “spirit of dependency.”¹²⁷ Under the New Deal, the League believed, little was left of liberty: “No business man was his own master” because New Deal programs “rigidly enslaved its devotees.”¹²⁸ Indeed, enslaving the people to an all-powerful government was the very point of the New Deal.¹²⁹ Roosevelt must be defeated, the Liberty League warned, or all Americans would soon be enslaved.¹³⁰

Convinced that the New Deal represented a profound breach of faith with American values, the League believed that the election of 1936 would determine whether the nation would survive.¹³¹ The nation stood at a crossroads, the League warned, in which it could choose to continue down “the old American ‘horse and buggy’ road of democracy with the Constitution as its foundation” or follow Roosevelt down a “foreign slave trail of arbitrary government built upon the will of man.”¹³² As one League pamphlet explained, the issue to be decided through the 1936 election was not “whether the Constitution shall be amended, but whether it shall be destroyed.”¹³³

II. THE ROOSEVELT CAMPAIGN’S RESPONSE TO THE AMERICAN LIBERTY LEAGUE

The story, frequently repeated, has become familiar. After the Supreme Court struck down key pieces of the New Deal, Franklin Roosevelt ran “against the Court” and won a resounding public mandate for his expansive philosophy of federal power.¹³⁴

126. Stinchfield, *supra* note 37, at 6–7.

127. *Id.* at 6. Moreover, by providing federal relief, the New Deal coddled the weak and lazy at the expense of the strong and hardworking, who had lawfully earned the money that the government then took from them and redistributed. *See id.* at 14 (“Modern nations will save themselves by developing the strong. Not by protecting the weak.”).

128. *Id.* at 4–5. For instance, the Agricultural Adjustment Act—held unconstitutional in *United States v. Butler*, 297 U.S. 1 (1936)—“told every man what, where, and how much to sow, and when and how much to reap.” *Id.* at 5. Jouett Shouse agreed that the AAA “embodie[d] the very basis” of the “New Deal philosophy”: “Under the guise of benefits to the farmers the effort is being made to regiment and to regulate the whole life of the American people.” Jouett Shouse, *Arousing Class Prejudices* (Dec. 23, 1935), in *AM. LIBERTY LEAGUE DOCUMENT NO. 84*, at 5.

129. *See, e.g.*, Hall, *supra* note 36, at 7 (asserting that the New Deal is making “each and everyone of us a political and economic slave in the hands of the bureaucrats in Washington”).

130. *Id.*

131. *See, e.g.*, Desvernine, *supra* note 5, at 3 (declaring that “we . . . do not doubt that [the nation’s] fundamental and characteristic precepts are being now seriously threatened”).

132. Desvernine, *supra* note 77, at 8.

133. Dawson, *supra* note 118, at 14.

134. *See, e.g.*, ACKERMAN, *TRANSFORMATIONS*, *supra* note 18, at 295 (asserting that the Court’s decisions “challenged the President to run against the Court in the next election and seek to gain a mandate from the People”); Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 *DRAKE L. REV.* 775, 787 (2003) (“It is credible to think that one pivotal Justice, Owen Roberts, was convinced to shift his position on economic due process because of the signals sent by Roosevelt’s landslide reelection based in part on his campaign against the Court.”); John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 *U. CHI. L. REV.* 775, 780 (2001) (“With the New Deal Court, President Roosevelt responded by campaigning against the Court and

As this Section shows, the story is false. Roosevelt and his advisers considered but rejected the suggestion to make the Supreme Court the focus of the reelection effort.¹³⁵ The truth is that Roosevelt did not need to campaign against the Supreme Court because the Liberty League launched a massive campaign on the constitutional issue, and the League made a much more compelling opponent than the Court.¹³⁶ Indeed, the League made a perfect foil for Roosevelt to present the New Deal constitutional philosophy. Campaigning against the Liberty League allowed Roosevelt to argue that the expansive constitutional philosophy of the New Deal was necessary to protect the American people from the representatives of entrenched greed, who perverted the Constitution to promote a philosophy of greed.¹³⁷ The dueling campaigns of Roosevelt and the Liberty League presented the election as a choice between competing constitutional philosophies, each of which were said by their proponents to embody what it means to be American.¹³⁸

A. *Roosevelt Made the Liberty League the Focus of the Reelection Campaign*

Leading up the 1936 election, President Roosevelt and his advisers were concerned that the constitutional validity of New Deal programs would become a major campaign issue. From 1933 to 1936, the Supreme Court issued six major rulings holding New Deal laws unconstitutional.¹³⁹ These defeats created major obstacles for carrying out Roosevelt's plans and raised grave doubts about their wisdom and validity.¹⁴⁰ Harold Ickes, Roosevelt's political adviser and Secretary of the Interior,

introducing his famous Court-packing plan.") This view is widely shared outside the academy. For instance, anticipating that the Supreme Court would rule against the Affordable Care Act, Democratic Congressman James Clyburn urged President Obama to run against the Court just like Roosevelt supposedly did. See Sam Stein, *Barack Obama Could Go After Supreme Court on Health Care, James Clyburn Suggests*, HUFFINGTON POST (Apr. 2, 2012, 9:47 AM), http://www.huffingtonpost.com/2012/04/02/barack-obama-supreme-court-health-care-james-clyburn_n_1396375.html ("We have seen presidents run against Congress and we have seen presidents run against the Supreme Court. Franklin Roosevelt did it to the Supreme Court[.]"

135. See *infra* notes 139–43 and accompanying text for a discussion of President Roosevelt and his advisers' consideration and rejection of a campaign against the Supreme Court.

136. See *infra* notes 144–50 and accompanying text for a discussion of Roosevelt's campaign shifting its focus to the American Liberty League.

137. See *infra* Part II.B.1 for a discussion of Roosevelt's attacks on the Liberty League as a force of entrenched greed.

138. See *infra* Parts II.B.1–2 for a discussion of both sides' constitutional stances. See BASIL RAUCH, *THE HISTORY OF THE NEW DEAL 1933–38*, at 233 (1944) (noting that the Supreme Court rulings were the "main obstacle to the completion of the administration's program.").

139. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 316–17 (1936) (holding unconstitutional the Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1, 78 (1936) (holding unconstitutional the Agricultural Adjustment Act of 1933); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935) (striking down the Frazier-Lemke Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (holding much of the National Industrial Recovery Act unconstitutional); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 374 (1935) (invalidating the Railroad Retirement Act of 1934); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (invalidating a section of the National Industrial Recovery Act).

140. See RAUCH, *supra* note 138, at 233 (noting that the Supreme Court rulings were the "main obstacle to the completion of the administration's program.").

urged Roosevelt to make the Court the central campaign issue.¹⁴¹ Roosevelt rejected the advice, apparently concluding that disputes over the meaning of the Commerce Clause and General Welfare Clause raised issues that were too abstract for a national campaign.¹⁴² Roosevelt agreed with Felix Frankfurter that the American people held the Court in too high esteem and an attack on the Court would let his opponents portray Roosevelt as radical.¹⁴³ This left the Roosevelt campaign in a quandary, wondering how to address doubts over the constitutionality of the New Deal program without challenging the Court's authority.

The American Liberty League was an unexpected gift. Early in 1936, the Roosevelt reelection team came to the realization that the American Liberty League gave Roosevelt the opportunity to make the case for the constitutional validity of the New Deal against an opponent that was much easier to discredit than the Supreme Court.¹⁴⁴ Postmaster General James Farley, who served as Roosevelt's campaign manager, concluded that the League was "one of the most vulnerable ever to appear in politics" because it was founded and managed by millionaire businessmen like the du Ponts who were widely blamed for the Depression and who personally stood to gain from defeating the New Deal.¹⁴⁵ Farley declared that the League should be called the "American Cellophane League" because "first, it's a du Pont product, and, second, you can see right through it."¹⁴⁶

With the recognition that the American Liberty League was just what the campaign needed, the Roosevelt reelection team decided to make the League the main focus of the 1936 campaign.¹⁴⁷ As Farley later wrote, the "first 'battle-order' was to ignore the Republican Party and to concentrate fire on the Liberty League."¹⁴⁸ Charles

141. See HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES: THE FIRST THOUSAND DAYS 1933-1936*, at 530 (1953) ("I told the President that I hoped this would be the issue in the next campaign. I believe it will have to be fought out sooner or later, and I remarked to him that the President who faced this issue and drastically curbed the usurped power of the Supreme Court would go down through all the ages of history as one of the great Presidents.").

142. See RAUCH, *supra* note 138, at 233 (discussing Roosevelt's rejection of a campaign against the Court because "it raised abstract and difficult questions of constitutional law, not easy to bring to life for the electorate").

143. See SHESOL, *supra* note 26, at 145-46 (noting that President Roosevelt agreed with Frankfurter's statement that "a general attack on the Court . . . would give opponents a chance to play on vague fears of a leap in the dark and upon the traditionalist loyalties the Court is still able to inspire").

144. See *id.* at 216 (noting that in early 1936, the Liberty League was "using their remaining ammunition to shoot themselves in the foot").

145. See WOLFSKILL, *supra* note 4, at 210 (asserting that the vulnerability of the League stemmed from the wealth and privilege of its supporters).

146. *Democracy Saved, Farley Declares*, N.Y. TIMES, Feb. 23, 1936, at L33; see also *Farley Blasts G.O.P. Critics of Roosevelt*, WASH. POST, Feb. 23, 1936, at 8 (quoting Farley calling the League "an organization of multimillionaires which is run as a subsidiary of the Republican National Committee.").

147. See WOLFSKILL, *supra* note 4, at 210-11 (stating that the administration was eager to brand the Liberty League as a tool to advance the interests of the wealthy, and the administration ordered operatives to concentrate their attacks on the Liberty League rather than the Republicans).

148. FARLEY, *supra* note 15, at 294; see also WILLIAM E. LEUCHTENBURG, *THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY 103-04* (1995) ("Roosevelt directed the Democratic National Committee to concentrate its fire not on the Republicans, but on such symbols of wealth as the American Liberty League, associated by the public with the du Ponts of Delaware and J. Howard Pew, Jr., the Sun Oil Company

Michelson, the director of press operations for the Roosevelt campaign, described the strategy: “[I]t was not difficult for us to get and keep before the public the Liberty League as the symbol of massed plutocracy warring on the common people. Thus the Liberty League was an asset and not a liability to the Roosevelt forces.”¹⁴⁹ The Roosevelt campaign did everything it could to keep the Liberty League in the news. As Farley put it, “[t]he more they [the Liberty League] work, the happier we are.”¹⁵⁰

B. The American Liberty League Allowed Roosevelt to Present the New Deal and Its Constitutional Philosophy as Essential to the Protection of the People

In countless speeches, advertisements, editorials, newspaper interviews, and even a well-publicized Senate investigation, the Roosevelt reelection team mocked the Liberty League as the voice of business tycoons who had long tyrannized the American people and whose power the New Deal was instituted to check. In doing so, Roosevelt presented the voters a choice between competing constitutional philosophies. On the one hand, the League argued that the New Deal conflicted with foundational notions of individual liberty and freedom from excessive government. In contrast, Roosevelt presented a constitutional philosophy that emphasized social responsibility and freedom from excessive industrial power.

1. The 1936 State of the Union Address and the Attack on “Entrenched Greed”

The gist of President Roosevelt’s response to the American Liberty League became apparent in his first public comment on the League. The day after Shouse announced the League’s creation, Roosevelt told reporters that he “laughed for ten minutes” after reading in the *New York Times* that the League was the answer to Wall Street’s prayers.¹⁵¹ Roosevelt said he agreed with the League that property rights should be protected, but the League emphasized property rights to the exclusion of all other goals.¹⁵² As Roosevelt put it, the League was like a church devoted to upholding two of the Ten Commandments, while disregarding the other eight.¹⁵³ Roosevelt mocked the League’s emphasis on individual liberty as a philosophy that only served the interests of the moneyed class while ignoring the needs of the people.¹⁵⁴ With Roosevelt’s rejoinder, it was anticipated that the Liberty League’s campaign against the New Deal could, in the words of the *New York Times*, “precipitate the greatest conflict of constitutional and economic philosophy of the times.”¹⁵⁵

After his initial comments, however, Roosevelt did not address the American Liberty League again until the 1936 State of the Union address, the speech that marked

tycoon.”).

149. Charles Michelson, *Democratic Strategy Is Told by Michelson*, N.Y. TIMES, Nov. 15, 1936, at E10.

150. Farley Back, *Unworried Over the Liberty League*, N.Y. TIMES, Apr. 14, 1936, at 1.

151. *Roosevelt Twits Liberty League as Lover of Property*, N.Y. TIMES, Aug. 25, 1934, at 2.

152. *Id.* at 1.

153. *Id.*

154. As Roosevelt put it, the League “paid little attention to the commitment of government to help the unemployed, to make work, to aid people in keeping their homes, to provide facilities for education and those other factors summed up in the commandment ‘Thou shalt love thy neighbor as thyself.’” *Id.* at 2.

155. *Capital Expects Smith Move Next in Liberty League*, N.Y. TIMES, Aug. 27, 1934, at 1.

the beginning of the 1936 election campaign, in which Roosevelt gave a detailed and forceful denunciation of the constitutional philosophy of the League.¹⁵⁶ It was the first time that a President had delivered the address at night so that it could be heard on the radio by the entire populace.¹⁵⁷ Roosevelt used the opportunity to give what was perceived at the time as an extremely political speech, which made little attempt to catalogue the state of the nation, but instead forcefully denounced his opponents as representatives of “entrenched greed.”¹⁵⁸ Although Roosevelt did not mention the American Liberty League by name, it was well understood to be the chief target of the speech.¹⁵⁹

Roosevelt’s central message was that New Deal opponents represented the forces of “entrenched greed” who hid their true goals in patriotic and constitutional rhetoric, and that expansive federal power was necessary to protect the people from these forces.¹⁶⁰ Roosevelt declared that he had proudly “earned the hatred of entrenched greed” because he recognized that it was “necessary to drive some people from power and strictly to regulate others.”¹⁶¹ His opponents sought to undo the New Deal, Roosevelt warned, solely for their own benefit:

They seek—this minority in business and industry—to control and often do control and use for their own purposes legitimate and highly honored business associations; they engage in vast propaganda to spread fear and discord among the people—they would “gang up” against the people’s liberties.¹⁶²

Roosevelt warned his listeners not to be fooled by the patriotic, constitutional rhetoric employed by his opponents: “They steal the livery of great national constitutional ideals to serve discredited special interests.”¹⁶³ New Deal opponents, Roosevelt warned, used patriotic language to hide their true purpose—to take away the people’s power to protect themselves from the tyranny of entrenched wealth.¹⁶⁴

156. Franklin D. Roosevelt, Annual Message to the Congress (Jan. 3, 1936), in 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 8, 13–18 (1938).

157. *Congress to Hear President in a Night Session Friday; He Seeks a ‘Fireside’ Chat*, N.Y. TIMES, Jan. 1, 1936, at 1.

158. Roosevelt, *supra* note 156, at 13–18.

159. See, e.g., *F.D. Roosevelt, Jr., Weds Ethel du Pont in June*, WASH. POST, Nov. 15, 1936, at M1 (stating that it was publicly known that the term “economic royalists” referred to the “du Pont clan” and their efforts to defeat Roosevelt’s reelection through the American Liberty League); *Roosevelt and du Pont Banns Await Election*, CHI. TRIB., Oct. 1, 1936, at 3 (“[O]f all the princes of ‘intrenched greed’ whom the New Dealers revile the du Ponts are ones most frequently mentioned by name.”); *Roosevelt Condemns All Warlike Countries; Defies His Critics to Repeal New Deal Laws; Demonstration Greets Belligerent Message*, WASH. POST, Jan. 4, 1936, at 1 (stating that although President Roosevelt did not directly mention the American Liberty League, it was clear that his “caustic sallies” were aimed at them, among others); *‘Stump Talk,’ Say Some Papers; ‘Imperishable,’ Others Declare*, WASH. POST, Jan. 5, 1936, at 8 (identifying Republican responses in the media describing the speech as an “aggressive” and “caustic” response to the American Liberty League and other organizations set on “destroying Roosevelt”).

160. Roosevelt, *supra* note 156, at 13–14.

161. *Id.*

162. *Id.* at 14.

163. *Id.*

164. *Id.* at 13–14.

In the State of the Union address, Roosevelt asked a series of rhetorical questions that amounted to a point-by-point response to the Liberty League's central assertion that broad federal regulatory powers conflict with a commitment to individual liberty.¹⁶⁵ The Liberty League had argued that federal relief efforts undermined the nation's commitment to hard work and individual responsibility.¹⁶⁶ Roosevelt disagreed:

Shall we say to the several millions of unemployed citizens who face the very problem of existence, of getting enough to eat, "We will withdraw from giving you work. We will turn you back to the charity of your communities and those men of selfish power who tell you that perhaps they will employ you if the Government leaves them strictly alone?"¹⁶⁷

The Liberty League had argued against federal power to address unemployment and child labor, asserting that those subjects were governed exclusively by state law.¹⁶⁸ Roosevelt disagreed:

Shall we say to the needy unemployed, "Your problem is a local one except that perhaps the Federal Government, as an act of mere generosity, will be willing to pay to your city or to your county a few grudging dollars to help maintain your soup kitchens?"

Shall we say to the children who have worked all day in the factories, "Child labor is a local issue and so are your starvation wages; something to be solved or left unsolved by the jurisdiction of forty-eight States?"¹⁶⁹

The Liberty League had argued that federal protections for workers conflict with individual freedom.¹⁷⁰ Roosevelt disagreed: "Shall we say to the laborer, "Your right to organize, your relations with your employer have nothing to do with the public interest; if your employer will not even meet with you to discuss your problems and his, that is

165. *Id.* at 15–16.

166. *See, e.g.*, Ralph M. Shaw, *The New Deal: Its Unsound Theories and Irreconcilable Policies* (May 31, 1935), in *AM. LIBERTY LEAGUE DOCUMENT NO. 39*, at 13 ("The New Deal is nothing more or less than an effort sponsored by inexperienced sentimentalists and demagogues to take away from the thrifty what the thrifty or their ancestors have accumulated, or may accumulate, and to give it to others who have not earned it, or whose ancestors haven't earned it for them, and who never would have earned it and never will earn it, and thus indirectly to destroy the incentive for all future accumulation."); Jouett Shouse, *Recovery, Relief and the Constitution* (Dec. 8, 1934) in *AM. LIBERTY LEAGUE DOCUMENT NO. 7*, at 12–14 (arguing that relief should be handled by the American Red Cross rather than the government).

167. Roosevelt, *supra* note 156, at 15.

168. *See, e.g.*, *NEW WORK-RELIEF FUNDS*, *AM. LIBERTY LEAGUE DOCUMENT NO. 117*, at 3 (Apr. 1936) (declaring emergency relief violates principles of state sovereignty); *WORK RELIEF: A RECORD OF THE TRAGIC FAILURE OF THE MOST COSTLY GOVERNMENTAL EXPERIMENT IN ALL WORLD HISTORY*, *AMERICAN LIBERTY LEAGUE DOCUMENT NO. 78*, at 13 (Nov. 1935) (arguing that there is no express authority for the federal government to spend funds on unemployment relief funds).

169. Roosevelt, *supra* note 156, at 15.

170. *See NATIONAL LAWYERS COMMITTEE OF THE AMERICAN LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT* iii (1935) (claiming that the National Labor Relations Act was an illegal interference with employees' individual freedoms under the Fifth Amendment); *THE NATIONAL LABOR RELATIONS ACT*, *AM. LIBERTY LEAGUE DOCUMENT NO. 66*, at 4 (Sept. 1935) (arguing that the Fifth Amendment protects worker rights to choose any occupation and sell their labor on their own terms, which was being subverted by the National Labor Relations Act).

none of our affair?"¹⁷¹ The Liberty League had argued against federal power to protect the elderly through measures like social security.¹⁷² Roosevelt disagreed: "Shall we say to the . . . aged, 'Social security lies not within the province of the Federal Government; you must seek relief elsewhere?'"¹⁷³

Through these rhetorical questions, Roosevelt argued that the Liberty League's philosophy of individualism protected only the rich while turning the nation's back on workers, the elderly, the homeless, and the unemployed.¹⁷⁴ While the central element of the League's constitutional philosophy was that the Constitution protects the people from government tyranny, the State of the Union address expressed the core of Roosevelt's constitutional philosophy that the Constitution empowers the people to protect themselves from economic exploitation.¹⁷⁵ The theme offered by Roosevelt in the 1936 State of the Union address—that the New Deal was necessary to protect the people from the forces of entrenched greed—crystallized the Roosevelt campaign's response to the American Liberty League, and Roosevelt and his supporters repeated these points throughout the campaign.¹⁷⁶

2. The Liberty League's Response to the State of the Union Address

Liberty League supporters responded with fury to the State of the Union address, calling it "the most dangerous speech that ever came from a President of the United States."¹⁷⁷ They charged that the speech expressed "contempt for the Constitution"¹⁷⁸

171. Roosevelt, *supra* note 156, at 15.

172. See Walter E. Spahr, *The Fallacies and Dangers of the Townsend Plan* (Jan. 3, 1936), in AM. LIBERTY LEAGUE DOCUMENT NO. 85, at 8–18 (discussing the economic fallacies of the Townsend Plan, which influenced the creation of the Social Security system); *Townsend Plan 'Absurd,' Avers Yale Professor*, WASH. POST, Feb. 16, 1936, at M13 (quoting a Liberty League radio address that criticized the Townsend Plan as an "utterly absurd" one that would result in bankruptcy and chaos).

173. Roosevelt, *supra* note 156, at 16.

174. *Id.* at 15–16.

175. As William Forbath, a law professor at the University of Texas and one of the nation's leading legal and constitutional historians, has argued, the New Deal constitutional philosophy did not consist solely of the assertion of broad federal power to enact programs for economic protection; it also consisted of the assertion that Congress had a moral and constitutional duty to do so. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 176–178 (2001).

176. At the Democratic National Convention, Roosevelt again declared that strong government action was necessary to protect the people from the tyranny of the "economic royalists":

For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. . . . Against economic tyranny such as this the citizen could only appeal to the organized power of government.

Text of Roosevelt Address, *supra* note 89, at 25. Roosevelt's convention speech likewise took up the argument that his opponents hid behind lofty constitutional rhetoric: "In vain they seek to hide behind the flag and the Constitution. In their blindness they forget what the flag and the Constitution stand for." *Id.* At the Convention, James Farley likewise charged that the Liberty League used patriotic and constitutional rhetoric to instill fear in voters: "I am forced to conclude that . . . they hope to create a bugaboo to frighten the American voters." *Critics' 'Bugaboo' Derided by Farley*, N.Y. TIMES, June 14, 1936, at L33.

177. *Roosevelt Fiscal Plans Go to Congress at Noon; Active Week Is Forecast*, N.Y. TIMES, Jan. 6, 1936, at 1.

and was “an insult to the Nation and a desecration of its sacred principles.”¹⁷⁹ No doubt to the delight of the Roosevelt campaign, the Liberty League responded to the attacks on corporate greed by defending big business:

[B]usiness is the source of the entire living of the people, of the wages of labor, of the very food, clothing, and shelter of the nation. . . . It is high time that men who live soft lives from taxation on business cease their attacks on the institutions that make our civilization possible.¹⁸⁰

Criticized as the embodiment of “entrenched greed,” the League defended the beneficence of wealth, declaring that “no country in the history of the world has ever benefitted more than America from the concentration of capital.”¹⁸¹

The American Liberty League planned what was certain to be a dramatic response to the State of the Union address: a nationally broadcast speech by Al Smith, the Democratic Party’s 1928 presidential nominee.¹⁸² The speech would be given at a dinner at the Mayflower Hotel in Washington, D.C., and it would launch the League’s 1936 election campaign.¹⁸³ The League’s directors bet that Smith, known as “the greatest apostle of the common people in America,” would help the League shake off the perception that it was the mouthpiece of millionaires.¹⁸⁴ Leading up to the speech, the newspapers eagerly anticipated the criticism that Smith would level at the President.¹⁸⁵ The *New York Times* reported, “[f]ew events other than national conventions staged by the two major parties have aroused keener political interest—and concern—than the American Liberty League dinner here tonight which Alfred E. Smith will address.”¹⁸⁶ In the days leading up to the speech, Democrats openly feared that Smith would lead a revolt against Roosevelt from within the Democratic Party.¹⁸⁷ Others speculated that Smith would attempt to split the Democratic Party, with Smith

178. *Id.*

179. *Guilty*, BULL. OF AM. LIBERTY LEAGUE, Jan. 15, 1936, at 1; see also *Dispute Rages on President’s Night Message*, WASH. POST, Jan. 6, 1936, at 2 (quoting a Liberty League statement accusing President Roosevelt of fomenting class hatred and identifying his State of the Union address as evidence that he is establishing a dictatorial system).

180. Neil Carothers, *Time to Stop* (Jan. 25, 1936), in AM. LIBERTY LEAGUE DOCUMENT NO. 94, at 5.

181. George Barton Cutten, *Entrenched Greed* (Feb. 8, 1936), in AM. LIBERTY LEAGUE DOCUMENT NO. 109, at 1, 4.

182. *Washington Dinner*, BULL. OF AM. LIBERTY LEAGUE, Jan. 15, 1936, at 2.

183. *Id.*

184. SHESOL, *supra* note 26, at 201. For instance, in October 1934, Father Charles Coughlin, the radio priest who launched his own fascist-leaning movement against the New Deal, had criticized the American Liberty League as the mere “mouthpiece of bankers,” whose sole aim was to protect the value of their bonds. *Coughlin Assails Liberty League: Priest Calls Organization ‘The Mouthpiece of Bankers’ in Fight to Protect Bonds*, N.Y. TIMES, Oct. 29, 1934, at L11 .

185. See *New-Deal Attack Prepared by Smith*, N.Y. TIMES, Jan. 24, 1936, at L6 (claiming that New Deal proponents and opponents were eager to see how far the former governor would go in criticizing the Roosevelt Administration); Ray Tucker, *New Role Is Taken by Liberty League*, N.Y. TIMES, Jan. 26, 1936, at E12 (stating that the buildup to Smith’s address had aroused public political interest and concern equal to that of a national convention).

186. Tucker, *supra* note 185, at E12.

187. See *G.O.P. Primes Heavy Artillery for Campaign*, WASH. POST, Jan. 23, 1936, at 9 (stating that Democratic leaders were concerned about attacks from Smith).

as the nominee of a Liberty League faction.¹⁸⁸ Secretary of the Interior Harold Ickes privately professed that Smith's speech gave the administration real reason to worry.¹⁸⁹

The speech promised great political theater because Smith had once been Roosevelt's political mentor, and Roosevelt had nominated Smith for the presidency in 1928.¹⁹⁰ Roosevelt had edged out Smith for the 1932 nomination, and Smith had since turned against Roosevelt and the New Deal.¹⁹¹ Media attention increased when news leaked that Smith had declined Eleanor Roosevelt's invitation to stay at the White House the night of the speech, apparently out of concern that the Roosevelts would not feel kindly toward him after they heard what he had to say.¹⁹²

Broadcast nationally in prime time over the CBS radio network, Smith's speech lived up to the hype. Smith charged that the New Deal was nothing less than an "attack . . . upon the fundamental institutions of this country," and Roosevelt and the members of his administration had betrayed their oaths to follow the Constitution.¹⁹³ Smith argued that Roosevelt was engaging in class warfare, pitting workers against businessmen in an unconstitutional attempt to redistribute the wealth.¹⁹⁴ Smith threatened to "take a walk" on the Democratic Party if it nominated Roosevelt for a second term.¹⁹⁵

According to Smith, the New Deal was incompatible with American values: "This country was organized on the principles of a representative democracy, and you can't mix socialism or communism with that. . . . They are just like oil and water, they refuse to mix."¹⁹⁶ Smith concluded by issuing a "solemn warning" that if the Democrats made the mistake of renominating Roosevelt, the American people would have to choose between the Constitution and communism:

There can be only one capital, Washington or Moscow. There can be only . . . the clear, pure, fresh air of free America, or the foul breath of communistic Russia. There can be only one flag, the Stars and Stripes, or the flag of the godless Union of the Soviets. There can be only one national

188. See *Scheme to Split Party Charged by Democrats*, WASH. POST, Jan. 2, 1936, at 1 (quoting a Democratic senator's prediction that the Liberty League would support a presidential campaign under the name "Constitutional Democrats" with Smith as its nominee).

189. See ICKES, *supra* note 141, at 516-17 ("I am worried about the political situation Here is the situation. Al Smith is to speak in Washington at a big dinner next Saturday night under the auspices of the Liberty League. He has been getting a wonderful build-up for this meeting. . . . Smith is to have up to an hour on a national hookup. . . . [E]very indication is that he is going after the Administration with a savage attack. The whole country will be listening in and the newspapers will give wide publicity to the speech.").

190. Sidney Olson, *Al Smith Opens War on His Political Pupil, Franklin D. Roosevelt*, WASH. POST, Feb. 2, 1936, at B3.

191. See SCHLESINGER, *supra* note 66, at 482-84 (stating that Smith favored a traditional role of the Democratic party as opposed to a highly centralized federal government and thus advocated to restore policies that made business leadership possible).

192. WOLFSKILL, *supra* note 4, at 143; *Smith to Decline White House Bid; New Attack Seen*, N.Y. TIMES, Dec. 29, 1935, at 1.

193. *Text of Address of Alfred E. Smith at Anti-New Deal Dinner in Washington*, N.Y. TIMES, Jan. 26, 1936, at 36 [hereinafter *Address of Al Smith*].

194. *Id.*

195. WOLFSKILL, *supra* note 4, at 152.

196. *Address of Al Smith*, *supra* note 193, at 36.

anthem, “The Star-Spangled Banner,” or the “Internationale.”¹⁹⁷

In the battle between traditional American values and the New Deal, Smith closed, “[t]here can be only one victor. If the Constitution wins, we win.”¹⁹⁸

Liberty Leaguers were thrilled. “It was perfect,” Pierre du Pont declared.¹⁹⁹ The League issued a statement proclaiming that Smith had succeeded in “dispelling the fog over Washington,” leaving no doubt about the fundamental crisis facing the nation.²⁰⁰ Having long believed that the American people would rise up against the New Deal if only they woke up to its un-American nature, Shouse declared that “the people have awakened.”²⁰¹

Republicans and conservative Democrats expressed strong agreement with Smith, and in the immediate aftermath of Smith’s speech, newspaper columnists speculated that it might have turned the tide of public opinion against Roosevelt.²⁰² The *New York Times* reported that “[t]he trend away from the New Deal has been easy to see for months,” and with Smith’s speech it was now “highly possible” that the Democrats would lose their hold on key states.²⁰³ Columnists speculated that Smith’s threat to “take a walk” might lead to mass defection by Democrats against the New Deal.²⁰⁴ Commentators suggested that Roosevelt’s defeat was a real possibility.²⁰⁵

New Deal Democrats expressed a very different reaction to Smith’s speech, and their reaction eventually carried the day. They were astonished that Smith delivered his remarks at a black tie dinner in a resplendent ballroom attended by wealthy

197. *Id.*

198. *Id.*

199. WOLFSKILL, *supra* note 4, at 152.

200. *The Fog Dispelled*, BULL. OF AM. LIBERTY LEAGUE, Feb. 15, 1936, at 1 (“As a result of Governor Smith’s speech, the nation is no longer in doubt as to the issue confronting it – a choice between government by a centralized, irresponsible, visionary and extravagant bureaucracy or by the orderly and constitutional processes under the protection of which the United States has prospered far beyond any other nation in the history of the world.”).

201. *Liberty Bloc Hints Drive to Enlarge*, SALT LAKE TRIB., Feb. 1, 1936, at 1.

202. Congressman Hamilton Fish of New York declared that Smith “takes exactly the same point of view as the Republican Party. . . . There is not a single statement by Gov. Smith which I can not indorse personally.” Felix Bruner, *New Deal Leaders in House Invite Smith to ‘Take a Walk’*, WASH. POST, Jan. 28, 1936, at 2. Colonel Frank Knox, running for the Republican presidential nomination (and who was later nominated as the vice presidential candidate), predicted that Smith’s speech “unquestionably will have the effect of swinging millions of Democratic votes to the support of the Republican ticket next fall.” *Id.* Welcoming Smith to the anti-New Deal fold, Governor Eugene Talmadge of Georgia predicted that he would lead Southern Democrats to join Smith and Northern Democrats to block the renomination of Roosevelt as the party’s presidential candidate. Franklin Waltman, Jr., *Al Smith ‘Changed Allegiance’ in Face of Foe, Robinson Says; Talmadge Supporters Gather*, WASH. POST, Jan. 29, 1936, at 1.

203. See F. Lauriston Bullard, *New England Takes Sides*, N.Y. TIMES, Feb. 2, 1936, at E4 (suggesting that Smith’s Liberty League speech could help Republicans win in Massachusetts, Rhode Island, and Connecticut during the next election).

204. See, e.g., Arthur Krock, *Smith’s ‘Walk’ May Start New Party Alignment*, N.Y. TIMES, Jan. 27, 1936, at 16 (postulating that Al Smith’s departure from the New Deal Democratic party will likely lead other Democrats to follow suit, causing a potentially permanent political divide).

205. See Olson, *supra* note 190, at B3 (remarking that “observers . . . are beginning to think for the first time that the President can actually be defeated in the November election”).

businessmen, including twelve members of the du Pont family.²⁰⁶ The *Washington Post* estimated that the leaders of the Liberty League attending the dinner had wealth exceeding one billion dollars.²⁰⁷ One congressman doubted that any of the attendees at the Liberty League dinner “missed a meal during the depression.”²⁰⁸ Another Democratic leader said, “Al Smith now stands for Millionaires’ Row as against ‘the sidewalks of New York.’”²⁰⁹ Senator Joseph Robinson, Smith’s running mate in 1928, gave a nationally broadcast response and declared that Smith had discarded his trademark brown derby for a “high hat.”²¹⁰

Smith’s speech spurred organized labor to increase their support for Roosevelt.²¹¹ John Lewis, president of the United Mine Workers of America, condemned Smith for speaking to a “billion-dollar audience of predatory financial interests,” and he sought to raise union dues to fight the League.²¹² The union quickly adopted a resolution characterizing the League as the mouthpiece of millionaires “who have piled up huge fortunes while denying their employees the right to organize,” and denounced the League as “wholly selfish in its aims, un-American in its methods and policies and inimical to the interests of the people of the United States.”²¹³ Other unions followed, organizing their efforts to reelect Roosevelt by pointing to the Liberty League.²¹⁴ In May 1936, a confederation of unions formed “Labor’s Non-Partisan League,” the sole object of which was the reelection of President Roosevelt.²¹⁵ Labor leaders said that the

206. As the *New York Times* reported, “the popular reaction was strong among members of the Democratic political community against the former Governor’s new association with du Ponts and other millionaires.” Arthur Krock, *President Works On Amid Verbal Barrage*, N.Y. TIMES, Feb. 2, 1936, at E3.

207. Franklyn Waltman, *Al Smith Puts on Good Political Show; Effect on Coming Election Problematic*, WASH. POST, Jan. 27, 1936, at 2.

208. Bruner, *supra* note 202, at 2.

209. *Notes Smith’s Company*, N.Y. TIMES, Jan. 27, 1936, at 2 (quoting Eugene Connolly, president of the Association of Knickerbocker Democrats, as he asserts that Al Smith does not speak for the masses of Democratic voters).

210. *Text of Senator Robinson’s Reply to Ex-Gov. Smith’s Speech*, N.Y. TIMES, Jan. 29, 1936, at 12; *see also* Meyer Berger, *The High Hat Turns the Corner, Too: Its Devoted Cult Knows that Prosperity Is Here*, N.Y. TIMES, Dec. 27, 1936, at SM8 (discussing the significance of Smith’s headwear).

211. *See Lewis Hits Smith, Backs Roosevelt*, N.Y. TIMES, Jan. 29, 1936, at 1 (stating that United Mine Workers of America President John L. Lewis supported President Roosevelt and criticized Al Smith in a speech endorsed by other labor groups).

212. *Id.* at 14; *see also Smith Is Booed by 1,700 Mine Delegates Here*, WASH. POST, Jan. 29, 1936, at 1 (describing the thirty-fourth United Mine Workers of America convention where delegates pledged to support President Roosevelt and the New Deal).

213. Louis Stark, *Miners Warned on Guffey Act*, N.Y. TIMES, Feb. 6, 1936, at 5; *see also Liberty League Held ‘Inimical’ at Mine Parley*, WASH. POST, Feb. 6, 1936, at 2 (describing passage of a resolution criticizing the American Liberty League at the United Mine Workers convention).

214. For instance, the head of the Amalgamated Clothing Workers called on labor to help defeat the Liberty League and related forces, which “resent every attempt to give the workers either a new deal, a square deal or any other kind of a deal, except a raw deal.” *Hillman Demands Vote for President*, N.Y. TIMES, Apr. 10, 1936, at 14. Roosevelt supporters also sought to rally African American voters to their side by pointing to the Liberty League, saying that the League and its lawyers “are principally engaged in preserving the liberty of a few men to wring their bread from the sweat of other men’s faces.” *26 Negro Rallies Back Roosevelt*, N.Y. TIMES, Sept. 22, 1936, at 4 (quoting Donald Richberg in his warning that placing control and power in the hands of wealthy men endangers the liberty of the rest).

215. Louis Stark, *Labor Chiefs Give Roosevelt Pledge*, N.Y. TIMES, May 12, 1936, at 2.

organization was necessary to counter the American Liberty League.²¹⁶ The new labor league did not even mention opposition by the Republican Party.²¹⁷ As one labor leader later declared, the League was the true opponent, and the eventual Republican nominee would merely be a “spokesman for the American Liberty League, a holding company organized by the big interests and an institution that is a threat to our liberties.”²¹⁸

The media attention on Smith’s speech gave Democrats new opportunities to mock the Liberty League’s constitutional rhetoric.²¹⁹ One speaker denounced Liberty Leaguers’ penchant for invoking the Founders, saying that “they apparently think the Revolution was fought to make Long Island safe for polo players.”²²⁰ A Democratic senator said that the American people understood that the “liberty” advocated by the Liberty League is “the liberty to exploit and profiteer upon the American people.”²²¹ One congressman succeeded in blocking a bill to prohibit teaching communism in federally funded schools by introducing, as a joke, an amendment to prohibit schools from teaching the Liberty League’s philosophy.²²² Both groups are radicals, the

216. See William V. Nessly, *Senate to Study U.S. Fund Use for Campaigns*, WASH. POST, Apr. 2, 1936, at 1 (explaining that the labor league was created to counter the Liberty League); Stark, *supra* note 213, at 2 (“We are neither afraid, bashful nor timid in our determination to the complete unmasking of the offensive of the Manufacturers Association, the offensives of the Liberty League . . . or any other such organizations formed to defeat the President.”).

217. See Stark, *supra* note 213, at 2 (quoting the labor league’s spokesman explaining the organization’s purpose and omitting any mention of the Republican Party).

218. Louis Stark, *Asks Union Labor to Support Roosevelt*, N.Y. TIMES, May 26, 1936, at 14 (quoting Sidney Hillman, president of the Amalgamated Clothing Workers of America). At the Republican National Convention, the president of the Amalgamated Clothing Workers likewise described the Republican Party as the “political agents of the Liberty League.” *Labor Executives Criticize Speech*, N.Y. TIMES, July 24, 1936, at 12. John L. Lewis said that Republican candidate Alf Landon was a puppet of the Liberty League and big business. *Lewis Declares Landon Is ‘Puppet’*, N.Y. TIMES, Sept. 20, 1936, at 27.

219. James Farley described the League as the “center and soul of the predatory powers.” *Farley Scores Liberty League as Anti-Social*, WASH. POST, Feb. 6, 1936, at 2. Secretary of the Interior Harold Ickes declared that the League was simply “an alias for big business.” *Ickes Says Hoover Aims to Stir Fear*, N.Y. TIMES, Feb. 27, 1936, at 8. New York Mayor Fiorella LaGuardia declared, “God help this country when the unemployed will be at the mercy of the Liberty League who would continue to feed the hungry on ticker tape, epigrams, wisecracks and slogans.” *Mayor Backs WPA and Warns Moses*, N.Y. TIMES, Mar. 15, 1936, at 31. One Democratic senator called the League the “American ‘Lobby’ League,” and said it was “composed in large part of a group of griping and disgruntled politicians . . . masquerading as patriots but in reality apostles of greed.” *Harrison Hits Plan of Liberty League*, N.Y. TIMES, Dec. 27, 1935, at 4; see also *House in Uproar on Liberty League*, N.Y. TIMES, Feb. 1, 1936, at 2 (quoting an Ohio congressman’s speech on the House floor that “the only difference between the American Liberty League and the Communists is that the Communists seek to divide all and the League seeks to take all”); *Text of Senator Robinson’s Reply to Ex-Gov. Smith’s Speech*, *supra* note 210, at 12 (declaring that “[t]he list of directors and officers of the American Liberty League reads like a roll-call of the men who have despoiled the oil, coal and water-power resources of this country”). Democrats frequently referred to the League as the “du Pont Liberty League.” See, e.g., *M’Nutt Says Others May Control Landon*, N.Y. TIMES, July 22, 1936, at 13 (demonstrating how Indiana Governor Paul McNutt referenced the League as the “du Pont Liberty League”); *‘Nonpartisan’ Fight on Roosevelt Is Opened by the Liberty League*, N.Y. TIMES, July 1, 1936, at 17 (displaying how Farley referenced the League as the “crew of the du Pont Liberty League” in discussing their financial support of the Republican ticket).

220. Eunice Barnard, *Dr. Counts Assails ‘Liberty’s Enemies’*, N.Y. TIMES, Feb. 24, 1936, at 5.

221. *Connally Defends New Deal*, WASH. POST, Mar. 29, 1936, at 6 (quoting Senator Connally of Texas in his critique of the American Liberty League).

222. James D. Secrest, *House Blocks Rep. Blanton in Red Fight*, WASH. POST, Feb. 1, 1936, at 13.

congressman said, and “the only difference between the American Liberty League and the Communists is that Communists seek to divide all and the American Liberty League seeks to take all.”²²³

Within a few weeks of Smith’s speech, some commentators had cooled in their assessment of its success, declaring that the speech had served to help both Roosevelt and his opponents.²²⁴ That perception did not last long. By April, the *Washington Post* reported that Roosevelt’s popularity had steadily increased following Smith’s speech.²²⁵ By August, the *Post* stated what had become conventional wisdom: after Smith’s speech, the general public rejected the Liberty League because it had become apparent that it was the “spokesman for special and selfish interests.”²²⁶

The negative reaction against the League that started with Smith’s speech became so strong that political commentators claimed that it was the turning point in the election and marked the moment when Roosevelt regained popularity—leading to his overwhelming reelection.²²⁷ *New York Times* columnist Arthur Krock, who in August 1934 had called the Liberty League the answer to Wall Street’s prayers, now declared that it had been obvious all along that the League’s campaign was bound to backfire: “A political neophyte could have told the founders of the American Liberty League that its concentration of du Pont backing, and its array of disappointed Democrats, threatened at the outset to turn it into a rich political gift to the President.”²²⁸

3. Senator Hugo Black’s Investigation of the Liberty League

The Democrats’ coordinated response to the Liberty League was not limited to speeches. On January 25, 1936, the same day that Al Smith gave his speech at the American Liberty League dinner, Senator Hugo Black announced that he was launching an investigation of the League.²²⁹ By all accounts, Black’s investigation was a deliberate attempt to discredit New Deal enemies, and it proved quite effective.²³⁰ It generated a great deal of media attention and has been credited by many as a key part of the Democrats’ strategy to undermine the Liberty League.²³¹

Black was chairman of the Special Committee to Investigate Lobbying Activities, which had been established in July 1935 to investigate unethical corporate lobbying

223. *Id.*

224. Franklyn Waltman, *Administration’s Strategy Believed Aimed to Keep AAA Substitute Apart from Taxes*, WASH. POST, Feb. 19, 1936, at 2.

225. *Political Battleground Shifts East Again to New York State*, WASH. POST, Apr. 12, 1936, at B1.

226. *The Part of Wisdom*, WASH. POST, Aug. 7, 1936, at X6.

227. See, e.g., Arthur Krock, *Political Tide Turns Again to Roosevelt*, N.Y. TIMES, Mar. 22, 1936, at E3 (“The President’s political ground-gaining seems to have begun after the American Liberty League dinner on Jan. 25.”).

228. Arthur Krock, *Black Committee Exposes the Political Promoter*, N.Y. TIMES, Apr. 17, 1936, at 20.

229. *Liberty League Is Target*, N.Y. TIMES, Jan. 26, 1936, at 37.

230. See, e.g., GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 48 (1977) (describing how Hugo Black’s investigation provided a key element in the Democrats’ overwhelming electoral victory); SHESOL, *supra* note 26, at 216 (“The League, by the late spring, was dying of a thousand cuts—many inflicted by Hugo Black of Alabama, the relentless chairman of the Senate Lobby Investigating Committee.”).

231. See, e.g., SHESOL, *supra* note 26, at 216 (arguing that the more investigating Black’s committee did, “the more ridiculous” the League appeared).

against the Public Utility Holding Company Act (also known as the Wheeler-Rayburn Act), a New Deal law that restricted the powers of holding companies.²³² Many leaders of the Liberty League had in fact lobbied against the Act.²³³ Yet it was immediately apparent that Black's investigation of the League would not focus in any significant respect on lobbying activities.²³⁴ The *New York Times* picked up on this immediately, describing the investigation as "[f]urther indication that the administration forces in Congress intend to wage war against the Liberty League and its membership."²³⁵ Black set out to show that the business interests controlling the League secretly coordinated a variety of groups opposing the New Deal.²³⁶ Echoing the President's State of the Union address, Black alleged that these groups sought to "conceal their sinister activities behind lofty names and sonorous phrases."²³⁷

Black's investigation succeeded in demonstrating that the Liberty League was deeply connected to other groups fighting the New Deal.²³⁸ Liberty League backers had funded the fascist-leaning Sentinels of the Republic, which declared that "old line Americans . . . want a Hitler"²³⁹ and claimed that a "Jewish threat" was undermining "the fundamental principles of the Constitution."²⁴⁰ Black's investigation also showed substantial connections between Liberty League backers and the Southern Committee to Uphold the Constitution, which added race-based appeals to the charge that the New Deal was unconstitutional.²⁴¹ Pierre du Pont and John Raskob had each given \$5,000 to finance the notorious "Grass Roots" Convention, organized by the Southern Committee, at which thousands of copies of a photo had been distributed showing

232. WOLFSKILL, *supra* note 4, at 225.

233. *Id.* at 227.

234. Black's biographers have agreed with the assessment that the investigation of the Liberty League was driven by politics, probably at the suggestion of the White House. See DUNNE, *supra* note 230, at 158 (arguing that the administration instigated the Black investigating committee as the presidential election approached); WOLFSKILL, *supra* note 4, at 227 (suggesting that Black's committee was clearly investigating more than merely lobbying activities).

235. *Liberty League Is Target*, *supra* note 229, at 37.

236. See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 185 (1994) (arguing that Black sought to prove that the Liberty League's leaders artificially created New Deal opposition).

237. *Saints and Sinners*, N.Y. TIMES, Mar. 11, 1936, at 18 (quoting speech of Black). Catching the drift of Senator Black's investigation, the *New York Times* asked, "What was the connection between these organizations whose business it was to attack the New Deal?" WOLFSKILL, *supra* note 4, at 228.

238. See, e.g., *House, 153 to 137, Rebukes Senate Lobby Committee; Bars Higher Counsel Fee*, N.Y. TIMES, Apr. 16, 1936, at 1-2 (noting the Senate Committee learned that Liberty League sponsors also financed an anti-New Deal campaign); *Say New Deal Foes Have Same Donors*, N.Y. TIMES, Mar. 22, 1936, at 13 (providing evidence that the same contributors, including the Liberty League, financed multiple anti-New Deal organizations). Liberty League President Jouett Shouse strongly denied that, even though the same backers funded them all, each of these other organizations was merely "one of the interlocking branches of the Liberty League." WOLFSKILL, *supra* note 4, at 233.

239. *New Deal Foes Help Sentinels, Inquiry Is Told*, WASH. POST, Apr. 18, 1936, at 5.

240. WOLFSKILL, *supra* note 4, at 231, 233; see also *New Deal Foes Help Sentinels, Inquiry Is Told*, *supra* note 239, at 5 (quoting letters from anti-New Deal organization leaders discussing the "Jewish threat"); *Says Smith Spoke for Liberty League to Remove 'Taint'*, N.Y. TIMES, Apr. 18, 1936, at 1, 4 (noting these letters).

241. See *Five Big Guns*, N.Y. TIMES, Feb. 2, 1936, at E1 ("The Federal Government is working consistently to tear down States' rights.").

Eleanor Roosevelt being escorted to her car by two African American men, accompanied by an editorial denouncing Franklin Roosevelt for inviting “Negroes to come to the White House Banquet Table and sleep in the White House beds.”²⁴² The du Ponts apparently were untroubled by the distribution of these race-baiting materials. “It is apparent they did not disapprove,” the conference organizer testified before Black’s committee, because they contributed more money after learning of the photos.²⁴³

As support for the Liberty League waned in the months after Smith’s speech, Black’s investigation kept the Liberty League in the news, painting the League’s backers as shadowy figures funding and pulling the strings on a variety of radical organizations that used constitutional rhetoric to attack the New Deal.²⁴⁴ At Roosevelt campaign headquarters, Democratic National Chairman Jim Farley no doubt had reason to smile.²⁴⁵

4. The Roosevelt Campaign’s Success in Portraying the Republicans as Servants of the Liberty League

At the same time that the Roosevelt campaign was making the Liberty League synonymous with entrenched greed, the campaign was making the Republican Party synonymous with the Liberty League.²⁴⁶ Campaign Chairman Farley declared that “[t]he Republican National Committee has a little cry-baby brother, called the American Liberty League. The brothers are always together. They pal around together, they think the same thoughts, the[y] echo the same phrases and they seek the same end.”²⁴⁷ As Farley charged, “whether they like it or not, the Republican leaders represent the same forces of reaction that the Liberty League represents. They would go back to the Old Deal and let those people run the country who presided over its downfall.”²⁴⁸ Again and again, Democrats charged that the Republican Party was

242. WOLFSKILL, *supra* note 4, at 177; see also ‘Grassroots’ Open War on New Deal; Boom Talmadge, N.Y. TIMES, Jan. 30, 1936, at 1, 8 (reporting of the “Grass Roots” condemning Mrs. Roosevelt for being escorted by African Americans).

243. WOLFSKILL, *supra* note 4, at 242. The committee discovered that one anti-New Deal group, the Farmers’ Independence Council, was run directly out of the Liberty League offices and was funded by the League. *Id.* at 239–40. In rhetoric almost identical to the Liberty League, the group called on farmers “who wish to preserve their liberty and our present form of government” to rise up to preserve the “principles of Americanism” against the radical, tyrannical policies of the New Deal. See James C. Carey, *The Farmers’ Independence Council of America, 1935-1938*, 35 AGRIC. HIST. 70, 72 (1961); *Anti-New Dealers Backed Farm Group*, N.Y. TIMES, Apr. 15, 1936, at 1, 11. Black asked derisively: “Does Mr. Jouett Shouse devote much time to farming?” *Shouse Denies League Backs Farm Council*, WASH. POST, Apr. 11, 1936, at X4.

244. See SHESOL, *supra* note 26, at 216–17 (noting several organizations that contributed to the League and referring to them as “self-proclaimed defenders of the Constitution”).

245. See *id.* at 217 (stating that Farley “grinned” after being told by a reporter about the League’s activities).

246. See Franklyn Waltman, Jr., *Foreign Affairs Stand Overshadows Domestic Issues as President Calls for Neutrality Law*, WASH. POST, Jan. 4, 1936, at 1 (quoting President Roosevelt’s address to Congress).

247. *Farley Asserts Administration Rescued Trade*, WASH. POST, Feb. 22, 1936, at 1–2; see also *Farley Blasts G.O.P Critics of Roosevelt*, *supra* note 146, at 1, 3 (describing the Liberty League as “an organization of multimillionaires which is run as a subsidiary of the Republican National Committee”).

248. *Farley’s Address on National Issues Before Democrats at Albany*, N.Y. TIMES, Apr. 16, 1936, at 18. Speaking at the Democratic National Convention in June 1936, Farley likewise charged that “[b]ehind the Republican ticket is the crew of the du Pont Liberty League and their allies.” *Farley’s Address to the*

merely a stand-in for the Liberty League.²⁴⁹

The Roosevelt campaign was correct that Liberty Leaguers worked to elect the Republican nominee Alf Landon. Few were surprised when Al Smith endorsed Landon; and no one was surprised when Lamont and Pierre du Pont endorsed Landon, making it clear that Landon had the support of the most well-known Liberty Leaguers.²⁵⁰ Indeed, the du Ponts were by far the largest contributors to the Republican campaign, donating \$144,000 to the Landon cause.²⁵¹ Late in the campaign, the *New York Times* described Farley as “jubilant” over revelations that Liberty League supporters had given large contributions to Landon’s campaign efforts.²⁵²

It was not merely the endorsements and financial backing of Liberty League leaders that made it easy for the Democrats to portray the Republicans as puppets of the American Liberty League. The philosophy and rhetoric advanced by the Republicans in 1936 echoed that of the League.²⁵³ In January 1936, Liberty League executives said they would actively support the Republican nominee if the Republicans adopted a platform that advanced the League’s policies.²⁵⁴ Six months later, the party adopted a platform that employed the same kind of constitutional rhetoric familiar from Liberty League pamphlets.²⁵⁵ Echoing Liberty League materials, the Republican platform

Delegates, N.Y. TIMES, June 24, 1936, at 14; see also *Farley Scores Liberty League As Anti-Social*, *supra* note 219, at 2 (quoting Farley describing the Liberty League as an ally of the Republican National Committee).

249. The Democrats alleged that the Republicans had chosen Alf Landon because “the DuPont Liberty League crowd is less afraid of him” than other Republicans, so he was acceptable to the Liberty League. *Governor Is Recognized as Likely Opponent for First Time*, WASH. POST, May 21, 1936, at 6. In his keynote address to the Democratic National Convention, Senator Alben Barkley called the American Liberty League the Republican Party’s “illegitimate brother.” *The Keynote Speech*, N.Y. TIMES, June 24, 1936, at 16. At the Convention, the Democrats portrayed the election as a choice between Roosevelt and the Liberty League. As Pennsylvania Governor Earle put it, “The more the people realize and the more they keep in mind that the issue is the liberalism of Roosevelt versus the big business fascism of the Liberty League the better it will be.” *Leading Democrats Minimize Effect of the Conservative Group Bolt*, N.Y. TIMES, June 23, 1936, at 12. Throughout the campaign, the Democrats continued the assault on Landon as the puppet of the Liberty League. See, e.g., *Farley Deplores Campaign of Fear*, N.Y. TIMES, Aug. 20, 1936, at 11 (arguing that Governor Landon was essentially the American Liberty League candidate); *M’Nutt Says Others May Control Landon*, *supra* note 219, at 13 (quoting radio address by Indiana Governor McNutt asserting that Republican presidential candidate Landon was controlled by the American Liberty League); *Robinson Derides Landon Tax Ideas*, N.Y. TIMES, Aug. 29, 1936, at 4 (emphasizing that Governor Landon received generous campaign funding from his Liberty League supporters).

250. See *Comment Acrid on Bolt Threat of Smith Bloc*, WASH. POST, June 22, 1936, at 2 (noting Al Smith’s support of Landon); *Hamilton Asks Senate to Rush WPA Inquiry*, WASH. POST, Oct. 17, 1936, at X7 (noting the du Ponts’ endorsements of Landon); *‘Remedy for All Our Ills’*, N.Y. TIMES, Oct. 2, 1936, at 1, 5 (highlighting Al Smith’s support of Landon).

251. See *Du Ponts’ \$144,430 Tops Landon Gifts*, N.Y. TIMES, Dec. 2, 1936, at 10 (providing that three members of the du Pont family were Landon’s largest financial contributors); *Hamilton Asks Senate to Rush WPA Inquiry*, *supra* note 250, at X7 (reporting that the du Ponts and their associates contributed \$383,000 to the Republican Party during 1936); *\$2,524,950 Spent by Republicans*, N.Y. TIMES, Sept. 11, 1936, at 10 (noting the du Pont family as among Landon’s largest contributors).

252. *Du Pont Funds Aid Landon in Maine*, N.Y. TIMES, Sept. 10, 1936, at 1, 4.

253. *Liberty League Tends Republican*, N.Y. TIMES, Jan. 26, 1936, at 37.

254. *Id.*

255. REPUBLICAN PARTY PLATFORM OF 1936 (June 9, 1936), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29639#axzz1xV5xdXfk>.

charged that the New Deal was un-American and unconstitutional.²⁵⁶ It declared that “America is in peril” because the New Deal “dishonored American traditions.”²⁵⁷ The platform dedicated the Republican Party to preserving free enterprise and the “American system of Constitutional and local self government.”²⁵⁸ Harold Ickes said that Liberty League President Shouse must have served as a “wet nurse” for the development of the platform.²⁵⁹

In his campaign speeches, Landon took up many of the themes advanced by the Liberty League. Although Landon had been described as a “practical” progressive before he received the nomination, his positions during the campaign echoed the constitutional nationalism of the Liberty League.²⁶⁰ He argued that the “essence of the New Deal” was “that the Constitution ‘must go’ in order to give men in Washington ‘the power to make America over, to destroy the American way of life and establish a foreign way of life in its place.’”²⁶¹ Harold Ickes responded by giving a nationally broadcast speech devoted to contrasting Landon’s earlier progressive views with the views he took during the campaign.²⁶² Ickes surmised that Landon had shifted to follow “the lead of the American Liberty League, founded by the liberty-loving DuPonts.”²⁶³

Having accepted substantial campaign contributions from Liberty League leaders and having adopted the League’s constitutional rhetoric, the Republicans were slow to recognize the political harm caused by the party’s association with the Liberty League.²⁶⁴ The *New York Times* reported that the “political liability of the League was so great by June that . . . Chairman Hamilton of the Republican committee would have walked a mile out of his way rather than be seen in the company of a leaguer.”²⁶⁵ By

256. *Id.*

257. *Id.*

258. *Id.* The Republicans’ focus on the Constitution was a new development. The 1932 platform had not presented the party’s agenda in constitutional terms and had mentioned the Constitution only in relation to the campaign to repeal the Prohibition Amendment. REPUBLICAN PARTY PLATFORM OF 1932 (June 14, 1932), available at <http://www.presidency.ucsb.edu/ws/?pid=29638>.

259. *Ickes Doubts Unity of Republicans*, N.Y. TIMES, June 8, 1936, at 4; see also *Foes’ Platform ‘Contradictory’ Says Wallace*, WASH. POST, July 2, 1936, at X3 (quoting Secretary of Agriculture Henry Wallace’s claim that the Republican Party platform serves the “monopolistic industrial groups which are back of the (American) Liberty League”).

260. See *Ickes Attacks Landon ‘Anti-Dictator’ Role, Citing 1933 Plea for Oil Control*, WASH. POST, Aug. 4, 1936, at X4 (describing Landon as a “practical” progressive and noting how his campaign positions closely resembled the policies of the Liberty League).

261. *Baltimore Crowd Cordial to Landon*, N.Y. TIMES, Oct. 27, 1936, at 20.

262. For instance, before the campaign Landon had supported federal regulation of the oil and gas industries but now argued that such regulation violated states’ rights. See *Ickes Attacks Landon ‘Anti-Dictator’ Role, Citing 1933 Plea for Oil Control*, *supra* note 260, at X4.

263. *Id.*; see also *Text of Secretary Ickes Radio Reply to Governor Landon and Colonel Knox*, N.Y. TIMES, Aug. 4, 1936, at 12 (reproducing text of speech).

264. See *Says Farley Is ‘Scared’*, N.Y. TIMES, May 22, 1936, at 3 (“[Farley] would like to hang the du Pont Liberty League crowd on our party, but he cannot do that for a minute” (quoting Rep. Lambertson)). The Liberty League problem was apparent by the Republican National Convention in June 1946, when one potential vice presidential candidate was eliminated from consideration because of his connection with the Liberty League. Charles R. Michael, *Cleveland Marks Turning Point for Republicans*, N.Y. TIMES, June 7, 1936, at 61.

265. Arthur Krock, *Liberty League Is Distinctly Pro-Landon*, N.Y. TIMES, Aug. 7, 1936, at 18.

the time of the Republican National Convention, Republican operatives feared that open support by the League would hurt Landon.²⁶⁶ Republicans begged the Liberty League not to endorse Landon or to work openly for his election.²⁶⁷

To comply with Republican requests to distance the party from the League, in July 1936 the League issued a press release declaring that its opposition to the New Deal was strictly “nonpartisan” and that the League endorsed no candidate.²⁶⁸ No one believed it.²⁶⁹ Secretary of Agriculture Henry Wallace quipped that, although Liberty League supporters “pretend that they are in no way identified with the National Republican leadership their money is and so are some of their trained seals.”²⁷⁰ By September 1936, Republicans realized that any association with the American Liberty League was poisonous.²⁷¹ But by then it was too late. Thanks to the relentless campaign of the Democrats to paint the American Liberty League as the spokesman for corporate greed and to portray the Republicans as puppets of the League, the League had become a liability that Landon and the Republicans could not shed.

C. *The American People’s Judgment*

On November 2, 1936, Roosevelt won reelection in a historic landslide. He received 60.8% of the vote to Landon’s 36.5%, the largest margin of victory since the uncontested election of 1820.²⁷² Roosevelt captured the electoral votes of every state except Maine and Vermont, giving him 523 electoral votes to Landon’s 8, the largest share of the Electoral College vote since the establishment of the two-party system.²⁷³

266. *Landon Packs Rods for Colorado Trip*, N.Y. TIMES, June 24, 1936, at 13.

267. See, e.g., Krock, *supra* note 265, at 18 (“The Republican candidate and organization, feeling that its implied endorsement and support are very hurtful, have made plain their wish that the League as a unit take a position outside the party breastworks.”).

268. See ‘Nonpartisan’ Fight on Roosevelt Is Opened by the Liberty League, *supra* note 219, at 1 (“The leaders of the drive to elect Governor Landon are understood to have urged the Liberty League to stay aloof from too close alliance with the Landon campaign.”); see also *Party Link Denied by Liberty League*, N.Y. TIMES, Aug. 6, 1936, at 11 (providing League’s statement that it did not endorse any party or candidate).

269. See, e.g., *Farley’s Address on National Issues Before Democrats at Albany*, *supra* note 248, at 18 (“But the Republican leaders seem very cold to them, for they realize that if they are found consorting with the Liberty League the American people will think even less of the Republicans than they do now. And so the Liberty League is making it more embarrassing for the Republicans every day. Republican leaders are asking each other how they can get rid of the Liberty League.”); Krock, *supra* note 265, at 18 (questioning how the League can be nonpartisan when they clearly are against Roosevelt and the New Deal); *The Part of Wisdom*, *supra* note 226, at X6 (declaring that, notwithstanding the League’s expressed nonpartisanship, “[t]here is no question, of course, about the league’s anti-New Deal position” or that the group is “headed by a Democrat openly hostile to President Roosevelt”).

270. *Declares Landon Offers Only Dole*, N.Y. TIMES, Oct. 4, 1936, at 42 (internal quotation mark omitted).

271. See, e.g., *Money in Elections*, N.Y. TIMES, Sept. 12, 1936, at 16 (“The League’s decision not to give [contributions directly to Landon] . . . was generally recognized as acceptance of the wholesome Republican National Committee fear of official connection with the League which, for one reason and another, has become a definite political liability.”).

272. 1 CONGRESSIONAL QUARTERLY’S GUIDE TO THE PRESIDENCY 375 (Michael Nelson ed., 2d ed. 1996); YANEK MIECZKOWSKI, THE ROUTLEDGE HISTORICAL ATLAS OF PRESIDENTIAL ELECTIONS 100 (2001); Leuchtenburg, *supra* note 19, at 2108.

273. MIECZKOWSKI, *supra* note 272, at 100.

Of course, the results by themselves do not resolve whether the 1936 election amounted to a popular mandate in favor of the New Deal constitutional philosophy. As Barry Cushman has written, “election returns alone tell us no more than which person or persons won.”²⁷⁴ Nor does the fight between the American Liberty League and President Roosevelt reveal the extent to which voters actually supported the New Deal constitutional philosophy, rejected the League’s philosophy, or gave any consideration to constitutional issues. The sources relied on here—pamphlets, radio addresses, campaign speeches, news articles, and editorials—reflect elite opinions and do not show why the American people actually chose Roosevelt, whether it was because they sought to endorse his constitutional philosophy or merely because they liked the cut of his jib.

The meaning of an election, however, is socially constructed. It is not an objectively determinable fact, and it is built more on public perceptions of what mattered to voters than on what was actually in voters’ minds.²⁷⁵ The story of the conflict between Roosevelt and the American Liberty League establishes that questions of constitutional philosophy received enormous attention in the campaign, and the election was presented to voters as a clash of competing constitutional visions. Key participants in the election—Roosevelt, the Liberty League, Alf Landon, and countless others—declared that constitutional issues were central to the campaign. Throughout the campaign, they employed constitutional rhetoric and asked the American people to take a stand on fundamental issues of constitutional philosophy. These participants in the campaign believed that the election would resolve fundamental constitutional questions.

At the time, the election results were widely understood as an expression of overwhelming public support for the constitutional philosophy supporting the New Deal and a repudiation of the Liberty League’s contrary views.²⁷⁶ The Democrats naturally understood the election that way, a conviction they repeated throughout the 1937 fight over Roosevelt’s Court-packing plan.²⁷⁷ Many in the press also interpreted the election returns in this way.²⁷⁸ Republicans, too, apparently saw the election returns

274. Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *BUFF. L. REV.* 7, 10 (2002).

275. As political scientist Lawrence Grossback has written, “Whatever is going on in the minds of voters, it may be that politicians sometimes interpret elections as carrying messages and then act on that interpretation.” Lawrence J. Grossback et al., *Electoral Mandates in American Politics*, 37 *BRIT. J. POL. SCI.* 711, 711 (2007). In Grossback’s formulation, an electoral “mandate” is not something that can be determined by polling voters about whether they actually intended to send a particular message through their votes but instead should be understood as “an agreement to regard a particular election as bearing a message.” *Id.*

276. See, e.g., *Pinchot Urges Party to Shed Rule by Rich*, *WASH. POST*, Nov. 23, 1936, at X22 (explaining the meaning of the 1936 election results with regard to the Republican Party and its views).

277. Speaking in 1938, Chairman Farley declared that the 1936 election definitively repudiated the Liberty League’s attempt to “steer our people back to a reactionary system.” *Farley Ridicules Speech by Frank*, *N.Y. TIMES*, Feb. 1, 1938, at 9.

278. See, e.g., Franklyn Waltman, *Second Decisive Defeat in Two Campaigns Has Started Tongues to Wagging Relative to the Future of the Republican Party*, *WASH. POST*, Nov. 6, 1936, at X2 (concluding that the “huge vote given to the President was intended as a rebuke to those financiers, industrialists and publishers supporting the Landon candidacy” and endorsement of enlarged “social responsibility” of the federal government). *But see Landslide Vote Is Not Blanket Indorsement of New Deal*, *WASH. POST*, Nov. 8, 1936, at

as a rejection of the Liberty League's philosophy.²⁷⁹ After the defeat, the Republicans abandoned the rhetoric of constitutional nationalism they employed in the campaign and did not challenge the foundations of the administrative state again until the Barry Goldwater campaign in 1964.²⁸⁰

The founders of the Liberty League also signaled their recognition that the election was a repudiation of their views by effectively throwing in the towel after the election. In the days following the election, the Liberty League put a brave face on the defeat, vowing to continue operations.²⁸¹ Unprepared for the magnitude of the defeat, however, the League drastically shrank its staff and decided to end its publicity campaign.²⁸² A month later, the press was already asking: "What has become of the league, anyway?"²⁸³ The election had made the Liberty League name toxic, and public support by the League was now understood to undermine any cause the League would support.²⁸⁴ The next year, the League's leaders vehemently opposed Roosevelt's Court-packing plan, but opponents of the plan begged the du Ponts and the Liberty League not to play any public role in the fight against it, declaring that "[t]hey are black beasts in the popular imagination and if they rally against the President, they are liable to make him friends instead of enemies."²⁸⁵ In 1940, the League closed down with little notice.²⁸⁶

III. POPULAR CONSTITUTIONALISM AND THE 1936 ELECTION

The competing campaigns of the American Liberty League and President Roosevelt shed new light on how the public came to accept the New Deal constitutional philosophy. For decades, the relationship between law and politics has been a central obsession of constitutional law scholarship, and the role of politics in the New Deal constitutional revolution has been one of the main subjects of this obsession. A mammoth body of scholarship has grappled with explaining how the profound changes in constitutional doctrine associated with the New Deal came about.²⁸⁷ This literature

B1 (concluding that the personality of the candidates overshadowed the individual issues of the campaign).

279. See, e.g., *Pinchot Urges Party to Shed Rule by Rich*, *supra* note 276, at X22 (declaring that the election results "proved 'beyond denial that the American people rejected the leadership of concentrated wealth'" (quoting former Pennsylvania Governor Gifford Pinchot)).

280. See Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 6 (2009) (describing how Barry Goldwater revived conservatism as a "major force in the Republican party").

281. See *Liberty League to Go On*, N.Y. TIMES, Nov. 13, 1936, at 14 (noting that the Liberty League had no plans to limit its activities following the election); *Liberty League Won't Disband, Shouse States*, WASH. POST, Nov. 13, 1936, at X7 (explaining that Shouse planned for the League to be just as active in the next session of Congress following the election).

282. WOLFSKILL, *supra* note 4, at 247.

283. *The Nation's Passing Show*, N.Y. TIMES, Dec. 20, 1936, at E9.

284. See WOLFSKILL, *supra* note 4, at 247–49 (describing the downfall of the Liberty League as a result of the 1936 election).

285. *Id.* at 251 (quoting letter from William Allen White to James E. Watson).

286. *Id.* at 248–49.

287. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 58 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*] (asserting that New Deal Democrats were equal to the Founding Fathers in creating substantive lawmaking solutions in the name of the people); ACKERMAN, *TRANSFORMATIONS*, *supra* note 18, at 25 (noting

focuses primarily on why the Supreme Court changed course in 1937 and stopped striking down New Deal legislation.²⁸⁸ Of central importance in this literature is how the famous “switch in time” occurred, under which Justice Owen Roberts joined with the dissenters to create a majority in favor of the constitutionality of New Deal laws.²⁸⁹ As historian Laura Kalman explained, the central dispute has been between “internalists” who explain the development as an evolutionary change in legal doctrine and “externalists” who point to political and economic events that persuaded the Court to change course.²⁹⁰

With the publication of the highly influential, yet highly controversial, *We the People*, Bruce Ackerman declared that he sought to get past the internalist-externalist divide.²⁹¹ Ackerman argued that in the 1930s the American people themselves chose to adopt a new constitutional regime, albeit without employing the Article V procedures for formally amending the Constitution.²⁹² As Ackerman tells it, in 1936, after the Supreme Court struck down key pieces of the New Deal, Roosevelt reconceived the New Deal in constitutional terms and took the fight to the American people, who voted overwhelmingly in favor of President Roosevelt’s constitutional vision and against the Court’s.²⁹³ The following year, chastened by the public’s repudiation of its constitutional views and under the threat of Roosevelt’s Court-packing plan, the Court submitted to the will of the people.²⁹⁴

The 1936 election thus is crucial to Ackerman’s claim that the New Deal revolution amounted to a “constitutional moment,” in which the voters—or, as Ackerman calls them, “We the People”—made a fundamental choice about the meaning of the Constitution, effectuating their wishes not merely in the realm of ordinary politics but instead creating a new “constitutional regime.”²⁹⁵ Ackerman asserts that through Roosevelt’s landslide victory the people endorsed the conception of federal power underlying the New Deal: “If the American people were ever endorsing a break with their constitutional past, they were doing so in the 1930’s.”²⁹⁶ The

the central importance of the New Deal transformations to modern constitutional development); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 5–6 (1998) (asserting that the constitutional and jurisprudential changes during the New Deal era exemplified the history of ideas more than the history of politics); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19 (1996) (casting the Supreme Court’s change in approach as approving a more active federal government); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 233 (1995) (noting the Court’s large amount of reversals of previous decisions in support of the breadth of the “Constitutional Revolution of 1937”).

288. See, e.g., CUSHMAN, *supra* note 287, at 3–7 (explaining the different conceptualizations of the Court’s decisions to stop striking down New Deal legislation).

289. Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165, 2166–69 (1999).

290. *Id.* at 2165–66; see also Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 *U. CHI. L. REV.* 1061, 1061–62 (1999) (book review) (describing “internalist” and “externalist” perspectives).

291. ACKERMAN, *TRANSFORMATIONS*, *supra* note 18, at 343.

292. *Id.* at 268–69.

293. *Id.* at 306–11.

294. *Id.* at 333–37.

295. *Id.* at 309; ACKERMAN, *FOUNDATIONS*, *supra* note 287, at 58–80.

296. ACKERMAN, *FOUNDATIONS*, *supra* note 287, at 53.

“Roosevelt revolution,” Ackerman asserts, should “be viewed as a constitutive act of popular sovereignty that *legitimately* changed the preceding Republican Constitution.”²⁹⁷ For Ackerman, the 1936 election demonstrates the people’s central role in adopting the new constitutional regime, declaring, “the language of popular sovereignty provides an appropriate description for the constitutional transformations achieved during this period.”²⁹⁸

Many scholars have sharply challenged Ackerman’s claims about the role of the American people in adopting the New Deal Constitution.²⁹⁹ Terrance Sandalow wrote that “it is doubtful that the People made, or can be shown to have made, the decisions he attributes to them.”³⁰⁰ Larry Kramer likewise declared, “[t]he engaged public—the ‘We the People’ Ackerman celebrates—was never asked to adopt the broad principles that come to define its new constitutional regime.”³⁰¹ A central aspect of the case put forward by Ackerman’s critics is that Roosevelt did not actually campaign against the Supreme Court.³⁰² As Michael Klarman pointed out, “Ackerman asserts that the 1936 election represented a popular mandate against the Court’s constriction of the New Deal. Perhaps the most problematic aspect of this thesis is that Roosevelt scarcely mentioned the Court during the 1936 campaign.”³⁰³ Barry Cushman likewise declared that “it is difficult to see how the Court could have construed the 1936 election as a constitutional referendum” because “Roosevelt assiduously avoided raising either the Constitution or the Court as an issue in his campaign.”³⁰⁴ Based on his conclusion that Roosevelt stayed silent on constitutional issues during the 1936 campaign, historian William Leuchtenberg rejects the claim that the 1936 election should be understood as a referendum on the New Deal constitutional philosophy.³⁰⁵

297. ACKERMAN, TRANSFORMATIONS, *supra* note 18, at 280 (second emphasis in original).

298. Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1522 (1997).

299. *See, e.g.*, Leuchtenberg, *supra* note 19, at 2077 (“Scholars have dealt harshly with Bruce Ackerman’s audacious reconfiguring of American constitutional history.”).

300. Terrance Sandalow, *Abstract Democracy: A Review of Ackerman’s We the People*, 9 *CONST. COMMENT.* 309, 329 (1992) (book review).

301. Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 *CASE W. RES. L. REV.* 885, 893 (1996).

302. *See, e.g.*, Leuchtenberg, *supra* note 19, at 2084 (explaining that Roosevelt avoided campaigning about the Court during the 1936 election).

303. Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 *STAN. L. REV.* 759, 771 (1992) (book review) (footnote omitted); *see also* CUSHMAN, *supra* note 287, at 27 (“Roosevelt assiduously avoided raising either the Constitution or the Court as an issue in his campaign.”).

304. CUSHMAN, *supra* note 287, at 27; *see also* Leuchtenberg, *supra* note 19, at 2084–85 (“The President . . . deliberately avoided making any issue of the behavior of the Supreme Court in his bid for reelection in 1936. . . . Indeed, he did not mention the Court even once.”). Indeed, strong evidence suggests that Roosevelt expressly rejected the suggestion that he take his case against the Court to the American people. *See* SHESOL, *supra* note 26, at 215 (describing why and how Roosevelt decided not to publicly oppose the Supreme Court). Historians have written that Roosevelt followed the advice of Felix Frankfurter that “a general attack on the Court . . . would give opponents a chance to play on vague fears of a leap in the dark and upon the traditionalist loyalties the Court is still able to inspire.” *Id.* at 145–46 (quoting letter from Felix Frankfurter to Roosevelt, May 29, 1935).

305. Leuchtenberg, *supra* note 19, at 2087–88. *But see* ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 177 (1941) (“The claim later made that the Supreme Court had not been an issue in the

As the story of the American Liberty League shows, both Ackerman and his critics are mistaken about the constitutional issues actually raised in the 1936 election. In Ackerman's view, the dispute pitted Roosevelt against the Court; Ackerman thus describes his focus as "the conflict between the Old Court and the New Deal during the 1930's."³⁰⁶ As he asserts, resistance to the New Deal "came from the conservative judiciary [that was] prepared to defend the property-centered constitution inherited from the prior era."³⁰⁷ Ackerman does not mention the American Liberty League or any other actors independent of the Court who opposed the constitutionality of the New Deal. Instead, in Ackerman's conception, in 1936 the American electorate was asked to mediate the conflict between the President and the Court because "Roosevelt had been obliged to seek popular support in the face of a withering constitutional critique led by the Court."³⁰⁸ While Ackerman's narrative gives the people an important role in mediating the constitutional conflict, he presents the conflict solely as an interbranch dispute over issues of constitutional doctrine, issues that in fact were not raised in the 1936 campaign.

Ackerman's critics likewise characterize the constitutional conflict of the 1930s in exclusively legalistic, Court-centered terms. Leuchtenburg thus asserts that whether the 1936 election really amounted to a constitutional referendum can be resolved by addressing these questions:

Did Roosevelt raise the Supreme Court issue in the 1936 campaign—in the Democratic platform or in his speeches? If he did not, did anyone else do so? Did "the People" conceive of the 1936 election as centering on their attitude toward the Supreme Court?³⁰⁹

Like Ackerman, Ackerman's critics repeatedly equate the constitutional issue facing the nation in the mid-1930s with the legal questions raised in the Supreme Court's rulings striking down New Deal laws.³¹⁰ Ackerman's critics dismiss his account of the New Deal revolution because they conclude that Roosevelt did not actually make a campaign issue of the Supreme Court's constitutional rulings. If Roosevelt did not actually ask the people to choose between his constitutional philosophy and the Court's, these scholars assert, the 1936 election cannot plausibly be read as a public endorsement of the New Deal Constitution.³¹¹

campaign is unfounded. It was merely an issue on which the President had no need to speak—one which his enemies could not win even by his default."). Michael Klarman, in contrast, rejects even the assertion that Roosevelt's opponent presented a competing constitutional philosophy. *See* Klarman, *supra* note 303, at 771 n.76 ("Nor is it correct to suggest that the Republican presidential candidate in 1936, Alf Landon, rejected activist government, thus presenting the electorate with a crystallized choice between competing conceptions of national government power.").

306. ACKERMAN, *TRANSFORMATIONS*, *supra* note 18, at 280.

307. *Id.* at 267.

308. *Id.* at 311.

309. Leuchtenburg, *supra* note 19, at 2079.

310. *See, e.g.*, CUSHMAN, *supra* note 287, at 26–27 (noting that the Supreme Court routinely struck down legislation following the Democrats' success in the 1934 election); Klarman, *supra* note 303, at 771 (asserting that the 1936 election cannot be understood as a constitution referendum because "Roosevelt scarcely mentioned the Court during the 1936 campaign").

311. *See, e.g.*, CUSHMAN, *supra* note 287, at 27 (explaining that Roosevelt focused his campaign on meeting the economic and social problems of society, not the constitutional philosophy of the Court).

The history of the American Liberty League, discussed at length above, shows that the 1936 election was in fact centrally fought over fundamental questions of constitutional philosophy,³¹² but it was not presented to the voters as a dispute between Roosevelt and the Supreme Court.³¹³ The dueling campaigns did not focus much attention on the Supreme Court's constitutional rulings. Nor did the campaigns address the construction of particular constitutional provisions. Yet, as this Article has shown, Roosevelt did have a public opponent in 1936 that presented a sharply contrasting constitutional philosophy—the American Liberty League, not the Supreme Court.

The constitutional rhetoric widely employed in the 1936 presidential campaign—like constitutional rhetoric in popular politics today—differs from the language of constitutional doctrine familiar to lawyers. Scholars looking for constitutional arguments in popular politics will usually find little that resembles lawyers' arguments.³¹⁴ Lawyers and law professors may believe that the central constitutional issues of the 1930s focused on the breadth of the Commerce Clause and General Welfare Clause, and the degree of deference owed to Congress over the reasonableness of federal laws—issues addressed by the Supreme Court in a series of landmark decisions.³¹⁵ The constitutional rhetoric prevalent throughout the 1936 election campaign, however, did not address these issues but instead focused on issues of national identity.³¹⁶ Both Roosevelt and the American Liberty League understood the Constitution to embody a set of fundamental values that they said form the core of what it means to be American.³¹⁷

The dispute between Roosevelt and the American Liberty League illustrates how constitutional rhetoric is the preeminent language in American politics for discussing fundamental questions of national identity. While it may be impossible to know for certain why American voters gave Roosevelt an electoral landslide in 1936, it is certain that the issues upon which they were asked to cast their votes focused on questions of national identity expressed in constitutional terms.

312. See *supra* Part II.B for a discussion of how Roosevelt presented the New Deal as a competing constitutional philosophy to the Liberty League's philosophy.

313. See CUSHMAN, *supra* note 287, at 27 (explaining that Roosevelt avoided campaigning against the Court).

314. See generally MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1987) (tracing popular attitudes toward the Constitution).

315. See, e.g., Robert J. Delahunty, *Federalism and Polarization*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 63, 83 (2007) (noting the importance of the Supreme Court's Commerce Clause jurisprudence in the 1930s in shaping future Court opinions).

316. See *Text of Roosevelt Address*, *supra* note 89, at 25 (noting that Roosevelt stressed the meaning of the Constitution in terms of national identity).

317. See *supra* Part I.B for a discussion of how the American Liberty League equated the Constitution with Americanism, a set of values focused primarily on individual rights, most particularly property rights. Roosevelt in turn argued that his opponents hid behind lofty constitutional rhetoric while ignoring the nation's true values:

In vain they seek to hide behind the flag and the Constitution. In their blindness they forget what the flag and the Constitution stand for. Now, as always, the flag and the Constitution stand for democracy, not tyranny; for freedom, not subjection, and against a dictatorship by mob rule and the overprivileged alike.

Text of Roosevelt Address, *supra* note 89, at 25.

CONCLUSION

This Article begins a project of tracing the history and significance of an idea, the belief that the Constitution embodies national identity and makes us who we are. It is a conviction repeated so often that it can often seem contentless and banal. It is intoned by national leaders in our most solemn national occasions.³¹⁸ Without giving the matter much scholarly attention, constitutional law scholars have been among the most frequent purveyors of the mystical dogma that “we are the Constitution and the Constitution is us.”³¹⁹ The deeply felt conviction that the Constitution lies at the heart of American national identity should be recognized as a distinctive ideology and thus deserves its own name: constitutional nationalism.

Constitutional nationalism is understood by its proponents as an especially benign form of nationalism, offering inclusion in the national community based on acceptance of universal ideals, rather than on race, religion, or ethnicity.³²⁰ Yet constitutional

318. President Obama repeated this familiar dogma in his second inaugural address, declaring: “We recall that what binds this nation together is not the colors of our skin or the tenets of our faith or the origins of our names. What makes us exceptional—what makes us American—is our allegiance to an idea,” an idea embodied in the Constitution. Barack Obama, Second Inaugural Address, *supra* note 12.

319. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 12 (1999) (declaring that the Constitution “constitutes us as the people of the United States”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1463 n.163 (1987) (“Thus, the most important thing that the Constitution constitutes is neither the national government, nor even the supreme law, but one sovereign national People, who may alter their government or supreme law at will.”); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 463 (2007) (“Viewing the Constitution as our Constitution constructs a collective subject with a collective destiny that engages in collective activities.”). Poetical declarations that the Constitution makes us who we are are not limited to left-leaning law professors. Steven Calabresi, founder of the Federalist Society, agrees that the Constitution is what makes the United States exceptional, and it lies at the heart of the American national identity. Steven G. Calabresi, “A Shining City on a Hill”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1397–1410 (2006); see also SHELDON S. WOLIN, THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION 9 (1989) (“A constitution not only constitutes a structure of power and authority, it constitutes a people in a certain way.”); Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 5 (2007) (“At a deeper level, however, the Constitution binds together people living in geographically disparate regions and constitutes them as members of a single nation, united by their understanding of themselves as fellow citizens with a shared political history and a common future.”); Duncan Ivison, *Pluralism and the Hobbesian Logic of Negative Constitutionalism*, 47 POL. STUD. 83, 84 (1999) (“A constitution constitutes the People who in turn constitute it.”); Palma Joy Strand, *Law as Story: A Civic Concept of Law (With Constitutional Illustrations)*, 18 S. CAL. INTERDISC. L.J. 603, 610 (2009) (“Our national identity, grounded in our shared myths, thus leans heavily toward law, and the Constitution is a key text in our collective story. This relationship is deeper than one in which we simply accept the Constitution and let it guide us. Instead, it constitutes us—not only our government—in the literal sense of the word: ‘We the People’ are created by the Constitution.”).

320. See generally HANS KOHN, AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY 3–13 (1957). More recently, Steven Calabresi exclaimed, “America is a special country because any person of any race from anywhere in the world can become an American simply by believing in a certain set of ideas. Being an American is a function of what you believe and where your loyalties lie. It has nothing to do with your race, or where you were born, or who your parents or ancestors were.” Calabresi, *supra* note 319, at 1414. Of course, this claim is not true and never has been true in anything like a literal sense: the overwhelming majority of Americans are American citizens precisely because of where they were born or who their parents were, and they remain members of the community regardless of what ideas they believe. And those who are not born citizens cannot become American “simply by believing in a certain set of ideas.”

nationalism always conveys a message of both inclusion and exclusion: those who do not ascribe to constitutional values (whatever they are) are not true Americans, and their ideas must be rejected as dangerously foreign.³²¹ In the ideology of constitutional nationalism, the Constitution represents the dividing line between what is truly American and what is alien. The exclusionary message of constitutional nationalism can be seen most clearly in political movements like the American Liberty League that make adherence to a constitutional vision central to their mission. Members of the American Liberty League did not merely believe that the New Deal was bad policy; they believed that it conflicted with the bedrock American value of individual liberty and was therefore un-American and unconstitutional. Eliminating foreign ideas that have infiltrated into American culture and politics is the core message of constitutional nationalism.³²²

In 1936, the American electorate rejected the constitutional nationalism of the American Liberty League in favor of the more expansive constitutional identity offered by President Roosevelt. The story of the American Liberty League's contest with President Roosevelt over the nation's constitutional identity thereby presents a twist on the developing narrative of popular constitutionalism. Popular constitutional scholars have shown that successful social and political movements are key movers of constitutional change, and change occurs when these movements persuade significant numbers of the public to adopt new constitutional understandings.³²³ The Liberty League, however, did just the opposite. Not only did the League fail to defeat the New Deal, it helped generate a public consensus in favor of the New Deal. The League gave Roosevelt a public opponent that kept constitutional issues in the news and gave him the chance to argue that the philosophy underlying the New Deal was necessary to protect the American people from the forces of entrenched greed lurking behind the Liberty League. It may be only a slight exaggeration to say that opposition by the Liberty League generated a consensus in favor of the New Deal Constitution.

While the American public rejected the Liberty League's constitutional nationalism in 1936, that rejection was not, and of course could not, be permanent. The 1936 election made the Liberty League synonymous with entrenched greed, but the philosophy and rhetoric of constitutional nationalism pioneered by the Liberty League have become prevalent features of American politics.³²⁴ As later chapters in this story

321. See Paul J. Kaplan, *American Exceptionalism and Racialized Inequality in American Capital Punishment*, 31 LAW & SOC. INQUIRY 149, 163–64 (2006) (noting the role of social exclusion in cultivating American exceptionalism).

322. Steven Calabresi explained that Supreme Court citation of foreign law gives him a “sense of horror” because “[t]he whole point of being Americans for many of us is that we are *not* Europeans; we are a special people, in a special land, with a special mission.” Calabresi, *supra* note 319, at 1398.

323. For instance, Reva Siegel's work has looked at the modern women's rights movement and the gun rights movement as movements that changed constitutional culture and, with it, the consensus understanding of the meaning of the Constitution, both inside and outside the courts. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1323–24 (2006) (describing how social changes influence how Americans view the Constitution); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192–93 (2008) (describing how the Supreme Court used both the original understanding of the Second Amendment and more contemporary developments in its *Heller* opinion).

324. See PHILLIPS-FEIN, *supra* note 7, at xii (noting how the origins of modern conservatism began with

will show, subsequent incarnations of this ideology proved more lasting than the Liberty League, and its philosophy has succeeded in surprising ways.