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Constitutional Order in Oligarchic Democracies: Neoliberal Rights versus Socio-Economic Rights

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journals.sagepub.com/home/lch**Salvador Santino F. Regilme Jr.**

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Abstract

What is the relationship between constitutional order and the emergence of oligarchic politics in contemporary democratic societies? How and to what extent does constitutional design contribute to oligarchic politics in contemporary liberal democratic states? Focusing on *constitutional discourses*, rather than the *legal positivist interpretation of the constitution* (or *constitutions as text*), I maintain that state constitutions should be understood as an ideational-discursive realm of competing discourses, paradigms, and interpretations of an ideal state. My main argument states that oligarchic democracies emerge because a coalition of stakeholders that promote neoliberal understanding of the constitution has taken hold of this discursive realm of constitutional interpretation both within the state apparatus and the public sphere. Thus, the crisis of democratic representation and its relationship to constitutional design represents *ideational* and *materialist aspects*: oligarchs promote, reinforce, and sustain self-serving constitutional interpretations and discourses that reinforce the political logic of oligarchic wealth accumulation while suppressing the politics of peaceful dissent and distributive justice.

Keywords

Constitutionalism, oligarchy, inequality, political economy, democracy, neoliberalism

I. Introduction

A constitutional framework embodies the foundational identity of a given political order. It provides insights about the origins of the state, aids in understanding the challenges of

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the present, and serves a guide upon which governance challenges could be addressed. Constitutional orders depend upon not only its ability to manage, and sometimes to constrain, the power-consolidating tendencies of state leaders and its agents, but perhaps, more importantly, they have to withstand the test of time.¹ With an enduring constitutional framework, rules and norms supposedly bind people over historical time and within the state's claimed territorial space. Indeed, the principal yardstick for the success of a constitution is its ability to facilitate the emergence of a *Leviathenesque* state that legitimately rules based on rules, order, cohesion, collective interest in enabling its individual members to thrive in the spirit of freedom.² That implies, therefore, that the constitutional outcome of a Leviathenesque state means the repression of *Behemoth-like* tendencies of state, particularly its propensity to lose its legitimacy because of its agents' whimsical deference to particularistic interests of lobby groups and highly empowered factions within the polity. This Leviathan vs. Behemoth problem is a good literary illustration of the main puzzle for constitutional studies and state theory: discerning the acceptable boundaries of the state's legitimate exercise of power, while still promoting social stability and order from within it.³

Many, if not all, states in the contemporary international system employ various methods and tactics that, at the minimum, demonstrate their willingness to constrain their power and to be subjected to domestic public scrutiny.⁴ Those methods include holding an election, inviting foreign electoral observers, and signing up various international treaties on human rights and other transnational legal instruments that underscores the individual citizen's welfare over the state.⁵ Notably, the constitutional frameworks of many states posit the importance of human rights and dignity of

1. Mila Versteeg and Emily Zackin, "Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design," *American Political Science Review* 110(4) (2016), 657–74.
2. Patricia Springborg, "Hobbes's Biblical Beasts: Leviathan and Behemoth," *Review of International Political Economy* 23 (1995), 353–75; Dan Slater, *Ordering Power: Contentious Politics and Authoritarian Leviathans in Southeast Asia* (New York: Cambridge University Press, 2010); Salvador Santino F. Regilme Jr., "Social Discipline, Democracy, and Modernity: Are They All Uniquely 'European'?", *Hamburg Review of Social Sciences* 6(3) (2012), 94–117.
3. Robert P. Kraynak, "Hobbes's Behemoth and the Argument for Absolutism," *American Political Science Review* 76(4) (1982), 837–47; Scott Gordon, *Controlling the state: Constitutionalism from ancient Athens to today* (Cambridge, MA: Harvard University Press, 2009).
4. A constitutional framework also specifies the criteria of what constitutes an insider member and an outsider, and the logics of stratification and hierarchy that underpin those elaborations on the differentiations among membership types. Refer to the insightful discussion on the logic of stratificatory differentiation, albeit in the context of the international system: Lora Anne Viola, "Stratificatory Differentiation as a Constitutive Principle of the International System," in *Bringing Sociology to International Relations: World Politics as Differentiation Theory*, Mathias Albert, Barry Buzan, and Michael Zürn (eds) (Cambridge: Cambridge University Press, 2013), pp. 112–31.
5. Susan D. Hyde, *The Pseudo-Democrat's Dilemma: Why Election Observation Became an International Norm* (Ithaca, NY: Cornell University Press, 2011); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge and New York: Cambridge University Press, 2009).

individual members of the state – a constitutional proposition that, by implication, aspires to temper state abuses of its power and to avoid potential violations of individual rights and claims to human dignity.

This article examines how and why oligarchic democracies emerge and the relationship of their emergence to the state's constitutional order. Focusing on *constitutional discourses*, rather than the *legal positivist interpretation of the constitution* (or *constitutions as text*), I maintain that state constitutions should be understood as an ideational-discursive realm of competing discourses, paradigms, and interpretations of an ideal state. My main argument states that oligarchic democracies emerge because a coalition of stakeholders that promote neoliberal understanding of the constitution has taken hold of this discursive realm of constitutional interpretation both within the state apparatus and the public sphere. That outcome undermines a socio-economic rights constitutional paradigm, which I maintain, as a more conducive framework supportive of a Leviathenesque state.

To build my case, this article is divided into three main parts. First, the next section articulates in detail the puzzle of constitutional discourses and its relationship with the emergence and sustaining power of oligarchic states, while I also provide therein some remarks regarding my methods for analysis and overall theoretical approach. The second part discusses in detail the three main points of the article: (1) constitution as a fluid, discursive, and combative realm of competing interpretations, or what I call as *contentious politics of socio-legal discourses*; (2) the emergence of oligarchic rule demonstrates how a neoliberal rights oligarchic coalition within the state-society sphere has momentarily gained control of such a discursive realm; and (3) the origins of oligarchic power coalitions in supposedly liberal democratic societies. The final part concludes this article with some broad normative prescriptions on how the domination of the neoliberal rights coalition can be undercut in pursuit of a more just and democratic state.

II. Puzzle and Theory: Constitutional Discourses and Rights Paradigms

What is the relationship between constitutional order and the emergence of oligarchic tendencies in contemporary democratic politics? How and to what extent does constitutional design contribute to oligarchic tendencies of contemporary liberal democratic states? What kind of constitutional order is likely to engender oligarchic politics in liberal democratic communities? Those questions constitute what I call as the *puzzle of constitutional oligarchy*, whereby the grim prospects for emancipatory politics exist due to the rise of extremely powerful oligarchs, who shape the substantive interpretations of the constitution as reimagined in the public sphere, particularly in ways that undermine collective long-term interests of the majority population.

My main argument states that oligarchic tendencies emerge because extremely wealthy stakeholders – especially in the context of growing material inequality – succeed in promoting hegemonic and dominant interpretations of constitutional provisions and related constitutional discourses. These hegemonic interpretations and discourses attempt to legitimize illiberal public policies in ways that undermine emancipatory counter-narratives and counter-discourses in the public sphere. Thus, the crisis of democratic representation and its relationship to constitutional design represents *ideational* and *materialist*

aspects: oligarchs promote, reinforce, and sustain oligarchic constitutional interpretations and discourses that consequently promote the logic of unfettered wealth accumulation in electoral democracies, whereby the state's policy agenda strongly empowers the ruling oligarchs. This problem of oligarchic democracy emerges from the consolidation of neoliberalism in the state's governance strategy through oligarchic manipulation of constitutional discourses and further eradication of public goods provision. While my arguments should be construed as exploratory, I aim to illustrate my theoretical points through empirical examples of contemporary problems in electoral democracies. In the following paragraphs, I define the key concepts of my analysis in order to build my argument on oligarchic democracies and constitutional discourses.

First, a constitutional order refers to the general principles and aspirational ideals upon which a particular political community should be organized. Essentially, such an order pertains to general principles because they rest at a higher level of abstraction upon which derivative laws, ordinances, and specific public policies have to abide by. Such general principles define the regulative boundaries upon which state power can be legitimately exercised, thus exercising the distinction between the public and private realms. Also, such an order describes the state's supposed relationship with its constituent agencies as well as the market, civil society, and the public sphere. At the core of any political system, constitutions pertain to the "structures, organized around the principle of separation and division of powers, territorially, functionally, and normatively."⁶ Hence, a constitution outlines, in broad strokes, the general competencies and limitations upon which such state agencies and its office-holders can legitimately exercise their powers.

I define oligarchs as political agents who possess enormous material wealth that can be used to reinforce arbitrarily their influence in the social and political spheres.⁷ These oligarchs hold extreme material wealth and political power as they do in oligarchic democracies, which refer to political orders that demonstrate four distinctive features. First, they constitute extreme forms of *material* inequality, whereby oligarchs persistently maintain and expand their wealth across generations, while the large majority of the population's chances for social mobility are heavily curtailed. Second, oligarchs legitimize their rule through a wide panoply of *discursive* means that primarily emphasize how their accumulated wealth is legitimately generated through merit, justified privilege, hard work, and some luck. Third, such orders show how the various branches of state power (executive, legislative, judiciary) have been systematically co-opted to rule in favor of oligarchic interests – a process that makes the state a quintessential *political* instrument for wealth consolidation of oligarchs. Fourth, oligarchs consolidate their authority by co-opting the majority of the population in the system through concessions such as minimal forms of civil and political rights, such as the right to vote, right to a fair trial, and the right to public services. Oligarchs deploy their resources that repress the meaningful exercise of those rights, particularly when the majority population's actions pose credible threats that could lead to transformative redistribution of resources. Thus,

6. Zoran Oklopčič, "Imagined Ideologies: Populist Figures, Liberalist Projections, and the Horizons of Constitutionalism," *German Law Journal* 20(2) (2019), p. 219.

7. Jeffrey A. Winters, *Oligarchy* (Cambridge: Cambridge University Press, 2009), p. 6.

oligarchs (1) possess immense material wealth that sets them apart from the rest of the population, and (2) they deliberately use such wealth in the public realm.⁸

What exactly is neoliberalism? David Harvey⁹ defines neoliberalism as constitutive of several elements: (1) a paradigm of political economy; (2) advocates the idea that human welfare is best advanced through individualistic entrepreneurial freedoms; (3) the necessity of an institutional framework that reinforces private property rights, free trade, and free markets. Operating within a neoliberal framework, a state establishes a coercive apparatus and a legal system in a way that makes free markets possible and secures private property rights. In policy terms, neoliberalism aims to eliminate or to minimize “extramarket forms of economic coordination,” which include institutionalized policy tools such as “redistributive taxation and deficit spending, controls on international exchange, economic regulation, public goods and service provisions, and active fiscal and monetary policies.”¹⁰ In oligarchic democracies, oligarchs persistently expand their wealth and influence through the consolidation of their power in the core spheres of the state apparatus: its coercive (police power apparatus) and non-coercive structures (legal system). Hence, a neoliberal state is a political order that *exclusively privileges* individual political freedoms through the constitutional framework and in actual practice, particularly in the formulation of public policies.¹¹

My analysis in this article stands in contrast to three dominant perspectives of constitutionalist literature. First, my stance herein stands in contrast to the originalist general theory of textual interpretation, which claims that understanding a text requires recovering a set of intended meanings formulated at the time of formulation of the constitutional text in question.¹² Words are written by their authors, whose life-world is structurally and historically constituted by the language, societal norms, political interests that revolve around her. Yet, it is misguided to decipher the intended meanings of the constitution’s authors from the historical past to resolve the challenges of the political present and to anticipate the challenges of an uncertain future. Words are subject to extreme politicization, and constitutional interpretation is a task undertaken not by neutral, all-knowing, and purely ethical legal gods; rather, judges and justices (and other political actors) interpret the constitution-as-text based on a wide range of factors largely shaped by their own life-world.

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8. Gordon Arlen, “Aristotle and the problem of oligarchic harm: Insights for democracy,” *European Journal of Political Theory* 64 (2017), 1–22.
 9. David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005), p. 2.
 10. Miguel A. Centeno and Joseph Cohen, “The Arc of Neoliberalism,” *Annual Review of Sociology* 38 (2012), 318.
 11. Wendy Brown, “American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization,” *Political Theory* 34 (2006), 690–714; John Rapley, *Globalization and Inequality: Neoliberalism’s Downward Spiral* (Boulder, CO: Lynne Rienner, 2004); Cemal Burak Tansel, “Authoritarian Neoliberalism: Towards a New Research Agenda,” in Cemal Burak Tansel (ed.), *States of Discipline: Authoritarian Neoliberalism and the Contested Reproduction of Capitalist Order* (Lanham, MD: Rowman and Littlefield, 2017).
 12. Thomas B. Colby and P.J. Smith, “Living Originalism,” *Duke Law Journal* 59 (2009), 239–307; Wil Waluchow, December 20, 2017, “Constitutionalism,” edited by Edward Zalta, *Stanford Encyclopedia of Philosophy*, May 9, 2019, <https://plato.stanford.edu/entries/constitutionalism/>.

My second point pertains to the notion of “living constitutionalism,” which claims that constitutional interpretation should not be undertaken as form of archaeological sort of digging for original meanings and intentions of its authors. Instead, interpretation should seriously consider the core principles of normative behavior and social morality. This paradigm demands constitutional interpreters to uncover the normative commitments of the constitutional principles in “abstract terms,” while leaving it to the contemporary constitutionalists and judges to specify the definitive actualization of how those commitments play out in practice.¹³ Despite its explanatory power to account for socio-political realities in the construction of constitutional orders, the living constitutionalist view does not sufficiently explain the facilitative role of constitutional frameworks in the emergence of oligarchic democracies. There are two main reasons. First, the interpretative process undertaken by contemporary actors is not a neutral process, whereby interpretation is not a precise analytic exercise in uncovering the relevant principles of political morality that are supposedly entrenched in a given constitutional framework. Second, the constitution should be understood for what it really is, at the minimum, a text that is subject to interpretation – and interpreters themselves operate within their historically- and geographically-bounded interpretative spheres through which justifications, moralization, and interpretations are formed.

While those two dominant views have their own fundamental analytic limitations, this article departs from those views and highlights the politics behind the text. Both views assume that the constitution has some inherent and objective features that any interpreter could uncover. Hence, I find it more analytically productive to reflect upon the constitutional order’s relationship to the rise of oligarchic democracy, particularly by going beyond the notion of an independent and sacrosanct legal text. That means that, aside from the view of constitution-as-text, I underscore the idea that constitutional interpretations form another important arena of contentious politics,¹⁴ where various players within the state-society nexus vie for their own interpretations in order to legitimize their own policy views, economic interests, ideologies, world paradigms, and perspectives. In other words, constitution herein, for analytic purposes, embodies a realm of power dynamics – and that investigative strategy potentially provides us a more comprehensive view of the relationship between oligarchic democracies and constitutional frameworks. That view of constitution as a form of contentious politics will be further explained in the next section.

III. Constitution as Contentious Politics of Discourses

In making the case that the constitution is another form of contentious politics of competing rights paradigms, this article proceeds into two parts. First, borrowing Habermasian

13. Jack M. Balkin, *Living Constitutionalism* (Cambridge, MA: Harvard University Press, 2011).

14. Ran Hirschl echoes this view by referring to the recent turn in the literature on “strategic-realist” approach, which posits the notion of “constitutional law as a form of politics by other means”: Ran Hirschl, “The Strategic Foundations of Constitutions,” in *Social and Political Foundations of Constitutions*, Denis Galligan and Mila Versteeg (eds) (New York and Cambridge: Cambridge University Press, 2013), p. 157.

ideas on discourse theory of law,¹⁵ I posit that a constitutional framework should be conceptualized not as a static, entrenched, and autonomous area of politics in which citizens and leaders alike passively follow. Instead, I consider constitutional frameworks as areas of contentious politics of competing discourses and interpretations that are shaped by the diverse range of interests, ideas, and preferences of various factions in a given polity at a particular historical period. Hence, the analytic focus is not on constitutional design per se, but on the complex power relations between dominant and vulnerable stakeholders' interests and discourses. On that regard, my notion of constitution-making echoes the theoretical insights of the sociologists Charles Tilly and Sidney Tarrow¹⁶ who defined *contentious politics* as a form of macro-social process that:

involves interactions in which actors make claims bearing on other actors' interests or programs, in which governments are involved as targets, initiators of claims, or third parties. Contentious politics thus brings together three familiar features of social life: contention, collective action, and politics.

The constitution forms a key pillar of the state apparatus.¹⁷ While elected governments come and go, justices retire and get replaced, and legislators get elected or booted out of office, the text of the written constitution usually remains the same – that is, if we are only referring to the actual text that endures over relatively long periods of historical time. Echoing some Weberian insights, I maintain that state-building or even state (re) construction requires monopoly on the use of violence and a claim for legitimacy.¹⁸ Legitimacy, in the context of political rule, could be reinforced through several means. Yet, one of those bases for legitimate rule of the state is through a robust, reliable, and enduring legal system. A legal system represents institutionalized guarantees to current

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15. Seyla Benhabib, "Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy by Juergen Habermas," *The American Political Science Review* 91 (1997), 725–6; William E. Forbath, "Habermas's Constitution: A History, Guide, and Critique," *Review of International Political Economy* 23 (1998), 969–1016; Juergen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996); Salvador Santino F. Regilme Jr, "Habermasian Thinking on Civil Society and the Public Sphere in the Age of Globalization," *Perspectives on Political Science* (2016), 1–7.
 16. Charles Tilly and Sidney Tarrow, *Contentious Politics*, 2nd edn (New York: Oxford University Press, 2015).
 17. Zachary Elkins, Tom Ginsburg, and James Melton, "The Content of Authoritarian Constitutions," in *Constitutions in Authoritarian Regimes*, Alberto Simpser and Tom Ginsburg (eds) (New York: Cambridge University Press, 2014); Ruth Gavison, "What Belongs in a Constitution?," *Constitutional Political Economy* 13 (2002), 89–105; Frank Munger, "Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand," *Cornell International Law Journal* 40 (2007), 455–75; Mark Tushnet, "Authoritarian Constitutionalism," in *Constitutions in Authoritarian Regimes*, Tom Ginsburg and Alberto Simpser (eds) (New York: Cambridge University Press, 2013).
 18. Max Weber, *From Max Weber: Essays in Sociology*, in H.H. Gerth and C. Wright Mills (eds) (London and New York: Routledge, 2009).

citizens, and it informs its *current and prospective members* a set of obligations and privileges that the state is willing to offer in exchange for societal compliance and regular taxation. Indeed, one of the reasons why it is more likely that societies aspire for enduring constitutional frameworks is because current citizens (for the sake as well of future generations) aspire for a sense of stability and predictability – and those public goods, among other benefits from compliance with the state, are only likely to endure if the rules of the game are transparent, broad, and demonstrative of a sense of fairness that are generally acceptable to the majority of the governed populations.

Mancur Olson's¹⁹ notion of *roving* and *stationary* banditry provides as an insightful metaphor for demonstrating this aspiration for a sustainable legal system as a way of managing expectations between the rulers and governed populations. Metaphorically, roving rulers are merely interested in subjugating populations to the extent that it unfairly benefits the rulers. That one-way street of “governing” is deemed unsustainable, as the ruler will only eventually cease to extract profits from the subjugated individuals, and the ruler will eventually move on to the next group. In that scenario, the need for a coherent, understandable, and realistic set of “rules of the game” or, perhaps a constitution, may not be necessary. The challenge now, in contrast, is for stationary bandits who decided to stay permanently in one territory and to subjugate the population under a political order that can endure over time, or over generations – consequently, in the hope of making it a two-way street of governing, with lasting benefits both for the rulers and the ruled. That aspiration for a mutually beneficial relationship can only be fostered through the formulation of a broad set of expectations in the form of a constitution. Whether that constitution is just and open to ceding more power to those being governed primarily depends on what exactly is written in that text: the more power and guarantees for open engagement are guaranteed to the citizens, the higher likelihood that such *stationary banditry* could evolve into a more democratic system of governance.

If state-building, or the shift from stationary banditry to democracy, fully depends on what is written on the constitution, then does that mean that governance itself is only dependent on the initiative of those within the state apparatus? What is the role of some factions within the society in making their state and their constitution more accountable to long-term collective interest of those under its rule? Such questions, I argue, are so important that, unfortunately, neither living constitutionalism nor originalism theories can fully consider. In contrast, my main contention states that constitutional frameworks should be construed also in process-oriented terms, rather than merely in legal-formalistic terms. By process, I consider constitution-making as the contentious politics of competing discourses and interpretations from various factions within the state-society spheres as well as the transnational arenas.

Constitution-making as contentious politics has several important elements. First, contentious politics underscores the highly competitive struggle of interests within a society at a given period of time, and constitutional debates are not only constricted within the confines of the judicial ivory tower; instead, constitution-making is subject to

19. Mancur Olson, “Dictatorship, Democracy, and Development,” *American Political Science Review* 87 (1993), 567–76.

various competing claims, interpretations, and interests. My understanding of contentious politics borrows the insights from Doug McAdam, Sidney Tarrow, and Charles Tilly,²⁰ who characterized “contentious politics” as “episodic, public, collective interaction among makers of claims and their objects when: (a) at least one government is a claimant, an object of claims, or a party to the claims, and (b) the claims would, if realized, affect the interests of at least one of the claimants or objects of claims.” The term contentious politics is a powerful explanatory concept that captures all forms of political struggle ranging from episodic displays of political protests such as riots, waves, of street demonstrations to more extensive and ground-breaking movements such as social revolution or even civil wars – and even those quite standard political processes such as interest group lobbying and electoral processes. I argue that constitution-making – and that includes its formulation, interpretational debates, revisions, and its concrete embodiments through public policies – is a form of contentious politics where political claims and interests are addressed, and whatever the outcome resulting therefrom has some consequences to the material-distributional and identity politics within the state-society nexus.

Second, constitution-making as contentious politics occurs not only within the confines of state-society nexus, but also within a global and transnational arena of ideas, paradigms, and political claims.²¹ Whereas the contentious politics literature focuses on struggles purely within the nation-state, my conceptualization goes beyond the narrow confines of the state-society nexus. Why? First, nation-states and their constitution-making processes are not immune from influences from what is “outside” their claimed territorial boundaries, and that also means that the constitutional processes that occur within a given state can also influence the transnational sphere or even the national politics of other states. Second, such a conceptualization abandons the “methodological-nationalist” parochialism of constitutional politics as it is often discussed by constitutional scholars and scholars of comparative politics; instead, I advocate for a “methodological cosmopolitanist” notion of constitutional politics, whereby I rebuke the myth that constitutions are made only by nationally bounded actors within the state-society.²² Ideas travel, and they do compete in a transnational sphere, where they are negotiated, reconstituted, and transformed by actors and later on adopted, changed, and reframed in the

20. Doug McAdam, Sidney Tarrow, and Charles Tilly, *Dynamics of Contention* (New York: Cambridge University Press, 2001), pp. 5, 7.

21. Stephen Gill, “Constitutionalizing Inequality and the Clash of Globalizations,” *International Studies Review* 4 (2002), 47–65; Dieter Plehwe, Bernhard Walpen, and Gisela Neunhoffer, *Neoliberal Hegemony: A Global Critique* (Abingdon: Routledge, 2006); Salvador Santino F. Regilme Jr, “Bringing the Global Political Economy Back in: Neoliberalism, Globalization, and Democratic Consolidation,” *International Studies Perspectives* 15 (2014), 277–96.

22. Ulrich Beck, “The Cosmopolitan State: Redefining Power in the Global Age,” *International Journal of Politics, Culture, and Society* 18 (2006), 143–59; Ulrich Beck and Edgar Grande, “Varieties of Second Modernity: The Cosmopolitan Turn in Social and Political Theory and Research,” *The British Journal of Sociology* 61 (2010), 409–43; Andreas Wimmer and Nina Glick Schiller, “Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences,” *Global Networks* 2 (2002), 301–34.

national sphere.²³ Put simply, constitutions are outcomes of those contentious struggles for ideas, many of which are not constructed and negotiated beyond the claimed spaces of the state.

My third point refers to the relationship between rights and constitution-making. Essentially, rights are political claims made by citizens and other members of the society, and such demands are made before the state, which has the monopoly on the use of violence and resources that can be deployed to respond to such rights claims. Indeed, contemporary constitutions spell out, usually in broad strokes, what those rights are, and how and under which general conditions those claims can be made and the broad principles by which the state can fulfill those demands. Globally, contemporary constitutions vary a lot in terms of form, historical origins, the social conditions when they were formulated, and the societies where such frameworks are supposed to serve. Many of these constitutional texts, if not all, refer to human rights or rights, with the intended or unintended goal of making citizens and other members possibly deem that the rules of the game are fair.

Yet, human rights promotion depends not only on the substantive and textual content of the constitution – after all, most constitutions today guarantee rights. The day to day practices of the state (and those societal factions who have the power to influence it), as reflected in its laws, public policies, and political discourses facilitate the conditions under which even electoral democracies with human rights-guaranteeing constitutional frameworks can eventually slide into an oligarchic order. In the next section, I discuss which sort of human rights paradigm and political utopia dominate to the extent that oligarchic democracies emerge. What sort of human rights paradigms compete in constitution-making processes?

IV. Constitutional Discourses in Battle: Neoliberalism versus Socio-Economic Rights

Oligarchic democracies emerge because constitution-making processes structurally privilege, implement, and sustain neoliberalism as its governing paradigm – which, in turn, emphasizes individual political and civil freedoms over socio-economic rights. Empirically, one can hypothesize that increasing material inequality paves the way for particular oligarchs to dominate the public sphere: (1) by ensuring that constitutional

23. Amitav Acharya, “How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism,” *International Organization* 58 (2004), 239–75; Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics,” *International Organization* 54 (2000), 1–39; Salvador Santino Fulo Regilme, Jr, “A Human Rights Tragedy: Strategic Localization of US Foreign Policy in Colombia,” *International Relations* 32(3) (June 2018), 343–65; Salvador Santino Fulo Regilme Jr, “Does US Foreign Aid Undermine Human Rights? The ‘Thaksinification’ of the War on Terror Discourses and the Human Rights Crisis in Thailand, 2001 to 2006,” *Human Rights Review* 19(1) (2018), 73–95; Lisbeth Zimmermann, “Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-Conflict States,” *International Studies Perspectives* 17(1) (2015), 98–115.

discourses exclusively and structurally privilege neoliberalism as the dominant mode of governance of state-society relations and, in effect; (2) dramatically reducing the state's interest and capacity in promoting the human dignity of every citizen through a reliable public goods provision system. In the earlier stages of an oligarchic democracy, dominant oligarchic factions within the state-society nexus deploy several strategies to instrumentalize the constitution-making processes in ways that consolidate their power and private interests at the systematic expense of long-term public interest.

First, oligarchs control public discourses and collective macro-social imagination by promoting what I call the *individualization of social failures*, whereby macro-social problems and issues in areas such as public health, poverty, housing, education are framed as outcomes of persistent failures of individual efforts. For example, in the United Kingdom, then-British Prime Minister David Cameron²⁴ affirmed in a speech in 2016 that “those in poverty have specific, treatable problems such as alcoholism, drug addiction, poor mental health [that] we’ve got to offer the right support, including to those in crisis.” In the United States, at least one out of three Americans polled in 1995 and 2014 believed that poverty emerges from an individual failure to overcome their financial challenges rather than structural circumstances that are beyond one’s immediate control.²⁵ Moreover, a 2013 NBC/Wall Street Journal survey found that after Clinton’s bid to undermine the welfare state, the majority of the respondents confirmed that “too much government welfare that prevents initiative as the leading cause of poverty than any other factor.”²⁶ Although not conclusive, those examples illustrate how poverty has been successfully framed as a product of one’s individual failures rather than the absence of state-supported opportunity structures that empower everyone to have a life of material dignity and just social recognition. Oligarchs uphold the idea that states should be extricated from their social contract of providing the needed public goods for the citizenry; instead, failures of individuals remain individualized, while social structures and state policies remain free from any form of institutionalized and collective responsibility. This promotion of the individualization of social failures narrative gains traction through the oligarchs’ possession or control of media conglomerates, networks, educational institutions, and other forms of public sphere where dominant public narratives are introduced and sustained. The dominance of neoliberal rights consensus in the contentious politics of constitutional discourses demonstrate how state-building – ideally should be about the pursuit of long-term collective public interest – now entails “the elevation of market-based principles and techniques of evaluation to the level of state-endorsed norms.”²⁷ At the peak of their power, oligarchs champion a constitutional discourse highlighting mar-

24. David Cameron, “Prime Minister’s Speech on Life Chances,” *Government of the United Kingdom*, January 11, 2016: <https://www.gov.uk/government/speeches/prime-ministers-speech-on-life-chances> (accessed April 11, 2019).

25. Spencer Platt, “Poll: Fewer Americans Blame Poverty on the Poor,” *NBC News*, June 20, 2014, <https://www.nbcnews.com/feature/in-plain-sight/poll-fewer-americans-blame-pov-erty-poor-n136051> (accessed March 20, 2019).

26. Platt, “Poll: Fewer Americans,” p. 13.

27. William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (Thousand Oaks, CA: SAGE, 2014), p. 6.

ket-based forms of governance vis-à-vis a lean state, while side-lining any form of state-mandated public goods provision and regulation of capital.

Second, the rise of oligarchic democracy is not only about the oligarchs' direct control as it could be permitted in the constitution *as text per se*; instead, the real issue lies on the oligarchs' manipulation of the legal system in ways that directly or indirectly favor the interests of capital accumulation. That may be possible by lobbying legislators to pass specific laws and public policies that promote oligarchic interests, while undercutting claims for human dignity of those individuals who depend on labor and not capital just for mere survival. Indeed, the careful and strategic lobbying efforts of oligarchs facilitated the highly contentious debate on universal health care coverage in the United States, and that problem is not necessarily about the constitution *per se* as text but a clear reflection of oligarchic control of the legal system. As Ugo Mattei and Laura Nader²⁸ compellingly argue, a neoliberal order demonstrates the "relentless process of corporatization through legal and illegal means, favors the smooth transfer of natural resources at bargain prices from public ownership to the rich oligarchs." Indeed, the manipulation of public policies and the legal system enables this unjust transfer of public goods to the private coffers of oligarchs. Reinforcing my point on the role of the legal order in constitutionalizing oligarchic wealth, Katharina Pistor²⁹ argues that the law codes specific entities as assets and capital, which in turn, introduces new forms of wealth and protects older ones. For that reason, Pistor³⁰ compellingly maintains that "how assets are selected to be legally coded as capital, by whom, and for whose benefit" constitute the quintessential element of a given society's political economy, and therefore, it is lamentable that "most observers treat law as a sideshow when in fact it is the very cloth from which capital is cut."

While oligarchs, in the early stages of the emergence of oligarchic democracy, may only manipulate specific public policies, an advanced stage of oligarchic control requires the reformulation of the constitution *as text* in ways that fully entrench their power. Specifically, such oligarchic constitutions "may outline limits on executive authority, codify individual rights and political obligations, and, given the right conditions, impose constraints on executive authority," thereby functioning as "coordinating devices for the elites who helped the dictator gain power."³¹ Because of the money and wealth that oligarchs can use at their disposal, courts in an emerging oligarchic state tend to be a battleground where oligarchs have an upper hand in championing constitutional discourses that favor their own particularistic interests. As Moustafa and Ginsburg³² show, oligarchs

28. Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, MA: Blackwell, 2008), p. 31.

29. Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019).

30. Pistor, *The Code of Capital*, pp. 3–4.

31. Michael Albertus and Victor Menaldo, "The Political Economy of Autocratic Constitutions," in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (New York: Cambridge University Press, 2014), p. 54.

32. Tom Ginsburg, and Tamir Moustafa, "Introduction: the Functions of Courts in Authoritarian Politics," in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2012), pp. 4–17.

can use the courts in several ways: (1) reinforce regime legitimacy and undermine political opposition; (2) strengthen compliance and resolve competing interests amongst oligarchic groups within the state-society nexus; (3) enable economic transactions and investments; and (4) the deputation of highly contentious government policies to courts to demonstrate objectivity and neutrality. Because courts derive their power from the impression of autonomy from populist influence and claimed expertise, oligarchs settle highly controversial policy disputes from social democratic activists and other forms of public interest movements by passing the buck to the courts.

Third, oligarchic democracies sustain themselves by manipulating constitutional discourses in ways that legitimize their hold for power and framing unfettered capital accumulation as purportedly supportive of the long-term collective interests of the society. For instance, oligarchs use surrogates who run for high-level public office to protect the long-term interest of capital accumulation; in that case, the role of public officials is no longer public interest, but wealth accumulation of the oligarchs. Electoral processes and campaigns function as a battleground for competing constitutional discourses as various candidates proffer their own notions of political utopia as embedded in their own framing of constitutional principles. Yet, in oligarchic democracies, electoral candidates with immense capital strategically use their wealth in expensive campaigns and electoral propaganda in the hope of winning public office that could be instrumentalized for private purposes. As an oligarchic democracy matures, the public sphere, where constitutional discourses are reproduced and renegotiated, exhibits “the monochrome ideological universe in which the system is plunged: an all-capitalist order, without a hint of social-democratic weakness or independent political organization by labour.”³³ Thus, the neo-liberal rights consensus thrives in the competition for the dominant constitutional discourse, while social democratic ideals and labor interests are substantially deemed as “unconstitutional” or discredited in the public sphere. As Versteeg and Zackin³⁴ contend, “elites can use entrenched documents to secure (or entrench) their privilege,” as exemplified by “the U.S. Constitution ... as a means through which the propertied few entrenched their material advantages against the democratic forces that might have attempted economic redistribution.” In this way, oligarchs, whether formally within or outside the state apparatus, primarily work not for public interest but for capital accumulation. Oligarchs weaponize the right to peaceful assembly in a way that bolsters their quest for wealth accumulation through financing protests in order to reinforce their socio-political power beyond the formal state apparatus, particularly in the public sphere. For instance, Jeffrey Winters,³⁵ a specialist of oligarchic politics, recounts his conversation with an oligarch during his fieldwork:

“I’ll tell you, sometimes I feel like funding a revolution,” an exasperated oligarch in Southeast Asia told me ... it was spoken late in 2007. After a quick calculation, the oligarch realized that it would only cost him about \$20 million to \$30 million to put 100,000 demonstrators on the streets of his capital for a month – a sum he considered cheap.

33. Perry Anderson, “Homeland,” *New Left Review* 81 (May/June 2013), 5.

34. Versteeg and Zackin, “Constitutions Un-Entrenched,” 6.

35. Winters, *Oligarchy*, p. xiv.

Taken together, I maintain that those aforementioned mechanisms demonstrate how oligarchs manipulate constitutional principles through the strategic deployment of favorable constitutional interpretations and immense material resources – all in the hope of turning public offices and the public sphere as tactical modes of wealth accumulation. Why do oligarchs take interest in consolidating their power through constitutional discourses and actual reshaping of the legal system in their favor? As Albertus and Menaldo³⁶ contend, the “fundamental reason is that constitutions can help dictators consolidate power, increase investment, and boost economic development – all while generating a steady flow of rents for themselves and their cronies without empowering challengers that might undermine their authority.” Simply put, constitutional discourses in the public sphere are just one of the many ways in which oligarchs build and reinforce their social legitimacy – a view that is echoed by Brancati,³⁷ who notes “that authoritarian regimes construct and utilize nominally democratic institutions, particularly legislatures and multiparty elections, in order to identify and manage sources of societal discontent.”

The case of contemporary Philippines³⁸ illustrates the ongoing maturation of an emerging oligarchic democracy, despite its historically long exposure to democratic institutions and civil liberties compared to its peers in the region.³⁹ Emerging from the downfall of the Marcos dictatorship, the 1987 Philippine Constitution guarantees civil and political rights but abstains from affirming the state’s indispensable role in institutionalizing a reliable welfare system, let alone material equality. Yet, the institutionalization of neoliberal policies of democratically elected presidential administrations since the 1990s has contributed to the widening gaps between the rich and the poor.⁴⁰ In 2017, Credit Suisse reported the increasing inequality in the Philippines, with only 0.1 percent

36. Albertus and Menaldo, “The Political Economy,” p. 53.

37. Dawn Brancati, “Democratic Authoritarianism: Origins and Effects,” *Annual Review of Political Science* 17 (2014), 315.

38. Refer to Mark Thompson’s discussion on the Duterte presidency (2016–present): Mark R. Thompson, “Bloodied Democracy: Duterte and the Death of Liberal Reformism in the Philippines,” *Journal of Current Southeast Asian Affairs* 35(3) (2016), 39–68. Accordingly, Duterte’s initial electoral came not from the poorest Filipinos, but from the middle class and upper-class voters. The appeal of the “good governance” narrative of the Aquino administration (2010–2016) appeared to have waned amid increasing inequality and criminal violence. Consequently, the relatively more prosperous voters feared for their personal safety and found Duterte’s anti-crime and war on drugs agenda more appealing. Duterte’s war on drugs, however, has killed thousands of unarmed civilians, especially in provinces with larger populations, more affluent, and stronger state agencies: Rollin F. Tusalem, “Examining the Determinants of Extra-Judicial Killings in the Philippines at the Subnational Level: The Role of Penal Populism and Vertical Accountability,” *Human Rights Review* 20 (2019), 67–101.

39. Salvador Santino F. Regilme Jr, “Habermasian Thinking on Civil Society and the Public Sphere in the Age of Globalization,” *Perspectives on Political Science* (2016), 1–7; Salvador Santino F. Regilme, Jr, “Why Asia’s Oldest Democracy is Bound to Fail,” *Journal of Developing Societies* 32(3) (2016), 220–45.

40. Walden Bello, Herbert Docena, Marissa de Guzman, and Marylou Malig, *The anti-development state: The political economy of permanent crisis in the Philippines* (London and New York: Zed Books, 2005).

of the country's adult population possessing wealth worth over 1 million USD, while nearly 87 percent of the adult population owns wealth below 10,000 USD.⁴¹ Remarkably, only 12 Filipinos have wealth amounting to more than 1 billion USD. Those aforementioned facts speak to how wealth is extremely concentrated to a handful of individuals. In the Forbes' 2019 *Philippines' 50 Richest List*, only five women were listed, and the majority of the listed individuals have inherited and expanded their wealth after several familial generations.⁴² In one case of blatant oligarchic capture of state power, the real estate mogul Manuel Villar, who is listed as the second richest, whose wealth amounted to 5 billion USD in 2019, once served as a long-time elected legislator and competed as a 2016 presidential candidate. In the current national government, at least two members of the Villar oligarchic dynasty occupy influential roles: Mark Villar (son of Manuel Villar) serves as the cabinet secretary for public works and Cynthia Villar (wife of Manuel Villar) works as a Senator in the upper house of Congress. This dominance of the Villar oligarchic dynasty continues despite the allegations that their real estate business empire has been directly benefitting from state-supported infrastructure projects and other favorable government policies.⁴³

The case of the Philippines illustrates the limitations of contemporary electoral democracies that are driven by oligarchic interests yet legitimized through a neoliberal rights consensus. As the political theorist Helene Landemore⁴⁴ rightly observes, "the diverse many are often smarter than a group of select elites because of the different cognitive tools, perspectives, heuristics, and knowledge they bring to political problem solving and prediction." By delegating so much power to oligarchs in the discursive shaping of constitutional discourses and the formation of public policies, a given political order does not only undermine its legitimacy in the eyes of the majority of the population; rather, the state is unlikely to be effective in solving its governance problems with the meaningful participation and rational deliberation involving its diverse stakeholder populations.

Oligarchic democracies are likely to emerge when the political economy of state-society relations uphold a *neoliberal rights consensus* while delegitimizing the moral claims of a socio-economic rights paradigm. The neoliberal rights consensus highlights four fundamental principles: (1) civil and political rights; (2) lean state, where the maximum role is only to provide general physical security within the society; (3) private property rights of individuals; (4) a highly deregulated political economy, where free markets and capital accumulation are heavily prioritized. That conceptualization of a neoliberal rights consensus echoes the "Washington Consensus" that gained traction in

41. Ian Cigaral, November 11, 2017, "Filipinos' wealth declines in 2017 as inequality widens," *Philippine Star*, <https://www.philstar.com/business/2017/11/22/1761419/filipinos-wealth-declines-2017-inequality-widens> (accessed April 20, 2019).

42. Forbes, January 1, 2019, "Philippines' 50 Richest," *Fortbes*, <https://www.forbes.com/philippines-billionaires/list/> (accessed April 21, 2019).

43. Reuters, February 10, 2010, "Five facts about billionaire Philippine senator Villar," *Reuters*, <https://www.reuters.com/article/idINIndia-46056920100210> (accessed April 20, 2019).

44. Helene Landemore, "Yes, We Can (Make It Up on Volume): Answers to Critics," *Critical Review* 26 (2014), 184.

development governance and state-building projects in the Global South.⁴⁵ In many ways, the Washington Consensus also influenced rich Western states that dramatically limited the extent of public goods provision while empowering oligarchs through tax cuts for the wealthy, bail-outs of big financial conglomerates, and the courts' consistent upholding of corporate interests when clashing with labor, among many other instances. Yet, those policies need ideological support for them to be seen as legitimate, and neoliberal rights-dominated constitutional discourses are reproduced and sustained by pro-capital institutions and organizations that systematically undermine competing paradigms such as social democratic principles. As Anderson⁴⁶ observes in the case of the US, "by the end of the decade the Chamber of Commerce and National Federation of Independent Business had doubled their membership, and corporate lobbyists in Washington multiplied over ten-fold; political action committees funded by capital far outdistanced those of labour, and hard-hitting new think tanks – the American Enterprise Institute, Heritage Foundation, Cato Institute – were at battle stations." Consequently, with the eventual legitimization and propaganda-hitting agendas of such organizations, constitutional discourses that prioritize neoliberal rights have gained traction, thereby paving the way for oligarchs to employ the state apparatus in service of oligarchic wealth accumulation. Although US President Donald Trump's predecessors had embraced neoliberal policies and concurrently disguised its detrimental effects through representative democratic discourses, the Trump administration, in contrast, renounces neoliberalism's legitimization trappings and enriches himself and his allies through the state's coffers.⁴⁷

V. Conclusions

This article reflects on the relationship between constitutional orders and the effectiveness of rights-making in the context of oligarchic democracies. My analysis shows that examining whether the constitution has any bearing upon the rise of oligarchic democracy requires the conceptualization of the constitution not only as the *text per se* but as *contentious politics of competing discourses*. An oligarchic democracy tends to champion a constitutional paradigm that highlights neoliberal rights consensus, whereby state power is dramatically undercut so as to empower individual political rights, private property rights, and unfettered capital accumulation. Over time, the sustained empowerment of individual property rights and further institutionalization of opportunities for capital

45. Philip Arestis, "Washington Consensus and Financial Liberalization," *Journal of Post Keynesian Economics* 27 (2004), 251–71; Toby Carroll, *Delusions of Development: The World Bank and the Post-Washington Consensus in Southeast Asia*, (Basingstoke: Palgrave, 2010); Charles Gore, "The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries," *World Development* 28 (2000), 789–804; John Williamson, "What Should the World Bank Think About the Washington Consensus?," *The World Bank Research Observer* 15 (2000), 251–64.

46. Anderson, "Homeland," 5.

47. Salvador Santino F. Regilme Jr, "The decline of American power and Donald Trump: Reflections on human rights, neoliberalism, and the world order," *Geoforum* 102 (June 2019), p. 160.

accumulation are detrimental to those who do not have the initial advantages in life, particularly because of oppressive structures of identity recognition and distributive politics.

Consequently, constitutional discourses that advocate a more robust welfare state apparatus and long-term collective interests of the polity are systematically repressed. While my analysis herein focuses on the processes within traditional nation-states, further research may investigate the emergence of constitutional discourses that promote a neoliberal rights paradigm, which is formulated and sustained at the transnational level. That potential analytic focus could highlight how neoliberal constitutional discourses emerge as a result of the agency-level decisions by international institutions and powerful states as well as the ordering principles of the global political economy.

The apparent spread of oligarchic systems in the contemporary world also means an opportunity to reform the unjust neoliberal political economy. The philosopher Avizier Tucker⁴⁸ suggests a more radical move: “deliberation in the public sphere requires, then, first the establishment of a communist utopia, the homogenisation of society and the generation of classless secularised society.” While a full-blown analysis of whether meaningful deliberative democracy could only emerge in a classless society is beyond the scope of this article, I tentatively suggest that the rise of oligarchic democracies can be curtailed in two ways, at least in the short-run. The first step requires unifying all counterhegemonic constitutional discourses under the banner of “social rights consensus” – where issues of identity politics and oppression are traced back primarily, but not exclusively, to unjust material distribution. A constitutional design that explicitly addresses issues of material injustice and empowers a welfare state to curb the abominable excesses of wealth accumulation could undermine oligarchs. The second step pertains to democratically expanding the public sphere, as it may be the case of a constitutional provision that subsidizes a wide variety of media agencies (ranging from generally non-partisan ones to grassroots interest groups), while also curbing corporate power that seeks to build conglomerates in the media and public sphere. With the state’s commitment to providing material resources to the marginalized sections of the society, the disenfranchised ones would have more opportunities to meaningfully participate in the public sphere, and hopefully, curb the power of oligarchs. Hence, the relationship between constitution-making and oligarchic politics is not only about the *constitution-as-text per se*, but a quest for dominance amongst competing cardinal principles of justice and human rights claimed and asserted within the transnational and national public spheres.

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48. Avizier Tucker, “Pre-Emptive Democracy: Oligarchic Tendencies in Deliberative Democracy,” *Political Studies* 56 (2008), 133.

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