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#### The United States federal government should treat any vertical restraint exercised by a firm with market power as a per se violation of its core antitrust laws.

### 1AC – Labor

#### The consumer welfare interpretation of antitrust encourages vertical integration in the name of efficiency. Franchise arrangements typify the power of firms to dodge labor regulations while avoiding antitrust liability. Increasing workplace hierarchy isolates workers from economic and political power.

Marshall **STEINBAUM** Economics @ Utah **’19** “ANTITRUST, THE GIG ECONOMY, AND LABOR MARKET POWER” *Law and Contemporary Problems* 82 p. 46-50

VERTICAL RESTRAINTS AND THE FISSURED WORKPLACE

David Weil’s book The Fissured Workplace describes a crucial component of the decline in labor’s bargaining power: the gradual disappearance of the traditional, and statutory, employment relationship.5 Instead of uniting workers at different levels of the labor market hierarchy (wages, skills, and social prestige), the contemporary corporation has become a mechanism for segregating low-wage (and even some middle-wage) workers from the economy’s dominant decision-makers: the executives and shareholders of the economy’s leading corporations and the financial institutions that own and control them. Although most workers remain statutory employees of some employer, they are increasingly remote from the decision-making entity that exerts power over their day-to-day lives and terms of work.6

Weil is himself a former senior official responsible for enforcing federal labor law, and he rightly points to the ease with which employers can evade that law by re-classifying workers as either independent contractors or as employees of their contractors as a crucial element in legalizing this fissured business model.7 Many other scholars and organizations, including worker organizations, have emphasized changes in labor law that are very important to understanding how these trends erode worker bargaining power in the economy and ensure that it takes the form of inter-firm wage segregation.8 Specifically, the National Labor Relations Act9 and the Fair Labor Standards Act,10 as well as numerous other state and federal labor regulations, impose tests for statutory employment as a necessary precondition for a worker to enjoy their protections. Increasingly, employers who classify their workers as exempt contractors rather than employees are able to pass these tests, thanks to deferential court rulings,11 technologies that enable employers to manage workers from afar, and industry deregulation that legalizes new, vertically dis-integrated business models in a given sector, among many other causes. These all give employers both the legal means and the pecuniary motive to push their workers outside the legal boundaries of the firm under whose effective control they remain.

Weil’s research is classified methodologically as industry case studies of what he calls the “lead firms” that direct and control a series of contractors and affiliates that actually employ the workers and do the work. His findings have been confirmed by more traditional economics studies of inter-firm earnings inequality using matched employer-employee data from a variety of sources.12 For instance, Song and others used social security records to document the rise in inter-firm inequality; increasingly, the highest-paid workers work for the firms where average pay is the highest.13 This is not because those firms are inherently more productive than other firms due to their firm-specific characteristics, but rather that they have gotten better at sorting out well-paid and highly-educated workers and excluding low- and middle-wage workers from their employment.14 A study by Abowd and others of data from state unemployment insurance records verifies these distinctions, and attaches further significance to working at a well-paid firm. Not only do workers earn more now, but they do so for the rest of their careers.15 “High-paying firms facilitate moving workers to the top of the earnings distribution and keeping them there.”16 Labor market surveys paint a similar picture.17

In a competitive labor market, the identity of a worker’s firm is irrelevant to what he or she gets paid, because if any worker were paid less than they were worth they would quickly switch to a job offering them their competitive market wage. In a competitive labor market equilibrium, all firms pay the same to all workers with similar characteristics. In reality, though, firms have considerable discretion to dictate pay, because outside job offers are sufficiently hard to obtain that it is unlikely that workers will have the option to leave.18 In other words, labor markets are not competitive, as evidenced by the increasing earnings inequality between firms. The aforementioned research on inter-firm inequality shows that workers are increasingly remote from profits and from centers of economic power.19 Anyone familiar with the history of labor organizing, worker solidarity, and the conditions for social mobility can recognize that under those conditions, it’s impossible for workers to benefit from economic growth. An article from the New York Times in 2017 made this point by contrasting the experience of janitors working at the corporate headquarters of Kodak in the early 1980s versus Apple today. The Kodak janitor was employed by the company, enjoyed a tuition subsidy as part of her benefits package, learned how to use inventory software as part of obtaining a college degree on the job, and ultimately worked her way up within Kodak to be head of IT for the whole company. 20 Meanwhile, the Apple janitor is employed by a contracted, franchised janitorial services firm, enjoys no part of the benefits package of an Apple employee, and has no chance of obtaining a promotion up the hierarchy of what is now one of the economy’s most valuable single firms.21

The antitrust side of the story of the separation of workers from lead firms is the simultaneous erosion in the jurisprudence of the Sherman Act’s prohibitions on vertical restraints. In the context of antitrust, a vertical restraint is a contractual provision or mode of operation that restricts the autonomy of the counterparty in the case where each party operates at a distinct segment of the supply chain. For example, if an automobile manufacturing company operates a network of independently owned dealerships, and its dealers are forbidden from selling within a given radius of another authorized dealer’s location, that is territorial exclusivity, a non-price vertical restraint. If such a contract imposes the final retail price of said automobiles, that is vertical price-fixing, or in antitrust lingo, resale price maintenance, which can be either a minimum or a maximum (or both, in the case of one definite price at which the car would be re-sold). Other vertical restraints include the varieties of exclusive practices that suppliers might impose on their affiliated dealers or distributors, like compulsory purchase contracts—known as full-line forcing or requirements contracts.22

Such exclusive dealing was the subject of the 1951 antitrust case United States v. Richfield Oil Co.23 The case concerned the relations between a dominant oil refiner and gasoline supplier—Richfield Oil—and its affiliated service stations, which were required to source their gasoline solely from Richfield and to carry exclusively retail auto parts, sponsored products, according to supply contracts negotiated by Richfield, rather than seeking out and negotiating their own sources of supply according to their customers’ preferences. The court ruled unequivocally for the government on the grounds that it exercised de facto control over these “independent business men,” in contravention of the antitrust laws, despite the fact that they were not employees of the company. That case created a sharp distinction and a comprehensive delineation between the realm of labor and antitrust: if subordinate entities are “independent business men” and not employees, it is illegal to exercise control. The United States Supreme Court affirmed the same basic principle against coercion of non-employees by vertical supply contract in the 1964 case Simpson v. Union Oil Co. of California.24 It is precisely through the erosion of the Richfield Oil standard that the fissured workplace has been allowed to come about. Independent business people are independent for the purposes of evading labor law, but once pushed outside the border of the firm, the restrictions antitrust places on their domination have been all but erased. As such, what Weil calls lead firms can continue to exercise control and direct their business operations by contract.25

Those contracts would once have been illegal, before antitrust jurisprudence began to search out spurious justifications for their immunity on the basis of supposed efficiency.26 For example, manufacturers would want their branded distributors to be bound by contractual provisions to ensure that dealers represent the brand effectively to customers, rather than hide their poor customer service behind the brand’s overall prestige, or that they must contribute to its marketing budget and abide by its standardized branding and pricing policies. Theoretically, this would serve the overall collective interest of the supplier-distributor network. The efficiencies to be gained by permitting franchisors to exercise overall direction and control were assumed to flow eventually to consumers in the form of increased output, enhanced variety or quality, or lower prices—all reflecting the fact that vertical control exercised this way is, in fact, pro- rather than anti-competitive and therefore ought not to be penalized by the antitrust laws.27

Brian Callaci lays out how this process occurred in one sector, so-called business-format franchising.28 As he writes, “While the economic boundaries of the firm correspond to the extent of centrally planned and hierarchically coordinated production, the legal boundaries are set in politically contested legislatures and courts. Exploiting or creating mismatches between the two has enabled corporations to enjoy economic benefits of vertical integration while avoiding many of the legal risks and costs.”29 In the case of franchising, that took the exact form that courts had ruled illegal in Richfield Oil and Simpson v. Union Oil Co. of California: franchisors licensed their trademarks and business models to an army of franchisees, who would be granted exclusive territories in exchange for agreeing to exclusive supply contracts, all enforced by the threat of dealer terminations.

Economists, particularly those operating in the Law and Economics tradition, have interpreted the rise of these hybrid structures, part firm, part market organizations, as reflecting the evolution of an efficient allocation of coordination rights and the alignment of incentives between principal and agent so as to remove the need for direct supervision and take advantage of economies of scale and specialization.30 But Callaci shows that, in fact, the advent and spread of franchising was not due to the law catching up with the natural evolution of a business model marked by superior efficiency. Rather, it is due to a concerted lobbying campaign31 to pry apart the sharp border between labor and antitrust represented by Richfield Oil and grow a whole business model in the legal gray area.32 As far as antitrust was concerned, the operation was meant to roll back the per se illegality of non-price vertical restraints that existed in antitrust following the Supreme Court’s ruling in United States v. Arnold, Schwinn & Co. in 1967, and the per se illegality for maximum resale price maintenance that existed following the Court’s ruling in Albrecht v. Herald Company in 1968.33 With the Court’s decisions in Continental Television v. GTE Sylvania in 1977 and in State Oil Co. v. Khan in 1997, antitrust immunity for vertical integration by contract was complete.34

#### Antitrust law allocates the right to coordinate economic activity. The consumer model of economic efficiency privileges allocating coordinating rights to large powerful firms.

Sanjukta **PAUL** Law @ Wayne State **’19** “Fissuring and the Firm Exemption” *Law and Contemporary Problems* 82:65 p. 68-72

A. Franchising

Franchising typifies the dynamic that has driven the expansion of large firms' coordination rights under conditions of business fissuring: an iterative interaction between shifting legal norms and affirmative decisions about structuring business arrangements. Franchisors succeeded in normalizing their business model in the eyes of the public, institutional actors, and the decisional law, relying to a large extent upon arguments that the business arrangement is efficiency-enhancing, ultimately benefiting consumers.1 2 However, aspects of the standard franchising business model still outstrip the now-permissive vertical restraints cases, and reveal tensions in the reigning consumer welfare standard.

Overall, by confining antitrust-immunized control relations largely to the space within the firm-and to a few more democratic arrangements outside the firm-mid-century antitrust had historically placed some limits on the unreciprocal control exerted by franchisors over franchisees. Mid-century antitrust took a dim view of control imposed through vertical, contractual restraints, for example by franchisors upon franchisees. Importantly, this view was motivated more by a norm of non-domination than by an idea of realizing ideal competitive prices, or of attaining the lowest possible consumer prices.13 The Borkian turn in antitrust law that took hold in the 1970s worked to remove these limits on vertical restraints.14 By doing so, it demonstrated that its fundamental preference for allocating coordination rights is not only within firms, but also by large, powerful firms (at least so long as that coordination too is in the form of control over less-powerful actors). Around the same period, the Borkian turn expanded antitrust law's concept of the firm itself, to capture parent-subsidiary relationships and other corporate groups, and thus extended antitrust immunity to any coordination between separate corporations within these relationships." The single entity doctrine, as it is called, expressly inscribes the preference for economic coordination in the form of control, preferably grounded in concentrated ownership interests." Franchisors have used and relied upon both of these changes in antitrust law to justify their control over franchisees and at times, franchisees' employees.

Fast-food franchisors coordinate their franchising families various ways. They exert control over key elements of franchisees' supply, labor, and product decisions. Notably, they even exert control over the prices of the products sold by franchisee firms, typically in the direction of driving them down. One McDonald's franchisee noted that "participation in deals and pricing is voluntary only in theory," and that on an occasion when its coffee price was a nickel over the franchisor-advertised sale price, "the head of the McDonald's region came in and he said: 'You are over. You can't do this."'17 Some other franchisors even more straightforwardly set the prices charged by franchisee firms; for example, janitorial franchisors often directly bargain contracts with customers on franchisees' behalf."s Burger King, like McDonald's, exerts the same downward pressure on its franchisees' prices through its "Value Menu."19

Franchisors have also placed limits upon worker mobility within franchise "families" through so-called no-poaching provisions placed into franchisee contracts. In the past, franchisors have successfully claimed immunity for these controls under Copperweld, or the single entity doctrine, thereby claiming that franchisees are effectively extensions of the franchisor itself.20 Such provisions have recently come in for new criticism, and have been challenged by workers in a number of pending cases. 21 In the current disputes, some franchisors have again raised the single entity defense, but thus far a judge has not ratified it. To expressly ratify this theory would be to make explicit the selective application of firm status to franchise "families" as between antitrust and labor law. Franchisees themselves are denied coordination rights by antitrust law,22 further cementing franchisors' power. Meanwhile, franchisees' employees' fight for coordination rights, for example in the form of unionization, has also been frustrated by franchisors' position that they are completely separate from franchisees, which would require workers to separately unionize numerous small franchisees. In short, franchisors have thus far been permitted to disclaim affiliation with franchisee firms altogether under labor law, even as they frequently claim that franchisees are extensions of the firm under antitrust, in both cases cementing their exclusive coordination rights in the overall arrangement.

The pending no-poach cases also illustrate the operation of the law of vertical restraints and franchisors' attempts to stretch its limits. To see this, note first that even franchisors' control over franchisee product pricing decisions ought to be uncertain territory. As noted, franchisors exert control over consumer prices charged by franchisees, in addition to aspects of their dealings with suppliers and workers. Even under the existing law's profound preference for vertical control over horizontal coordination, franchisors' control over franchisee pricing-which in turn has direct, negative implications for franchisees' labor relationships and workers' wages 2 3-does not obviously fit within the parameters of legal vertical restraints. The paradigm cases, from GTE Sylvania (geographic market allocation) to Khan (maximum prices) to Leegin (minimum prices), all deal with re-sale of a product sold by the actor seeking to impose the restraint. Franchisors do not sell hamburgers to franchisees, who then re-sell them. This problem is not necessarily resolved by extending the principles of these cases to intangible property-such as the franchise brand-which are covered.24

There is, in any event, no credible argument for extending these precedents to labor-facing restraints imposed by franchisors upon franchisees. Franchisors do not hire out workers to franchisees. No proprietary technology licensed by franchisors to franchisees is implicated in those relationships. Yet the Department of Justice chose to file a brief in these pending cases effectively supporting franchisors' position and suggesting that no-poach agreements limiting mobility among some of the lowest-wage, most vulnerable workers have legally cognizable benefits.25 This is notable in part because it dramatizes the tensions in antitrust law's current governing normative framework. The DOJ brief purports to treat labor market restraints symmetrically with product market restraints. But this is belied by their own arguments about the putative countervailing efficiencies of no-poach agreements, which are framed purely in terms of consumer benefits, namely lower prices. This points up a basic tension within the existing legal framework, which simultaneously claims to treat worker welfare equally with consumer welfare, but which only admits evidence of countervailing benefits to consumers, primarily price benefits, when evaluating forms of permitted coordination. In short, the DOJ's briefs supporting franchisors' position in the pending cases brought by fast food workers to invalidate employee no-poach agreements imposed by franchisors upon franchisees stretch existing tendencies in the law to favor control by powerful firms, which is presumed to confer consumer benefits.

In effect, the DOJ's brief seeks to enshrine in the official, surface grammar of the law what has heretofore been only a tacit expansion at the level of its deeper grammar, where the firm exemption partially resides. That tacit expansion of the borders of the firm exemption has been achieved through decades of creating facts on the ground by naturalizing franchisors' business model, and through economic arguments that these arrangements are efficiency-enhancing because of lower consumer prices.

#### We should allocate coordination rights on the basis of power rather than efficiency.

Sanjukta **PAUL** Law @ Wayne State **’19** “Fissuring and the Firm Exemption” *Law and Contemporary Problems* 82:65 p. 85-87

TOWARD A RE-ALLOCATION OF COORDINATION RIGHTS

Contemporary fissured business arrangements distill the preference for topdown, hierarchical control of smaller players by more powerful firms that is already present in today’s antitrust framework, while often pushing beyond the boundaries set by the current expression of that framework in the surface structure of the law. They call out for a re-allocation of coordination rights under antitrust law. What criteria are available to effect this re-allocation, and on what basis should it be achieved?

Our current framework recognizes one other relevant source of coordination rights, beyond the firm, and that of course is based in labor law. The labor exemption to antitrust essentially permits economic coordination that antitrust would otherwise condemn where individuals engaged in the performance of labor or services are sufficiently subject to the power and control of a firm, and lack significant power and control—including relevant ownership rights—of their own.75 From this perspective, the labor exemption has always—or at least, long— been a limited qualification of the firm exemption, and it has been in a basic way dependent upon it. The limited qualification represented by the labor exemption is underlined by the fact that the collective power of labor—even if it were fully realized—cannot legally be brought to bear to contest basic firm or capital decisions, an outcome that Karl Klare and others have shown was not intrinsic to the Wagner Act itself, but was instead imposed by a contingent turn in the decisional law.76 Given this basic derivative relationship of the labor exemption to the firm exemption, it is then no wonder that the superficial undoing of the firm has further undone the labor exemption.

How might we conceive of a new allocation of economic coordination rights that would avoid some of these problems, which have undermined the New Deal order almost beyond recognition? Attempts to broaden the labor exemption or to create new worker exemptions while retaining or copying its basic structure are unlikely to be sufficient. Fissured business structures show that the firm, which was never a platonic ideal to start with, will continue to change and mutate—partly of course in response to the law’s own allocation of coordination rights. Imagine if all workers or individual service-providers currently classified as independent contractors gained coordination rights. What would stop many firms who currently use independent contractors from moving to a system of contracting with, say, two to three person “firms” of workers—firms that are conveniently incorporated by signing ready-made forms in the company’s office upon hiring? These groups of workers would of course lack coordination rights in their bargaining with the firm that retains their services, and their intra-firm coordination rights would be negligible. The law should not allocate coordination rights to working people on the condition of particular business structuring decisions made by others. But such decisions are the inevitable response to smallbore redefinitions of the labor exemption, as fissuring itself teaches us.

Instead, we might consider allocating coordination rights on the basis of power and social benefit. Importantly, to guide the application of these concepts, we must first discard the ideal-state competitive order as the default normative framework for antitrust and for economic regulation more generally. This is not to say that competition as a social process, referring to healthy business rivalry, is not important to antitrust law: it is, and ought to be balanced with appropriate and socially beneficial coordination. However, once we realize that the ideal state concept of competition that is currently presumed to form the basis for antitrust law is contributing very little—except as a smokescreen for other normative choices—then we need no longer view economic coordination as a special exception to the order of things. Thus, we need not look for conditions of deprivation, or powerlessness, as constituting the sole basis—aside from the firm exemption—for the appropriate exercise of coordination rights because they are an exception to an otherwise perfect order. That is what our current framework does, and it is also the assumption on which even the most ambitious reform proposals proceed.77

Instead, once coordination is no longer a special exception to the ideal-state competitive order, we may think of allocating coordination rights not only in order to contest existing power over someone—in other words, to contest conditions of domination—but more broadly and positively, to allocate coordination rights in order to confer a social benefit and so long as the coordination does not result in power over someone else. In this vision, power would be a constraint upon coordination rather than the criterion of its permission. So, truck drivers would be able to engage in direct price coordination among each other, so long as that coordination did not result in the undue exercise of power over some other group of people: other truck drivers or customers, for example.78 They would not have to show that someone else has power over them—whether through prices, or something else—in order to engage in coordination. Indeed, within such a framework, each of the groups discussed in Part II—franchisees, Uber drivers, and independent contractors— would quite plainly be allocated coordination rights. The precise scope of those rights should be determined in order to ensure that undue power over other groups does not result. Moreover, the availability of those rights would largely not depend upon unilateral decisions made by the lead firms in any of these arrangements in defining their relationships with workers, franchisees, or others in their orbit. Thus, small players’ coordination rights would be more secure than those allocated by a broadened labor exemption or other new exemption. Conversely, on this alternative approach to the allocation of coordination rights, antitrust law would not permit powerful firms like Uber and McDonald’s to exert control over small, less-powerful players like drivers and franchisees. However, rather than prohibiting this coordination on the ground that it facilitates horizontal coordination that is presumptively bad, antitrust law ought to take the view that it is impermissible because it unduly exacerbates power imbalances and domination, and confers no social benefit that would not be better realized through more democratic forms of coordination.

In both directions, a conscious re-allocation of coordination rights would work toward balancing undue asymmetries of power rather than exacerbating them, as the current antitrust framework does, particularly in the context of fissured business arrangements. In order to do so, it would also recognize that the current framework makes normative choices about allocating coordination rights that cannot be derived from putatively neutral principles supplied by the competitive ideal.

#### Contesting conditions of domination should be a core political-economic value and basis for organization.

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This diagnosis of unequal economic power recasts the problem of modern capitalism as one not of income inequality but rather one of domination—the accumulation of arbitrary, unchecked power over others.38 Domination, as suggested by these Progressive Era critics, could manifest in both the concentrated form of corporate power and the diffuse form of the market system itself**.** Domination captures a wide range of the moral harms in an economically unequal society: the subjugation of workers to corporations, the subrogation of the public as a whole to monopolies and “too-big-to-fail” banks, and the ways in which diffuse patterns of discrimination or market structures might constrain individual and collective freedom. The problems of our unequal society are not just matters of distributive justice and income. To overcome these challenges we must do more to ensure that all Americans have real, meaningful freedom to shape their own lives—and that means have a real voice, a real share of power in economic, social, and political realms. The freedom that domination threatens—the freedom we must seek to realize—is not the libertarian freedom of consumer choice and market transaction; it is the richer freedom to live lives we each have reason to value—a freedom that is expanded with our capacities and capabilities to have real agency in the world. In short, it is the freedom of being an agent, capable of authoring one’s own life and coauthoring collectively our shared political, social, and economic life. This is the freedom that is constrained by the accumulation of unchecked power, whether by the state, the corporation, or the market itself.

#### Antitrust plays a key role in contesting workplace domination. The legal strategy of separating a firm from its workers means any challenge to corporate power should prevent firms from separating workers from shares in decision-making and profits.

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CONCLUSION: USING ANTITRUST TO RE-BALANCE POWER IN LABOR MARKETS

This paper sets out an important but under-appreciated aspect of the rise in labor market precarity and diminishing worker bargaining power: the erosion of antitrust laws restricting dominant firms’ ability to use vertical restraints to control and restrict both less powerful affiliates and the workers who work for them, and the concurrent use of antitrust against any attempt by those workers or independent businessmen or contractors to bargain collectively against such concentrations of power. In ascertaining the causes of contemporary inequality in wealth, income, and social status, especially with respect to the labor market, we cannot overlook the role that antitrust has played.

This contrasts with a recent Economic Policy Institute paper by Heidi Shierholz and Josh Bivens that treats the rise of employer power in labor markets, and the extent to which weakening antitrust has caused that phenomenon, as a less important cause of rising inequality and stagnant wages compared to the erosion of labor law and thus of collective bargaining.95 Their evidence for the contention that diminishing worker bargaining power matters more than concentrated employer bargaining power is that inequality within the distribution of labor income is a more significant cause of stagnating wages and the growing gap between median worker pay and average worker productivity than is the declining labor share of national income, which is of more recent vintage than either of the first two economic trends.

But we cannot map rising labor income inequality to worker bargaining power and labor law and the declining labor share of income to employer power and antitrust so neatly. As the analysis in Parts II and III show, income inequality is to a large extent caused by rising earnings inequality between firms, rather than between workers, reflecting employer power to set wages. This is the result of the legalization of business models like the fissured workplace that allow powerful employers to segregate workers from the profits they earn for their bosses. The point of Part II of this paper is that the fissured workplace is the product of both labor regulation and antitrust. Thus, increasing inequality of power between employers and workers cannot be coherently treated as two separate phenomena: rising employer power, and declining worker power. That means the solution to unequal bargaining power is not necessarily or not entirely an antitrust solution, but antitrust must play a major part, since it implicates the business models available to the economy’s dominant firms. In particular, we should seek, through revived antitrust and labor regulations that both take account of how the economy actually works, and how power is exercised within it, to re-establish the sharp distinction embodied in Richfield Oil.

Either workers are employees, in which case they can be controlled by their bosses, who in turn owe them statutory protections including the right to bargain collectively, or they are independent businesses, in which case they cannot be coerced by contract or by any other means. Proposals to extend and strengthen labor law tests for statutory employment to take account of gig economy technologies are crucial, but they will be ineffective so long as employers and lead firms retain the strong incentive to push workers outside their protection. The role of antitrust in that context is to create a significant cost to so doing: the potential for treble damages under antitrust liability should a lead firm be caught coordinating and directing the activities of its non-employee subsidiaries and contractors. That is the mechanism that would weigh against employers’ incentive to mis-classify.

Putting such an antitrust regime in place entails the abandonment of both the consumer welfare standard and, with it, the Chicago School’s jurisprudence of vertical restraints. Instead, any vertical restraint, price or non-price, should be a presumptive violation of the Sherman Act if it is imposed by a firm with market power. And antitrust’s definition of market power must, in turn, be expanded beyond the confined market-share-based Sherman Act jurisprudence to instead take account of the many ways economists have of testing for the existence of market power. Firms would be judged to have market power if they:

• Have the power to unilaterally raise prices for their customers or lower them for their suppliers, including workers;

• Wage- or price-discriminate among customers, suppliers, or workers;

• Unilaterally impose non-price, uncompensated contractual provisions on their counterparties, like non-compete agreements in labor contracts;

• Impede or control entry by would-be competitors; or

• Earn profits and/or make payments to their shareholders at a rate in excess of their market cost of capital.

All of these things are economic indicia of market power because they could not be done by any one or more firms acting in concert in the face of competition from rivals—therefore they should be legal indicia of market power as well.96

Drilling down on how the antitrust laws should target labor market monopsony in particular, not merely prohibit vertical restraints that enable fissured workplace-style business models, the antitrust authorities should bring a monopsonization suit against an online labor platform like Uber that fixes wages and imposes exclusivity on independent businesses, along the lines of Meyer v. Kalanick. If, as would be expected, that case would be adjudicated under the Rule of Reason, despite its economic equivalence to the FTC’s per se cases against professional organizations and unions of independent contractors, then Congress should streamline the Rule of Reason for labor monopsony. This should be done along the lines proposed by Ioana Marinescu and Eric Posner, setting out principles to guide market definition that are responsive to measured firm-level labor supply elasticities.97 In fact, if firms have the unilateral power to dictate wages without causing a significant share of their workforce to leave, then the proper market definition for a monopsonization case may be significantly smaller than the one those authors recommend as a baseline. The point of such a suit is to force Uber to choose one business model or another: either employ the drivers if Uber wants to fix their wages and monitor them on the job, or give up the pricesetting and market coordination power that makes the platform such a value proposition for its investors. It cannot be allowed to do both. Meanwhile, workers themselves who are not statutory employees should be protected by antitrust’s labor exemption and should be permitted to bargain collectively. However, any such extension of the labor exemption must not also immunize the powerful employer against whom they would seek to bargain. And at the very least, both no-poaching clauses in franchising contracts and non-compete clauses in employment contracts should be illegal per se.98

**The imperative of efficient firms hands despotic power to bosses. Democratizing the governance of firms is key to genuine democracy.**

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This book addresses a fundamental tension between capitalism and democracy, a tension so great that it has the potential to lead our democratic societies to the brink of collapse. It begins with the observation that life in Western democratic society has created an expectation of voice in the economy and the workplace, which cannot be fulfilled by the arbitrary way in which most firms are run. To be a citizen and to be an employee today is to live with a great contradiction between the democratic culture of our times and the reality of the work experience. Our democratic culture gives citizens a hunger for a voice in the way their lives unfold, while their experience in the workplace is one in which they are reduced to mere production factors. Capital investors truly are “more equal than others”1 within contemporary firms – specifically, more equal than the employees who invest their labor in those same firms. Capitalism grants capital investors despotic power – in the original sense of that term2 – over ­­ labor investors, who, in a capitalist economy, are considered to be elements in the means of production. This runs counter to the democracies in which capitalist firms have flourished, and this contradiction has necessarily affected contemporary workplaces: employees today struggle with a range of problems, from lack of motivation and absenteeism to depression. It affects the world outside the workplace as well: the financial, environmental, social, and political crises we now face all press us to examine the role and structure of the firm as an institution within the context of our democratic societies. This book offers such an examination, and its conclusion is unambiguous: firms are better understood as political entities, and not mere economic organizations. Economic organizations they are, but they are much more than that as well, and it is time to acknowledge this fact. If democratic societies do acknowledge this, they will be called to begin to treat firms like all of society’s other institutions: not only endowed with rights, held accountable for discharging specific responsibilities. As political entities, it is crucial that firms be made compatible with the democratic commitments of our nations – in other words, democratized.

The political project that organizes our lives inWestern democracies is driven by a democratic ideal. By this we mean “a compelling normative idea, requiring that people be treated as equals in the process of collective decision-making” (Cohen 2009: 6). This entails that the government be a government “of the people, by the people, for the people,” according to Abraham Lincoln’s Gettysburg Address in 1863. Despite the physical, material, intellectual, and cultural differences of our members, we as societies have declared all citizens to be equal, and organized our institutions in ways intended to help us perceive and treat each other as equals. As Article 1 of the Universal Declaration of the Human Rights affirmed in 1948, we are born “free and equal in dignity and in rights” – equal, and therefore fit to participate in choosing the collective standards that order our lives. But as this book will argue, these assertions are not taken seriously in the world of work. As the level of inequalities within and among nations reaches historic levels (Piketty 2013, Milanovic 2016), people around the world are increasingly impatient with the failings of democracy. They are aware that their life prospects and those of their children differ drastically depending on whether they are born rich or poor – and what clearer violation of the standard of equality underpinning the democratic ideal could there be? Of all aspects of contemporary life, the world of work would seem to be the last great holdover from a bygone era in which despotic and plutocratic rule was the norm. The unsettling cognitive dissonance to which this state of affairs has given rise is plain: in their everyday lives, citizens are enjoined to behave as responsible members of their democratic society. As electors, they are presumed capable of coming together to decide important political questions such as “Who should be president of this country?” or “Should this country leave the European Union?” And yet these same citizens, when they arrive at their jobs, become the subjects of a despotic corporate government in which profitability is the main criterion for all decisions. This criterion of profitability is just as ill defined: Whose profit? To what end? According to what terms? Over how long? In my work as a sociologist, I have observed that employees today live with a contradiction that I, reading it from a Marxian perspective on capitalism, have identified as the capitalism/democracy contradiction. It raises significant questions: What are the limits of the current confrontational coexistence of capitalism and democracy? And, in practical terms, how are we going to reconcile, escape, or end this confrontation? What can be done moving forward to solve the contradiction? Essentially, the road diverges ahead, and we must choose: more capitalism or more democracy. The former will grant more arbitrary power to those who own capital, giving “capitalist despotism” freer rein in our work lives and beyond. The latter leads toward a reinvigorated version of democracy, in which the political rights granted to working people are at least the same as the political rights accorded to capital owners.

To offer a concrete example – not to say an ideal type – the United States has, for the past four decades, been on the path toward capitalist despotism. Corporate money provides limitless funds to electoral candidates; the U.S. Supreme Court’s Citizens United ruling declared that corporations are to be considered as people with the right to free speech; and a significant proportion of social and cultural life has come under the influence or even the direct leadership of corporations, from prisons to sports arenas. In January 2017, as this book is being completed, Donald Trump, a billionaire corporate leader with a track record as a capitalist heir, is about to be sworn in as the country’s president, showing just how far down the path of capitalist despotism the United States has gone. For the time being, and perhaps for the foreseeable future, the United States appears to have resolved the capitalism/democracy contradiction by choosing more capitalist despotism and less democracy.

Yet, what analysts have referred to as a populist revolt against the establishment in the November 2016 election expresses nothing so much as a deep “hunger for democracy” (Ferreras 2007b). People raised as citizens in a democracy aspire to have some agency over the course of their own lives, and the past decades have shown them with aching clarity that this aspiration to agency is little more than a dream.3 It seems clear that the time to explore the alternative route is now. The path of more democracy, as a project of deepening and extending democracy (Olin Wright and Rogers 2015), is a long, historic avenue, the one down which social justice and progress have advanced. It is the long path of emancipation, distinguished by the enfranchisement of different categories of people previously considered unequal. If we are to continue down it today,we must dare to look closely at the specificities of the world around us. This book does just that, and offers a map for the next step, which is the democratization of the corporation. If we fail to take this step, we will be forced to a standstill, from which we will see capitalism eat up what is left of political democracy**.** To forge ahead – and we can – we must keep moving toward more productive4 institutional arrangements in the firm. This book, then, offers a way out of the impasse of “capitalist democracies” (Cohen and Rogers 1983) in which we now live, in which the standards organizing our – capitalist – economies are set by capital investors, while the purportedly egalitarian standards organizing the rest of our – democratic – political life are set by all.

In the West, our age-old understanding of the economy as private in nature has worn away to the point that it must be reconsidered. What should be considered private has changed considerably with time: our economy began as agrarian, became industrial, and is now service-based. More and more employees now work in full or partial view of the public, meaning that the economy, considered since antiquity to be private (the term economy being derived from the Greek oikos-nemein, or the management of the household), is now experienced by many of those contributing to it as part of the larger public space. Service employees greet their fellow citizens as customers face-to-face, over the phone, and through the tentacular world of the internet; even those not in direct contact with customers are constantly reminded of their importance and presence. Beneath the constant gaze of citizen-customers, the corporation household, once intensely private, has slowly moved into the public sphere. This is a shift the full impact of which has yet to be measured. In advanced democracies, we take as given that the public sphere should not be dominated by the power (kratein) of a single (auto-) person, nor by a small group of individuals, valiant, intelligent, or rich as they may be (aristo- or pluto-). Democratic societies have agreed that the public sphere is a space through which people – the demos, all themembers of the democracy – should express their sovereignty, both as individuals and as a society. If this is so, and if the workplace has shifted into the public sphere, then shouldn’t our reference point for its government also shift from the household (oikos) to the people – demos? Analyzing the experiences of those who invest their labor in the firm, I have found that it is impossible to ignore the ways in which they are steeped in notions of democratic justice. Work, for those who do it, is a fundamentally expressive experience. This is, in fact, one of the fundamentals of my argument, that those who invest their labor in firms are motivated by expressive rationality. By this I mean that the work experience resonates with meaning that is constructed by those doing the work, and that this meaning is derived by mobilizing concepts of what is just and unjust in the life of a community – what political philosophers generally refer to as the “political.”

Although it is hardly surprising that traces of democratic culture should be perceptible in the workplaces of democratic societies, this reality has remained strangely invisible. I will mobilize research in corporate and labor law (among other fields) to argue that this is because the idea of the corporation has managed to eclipse the idea of the firm, allowing corporate shareholders to maintain all power over it. As I will explain, the dominant economic theory of the firm reduces the firm to a mere corporation at the center of a nexus of contracts, including labor contracts. In this sense, it practices what I call a Reductio ad Corporationem: it folds the firm into the corporation, despite the fact that the latter is merely the legal vehicle that structures capital investments. It does this by pretending that the fundamental qualities of a firm are identical to those of a corporation. This occludes an immense portion of the firm’s reality. In this way, the economic theory of the firm, while claiming scientific neutrality, has in fact upheld and validated a very narrow approach to the firm (and even to the corporation, as we shall see in Part II) – one that has helped shareholders maintain an excess of power. The scientific task pursued by this book is to initiate the development of a political theory of the firm5 as an alternative to this Reductio ad Corporationem by shedding light on the dense reality of the firm not captured by the description and institutional design of the corporation. It will examine the actual relationship between the corporation and the firm, rather than ignoring or obscuring that relationship.

This alone is a vast project. This research agenda cannot possibly be addressed without a dedicated collective effort. A great deal of research into this topic already exists. Unfortunately it has so far remained isolated in different corners of the social sciences. This research needs to be drawn together – and, I believe, deployed – through the hypothesis put forth in this book: to consider firms as political entities. To do so requires addressing three dimensions of the political theory of the firm: the substantive, the descriptive, and the normative. The political theory of the firm mobilizes analytical categories coming from the body of literature in political analysis and political theory to look at the life of the firm. Its evaluative and critical aspects – the normative dimension of the theory – will flow straightforwardly from the substantive and descriptive dimensions. In the interest of giving life to this new research landscape made of the many existing, scattered contributions that the author of these lines could not possibly hope to know of, and cite, this short book contains a proposal that draws practical conclusions from the analysis it provides, as a lens for looking to the future. The imperative of efficiency conditions economic life today, and the imperative of collective freedom conditions public life inWestern democracies. The continued growth of our economy and our society demands that we identify a viable compromise between the two. As current events constantly remind us, the grave risks posed by the shock of these two imperatives are inescapably present, and the need for compromise inescapably important. We as citizens are facing big questions, and our democracies cannot afford to shy away from them. Can efficiency and justice be reconciled? How compatible are capitalism and democracy? Can capitalism be democratized? My own research into the workplace led me to these questions – and then to the observations and to the proposal put forth in this book. I have written a text intended to inject new life and new energy into an often shopworn and anxiety-inducing debate. The ideas I offer in the pages that follow are the beginnings of my own attempt, as a scholar and a citizen, to seriously and pragmatically envision a sustainable future for our democracies threatened by financial global capitalism, and more specifically by the current confusion of the corporation with the firm.

I am a labor sociologist and a political scientist, but the work I present here is strongly interdisciplinary, as is required by such vast questions. Because this is a book about the future of democracy and capitalism, I have grounded my analysis in the past, which is, after all, an indispensable reference point if we are to look ahead. Specifically, I have grounded it in political history: although the transition is arguably still in process, over the long term ourWestern societies have progressed from absolutism (in the form of autocracies or oligarchies) to democracy. For this reason, in my thinking about the government of the firm, I chose to draw inspiration from political revolutions, since the central issue that caused them is the same one now faced by the capitalist firm: how power ought to be shared. As I will explain, in the history of Western democratic revolutions the transition from absolutism to democracy occurred through a specific institutional innovation. Although it varies from country to country and from context to context, this transition has always involved what I call a bicameral moment. In modern history, England may be considered as having given birth to this compromise: faced with the prospect of losing it all, the king of England realized it was necessary to share his power. British bicameralism was his tactic for avoiding fatal revolution, a compromise with the people in the form of a partial democracy that seated landed aristocrats in the House of Lords and the representatives of the people in the House of Commons, with an executive branch accountable to both. The king’s government had to win the majority in both Houses to pass a law. Today’s workplace bears a more than passing resemblance to a pre-democratic state, with upper management holding the place of the pre-democratic executive branch of government. It is an institution governed by a property-owning minority that profits from the labor of the majority. The parallel is arresting: What would you think of an England governed by the House of Lords alone?

Bicameralism was a radical idea because it was so simple. This book seeks to inject the same radical simplicity into the debate over governing and democratizing capitalism – not to oversimplify the questions we face as societies, but rather to offer solid foundations for that debate. It begins with the observation that work has shifted from the private to the public sphere; that employees are suffering from the tension between their aspiration to greater voice in the workplace and the authoritarian power structures that continue to hold sway there; that the formerly “private household” of the economy has evaporated under customers’ gazes and left employees with a work experience that takes place in the public space of the service economy. Then, drawing inspiration from the political history of Western societies, it conveys the notion of bicameralism, the institutional innovation that spurred the process of democratization, into the government of the firm.

The point of democracy is to serve all; my proposal here is no exception. Lately, business rhetoric has become more and more imbued with the idea of corporate social and environmental responsibility, and with the questions of how to sustainably secure the innovation capacities of firms’ “human resources” while promoting efficiency and avoiding lack of motivation, depression, and, in extreme cases, job-related suicide. The proposal that follows is based on the pragmatic observation that the investment of labor in firms is at least as necessary and legitimate as the investment of capital, and that firms would be better served if all its investors were represented in their government. After all, as political history has shown, power sharing is preferable to confrontation, gridlock, or even collapse. Sharing, not relinquishing: to each set of investors its own house, bound to govern together in the interest of all through a representative government they both designate. A Capital Investors’ House of Representatives and a Labor Investors’ House of Representatives with an executive branch – or top management – whose laws must be consented by a majority in both houses; in other words, by at least 50% + 1 vote from the Representatives elected by Capital Investors and 50% + 1 vote from the Representatives elected by Labor Investors.

#### Using the prism of power instead of efficiency is part of a project of critical political economy in legal advocacy. This framework can displace the synthesis of law and economics.

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What might legal scholarship that took the political nature of the economy seriously look like? What questions would it foreground, and how would it address them? We offer a possible set of broad reorientations and questions, intended not as a last word but as invitation. They are constructed from our critique of the deficiencies of the Twentieth-Century Synthesis and in dialogue with developments across legal scholarship and grassroots movements.

A. From Efficiency to Power

By centering efficiency as a value and making key assumptions about markets and how they work, the Twentieth-Century Synthesis marginalized questions of power that had been central to legal analysis since at least the time of legal realism. Realists understood that the law generates the very order of rights that market advocates invoke to define the boundaries of "the economy." As they pointed out, when the state orders "private" rights it acts coercively, but in indirect fashion, allocating powers and immunities that authorize individuals to act on or with disregard for others.

Take as an example the thought of legal realist and institutional economist Robert Hale. Hale characterized economic life as a system of mutual coercion, with the degree of each person's coercive power arising directly from legal entitlements. "The law," Hale stressed, "confers on each person a wholly unique set of liberties with regard to the use of material goods and imposed on each person a unique set of restrictions with regard thereto."m2 Law, that is, allocates the powers and resources that are necessary to most human projects, thus defining the terrain on which people must work with others to fulfill their needs and pursue their purposes. Property law, for instance, tells you whom you must induce to give you access to what you need to meet your needs; conversely, it says which resources others can only access by winning your permission. This power to drive a (more or less hard) bargain was what Hale called coercion, and he saw it everywhere. For him, every bargain was conducted in the spirit of the strike and the lockout. (It is no coincidence that his was a theory of economic life for a time of fierce labor conflict.)

This account centers the power, rooted in state decisions and articulated through law, that constitutes the field of economic life. The Twentieth-Century Synthesis held that such power was unimportant, either by redirecting attention from it or by denying that power was stratified or structured in ways that matter. By refocusing scholarship on questions structured by transaction costs and externalities, law-and-economics analysis placed questions of distribution and coercion outside the lamplight of methodology. It thus neglected the actual social world comprised of highly disparate resource allocations that are themselves products of background legal rules: the power of the venture capitalist to bring to life or quash the plans of others; the trust beneficiary's option to refuse unwelcome offers in favor of idleness; and the acute need of the person living without any savings (as forty percent of Americans do) to find and accept an unequal bargain in order to stay alive.123 As important were a host of assumptions about markets and market subjects. Markets were typically presumed to be sufficiently competitive that concentrated power generally could not last. 124 Some suggested that politics might "clear" as markets did, so that when wealth was reallocated, when, for example, a new legal rule took from one side and gave to the other, it would be transferred back via a seamlessly adjusting market of politics.12 Under the pressure of these various conceptual moves, legal thought was effectively disabled from centering questions about power and distribution that would once obviously have been its main concerns. Who gives the orders, who dictates the plans, and who must aim to win a place as a cog in someone else's scheme? Who takes profits, who takes wages, and whose wages make for a secure life versus a precarious one? When the questions are posed in this way, it becomes clear that in the economists' standard definition of their subject matter, "choice under constraint," the emphasis should fall soundly on "constraint" and its legally constituted allocation. The study of that constraint, what Hale called the ubiquitous mutual coercion of economic relations on the basis of (almost always unequal) bargaining power, is the question that should replace the focus on the feasibility and comprehensiveness of bargains and the sum of economic activity that they make up.

What would it mean to take power once more as a central unit of analysis in law? In the broadest sense, when we teach a canonical case or encounter a legal problem, we might ask quite simply, who has power here, who should have power, and why? At least three forms of power deserve our attention: the constitutive power of law to create endowments that shape all voluntary bargains, the market power that legal structures enable, and the political power that may arise from differential endowments, market power, or ways that legal rules insulate economic power from democratic reordering. In selecting topics and framing questions, this reorientation would inquire into how law creates, reproduces, and protects political-economic power, for whom, and with what results.

Regarding constitutive power, an LPE reorientation would mean less attention to Coasean problems and what we might call (following the lead of economic sociologists) the "social geometry of bargains."126 Whom does law endow with bargaining power, and with what justification? How, if we aspired to more egalitarian distribution of power and resources, might law reconfigure these endowments- through both redistribution and "predistribution"? This way of reasoning would also invite attention to the history of state creation of systemically unequal endowments and to how legal regimes and lawyers by coding resources as capital have contributed to stratification and patterned disadvantage. 12 7 For example, we might, as some scholars of law and political economy already have, map the relations between techniques to render land a source of credit and the historical dispossession of native lands, 128 or rules of finance, property, and inheritance that have systematically undermined both black wealth and black land ownership in recent years. 2 9 Insofar as property and contract law serve as first-year allegories for economic life in general, our reorientation would also-in conjunction with attention to market and political power - redirect the pedagogical spirit of "private law" courses toward examining inequality and encasement of private power in markets as an ongoing product of law. The same reorientation would mean asking in other "economic" courses how law patterns the landscape of bargaining power: how antitrust law, for instance, has produced - but might instead restrict -new forms of enhanced bargaining power for firms, or how shifts in labor law have reduced labor's endowments but correspondingly might be revised to generate more meaningful countervailing power and negotiation over workplace governance.130

Market power, too, requires attention from a political-economy perspective. Economic power cannot be reduced to market power, as our discussions of constitutive and political power indicate. But in the presence of market power - the ability to dictate prices and the terms of market transactions due to one's dominant position as a buyer or seller - allocating decisions to markets will generate significant problems both within a conventional economic framework and beyond it. For example, where employers have pervasive monopsony power, we can expect implications for wages and working conditions that lend credence to new arguments for antitrust intervention, employment regulation, and the affirmative support of labor as countervailing power.131 Notably, a new wave of scholarship in economics argues that market power is today a pervasive rather than occasional phenomenon.132

Finally, to do justice to the conjunction that is political economy, we must also ask when and how economic power relates to political power. Political-science literature has begun to document the influence of wealth on legislation.133 We should ask about the means by which economic power translates into political power and how law structures, or could restructure, these channels of influence. 134 Of special importance here are measures that encase market power from politics, disabling ordinary democratic means of defining the place of markets in our political order. For example, investigations of where and how property or markets receive constitutional protection, as well as the limits of such regimes and their potential for reinterpretation, deserve to be central subjects of political economy.13

In a broader frame, the move to political economy requires a shift in our view of interpersonal relations - not as presumptively equal market transactions that are further legitimated by being voluntary and theoretically "making everyone better off' but rather as fundamentally power-laden bargains that require law and policy to be rendered more equal and fair. It also requires a shift in our view of inclusion from the individual to the structural level, looking not just at individualized experience but rather at how law and policy construct systematic forms of hierarchy and domination through a market that is always embedded in social relations. This is one of the key insights of critical legal thought and literature from both feminists and scholars of critical race theory. 136 Then, we may ask: how might public power be reconstituted where the market has been insulated from democratic control? Which legal tools are required? What is the proper relationship between expertise and democratic authority, and how can that be institutionalized? How might one reenvision the process of democratizing control over the economy, while recognizing the harms that governments have done - always to some more than others -in the name of the people?

#### Developing a new legal imaginary that center issues of power is necessary to displace the institutional and ideological power of the law and economics synthesis. A positive program helps us link together different areas of power inequalities in the law.

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In synthesizing these last two points, we might say that two criteria define a properly democratic political economy. First, the political community must be able to assert its collective will over the economic order, not be blocked from doing so by the antipolitics of efficiency-focused adjudication or technocracy. Second, the substance of economic life must support democratic self-rule by ensuring substantial equality, freedom from abjection and dependence, a workplace experience of dignity and self-assertion rather than vulnerability and humiliation, and the capacity to build power through institutions such as unions. A democratic political economy must be answerable to its citizens' rule, and it must produce citizens capable of ruling it.

Third, a commitment to democracy demands that we experiment with alternatives to the prevailing technologies of elite governance, particularly in the regulatory state itself. Instead of viewing state bureaucracy as a domain of apolitical expertise (or of malevolent capture and corruption), we might reconceive regulatory bodies as sites of democratic contestation.162 If purportedly neutral and technocratic visions for rationalizing governance are neither neutral nor, in practice, rationalizing, we need new conceptions of how to democratically discipline administrative decisions. What would processes of administrative accountability look like if they were wise to dynamics of power and animated by a commitment to more genuine equality? There is a dynamic scholarly agenda here, already under construction. We might explore, for example, means to bring representatives of affected communities to participate in administrative decision-making, aiming at modalities of democratic voice that could meet our needs for both (a broadened conception) of expertise and for institutionalized forms of countervailing power.163 There is a rich history of social movements engaging and seeking to remake the regulatory state in a more inclusive, but still effective, way.164 A democratic political economy compels us to revisit and build on this tradition. Like many of the cases we have advanced here, the substance of these arguments lies in political morality. A democratic political economy is a moral project, aimed at taking with full seriousness the equality of persons and our capacity to set for ourselves the terms of our collective lives, to decide how to deal out power and vulnerability, to figure out how to live together - and to defend these decisions to one another. When we follow Karl Polanyi in speaking of an economy "embedded" in society,165 we mean not just that economic ordering is always derived from legal ordering but also that an economy's ordering of power and vulnerability always bespeaks a moral vision of persons, whether egalitarian and generous or hierarchical and cramped.

Thus, scholarship should consider what moral images of social and political order are implied in a given legal patterning. What image of economic citizenship, or of a democratic economy, is embedded in a Brandeisian antitrust regime or in a labor law that assumes workers are involved in governing the workplace? In what ways is democracy or political membership hollowed out when replaced by the increasingly libertarian and wealth-maximizing premises of the Synthesis? Do "private-law" regimes here constitute citizens as market subjects who could demand a different kind of equality in these domains? What is revealed about the racialization of political membership by racial patterns of property ownership and loss, about gendered citizenship by the ways that the burdens of social reproduction interact with the wage bargain?166 Once the legal constitution of the economy is taken to be centrally about the production and enforcement of inequality, these questions present themselves naturally.

CONCLUSION

The Twentieth-Century Synthesis was a successful remaking of the legal imagination, creating a neoliberal political economy premised on concepts of efficiency, neutrality, and antipolitics. But even as this was a successful intellectual shift, manifesting in a wide range of scholarly discourses, doctrinal areas, and policy changes, it has always been a fragile configuration. As the contradictions of an increasingly unequal political economy have become painfully visible and exacerbated, the veneer of consensus around this Synthesis has fallen away. Thus, we find ourselves in a moment of political crisis and accompanying intellectual upheaval: an old order of political economy and its legitimating concepts are crumbling, but a new order has yet to emerge. The outlines of the battle for a new order have come into focus. The populisms of the far right, resurgent across the globe, point to one dark path coming out of this moment: the resurgence of reactionary political economy that marries anger at economic and political corruption with exclusionary attachment to racialized and gendered hierarchy. At the same time, centrist calls for a restoration of an imagined pre-2016 consensus on norms of good governance ignore the deeper causes of neoliberalism's crisis. But in contrast to both of these visions, the account offered here points to the beginnings of a very different, more deeply democratic and progressive political economy.

To embrace the possibility of democratic renewal requires rejecting the terms of the Twentieth-Century Synthesis. We believe that the legal realists-and thinkers in a much longer history of political thought-were right in believing that "the economy" is neither self-defining nor self-justifying. The emphasis in these traditions has been the right one: on power, distribution, and the need for legitimacy as the central themes in the organization of economic life. Moreover, precisely because economic ordering is a political and legal artifact, the idea of an "autonomous" economic domain has always been obscurantist and ideological, even when accepted in good faith. 167

Law does not and never could simply defer to such a realm. Rather, law is perennially involved in creating and enforcing the terms of economic ordering, most particularly through the creation and maintenance of markets. One of its most important roles, indeed, is determining who is subject to market ordering and on what terms and who is exempted in favor of other kinds of protection or provision. 168 Thus the program of law, politics, and institution building often called "neoliberalism" is, and can only be, a specific theory of how to use state power, to what ends, and for whose benefit. 169 The ideological work of the Twentieth-Century Synthesis has been to naturalize and embed in legal institutions from the Supreme Court to the Antitrust Office and World Trade Organization a specific disposition of power**.** This power represents a deployment of market ordering that produces intense and cross-cutting forms of inequality and democratic erosion. However, Twentieth-Century Synthesis theorists tend not to see this, precisely because the Synthesis makes it so hard to see (or at least so easy to overlook).

If it is to succeed, law and political economy will also require something beyond mere critique. It will require a positive agenda. Many new and energized voices, from the legal academy to political candidates to movement activists, are already building in this direction,170 calling for and giving shape to programs for more genuine democracy that also takes seriously questions of economic power and racial subordination;1 7 1 more equal distribution of resources and life chances;172 more public and shared resources and infrastructures; 73 the displacement of concentrated corporate power and rooting of new forms of worker power;174 the end of mass incarceration and broader contestation of the long history of the criminalization and control of poor people and people of color in building capitalism; 175 the recognition of finance and money as public infrastructures; 176 the challenges posed by emerging forms of power and control arising from new technologies;177 and the need for a radical new emphasis on ecology. 178 These are the materials from which a positive agenda, over time, will be built.

Political fights interact generatively with scholarly and policy debates in pointing the way toward a more democratic political economy. The emergence of new grassroots movements, campaigns, and proposals seeking to deepen our democracy is no guarantee of success. But their prevalence and influence make clear the dangers and opportunities of this moment of upheaval- and highlight the stakes of building a new legal imaginary.1 7 9 Neoliberal political economy, with its underlying commitments to efficiency, neutrality, and antipolitics, helped animate, shape, and legitimate a twentieth-century consensus that erased power, encased the market, and reinscribed racialized, economic, and gendered inequities. By contrast, a legal imaginary of democratic political economy, that takes seriously underlying concepts of power, equality, and democracy, can inform a wave of legal thought whose critique and policy imagination can amplify and accelerate these movements for structural reform- and, if we are lucky, help remake our polity in more deeply democratic ways. 175.

#### Legal realists see law as one arena of struggle. We all have the opportunity to take up the tools in the fight against the new Lochnerism of law and economics. Claiming the power to interpret the law connects scholarship with a publicly articulated vision for a new economic order.

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The politics of today’s post-financial-crisis era echo the concerns of the post-Gilded Age, pre-New Deal period, with the confluence of increasing economic inequality and dislocation; new forms of concentrated corporate power; a hostile Supreme Court; and a political system marked more by its dysfunction and corruption than its ability to redress these problems. Indeed, the problem of American politics today is not just one of income inequality. A growing body of empirical research highlights the toxic feedback loops between economic and social inequality on the one hand, and political inequality on the other.10 The decline of the countervailing power of unions and community-based organizations, coupled with the increased social and economic ties between policymakers and economic elites, contributes to a skewed political system, which in turn produces policies that favor elites and further exacerbate inequality.11 The citizens and communities most harmed by the modern economy are thus also increasingly unable to leverage political power to change the policies that drive those inequities.

The Supreme Court is, in one sense, an obvious front line for the battle to redress problems of economic and political inequality. To the extent that the Court’s constitutional interpretation magnifies disparities of political and economic power, it seems logical to target these decisions specifically. But the challenge of economic and political inequality today goes beyond Supreme Court doctrine and constitutional text. The charge of neo- Lochnerism on the Roberts Court opens up an important debate but leaves two critical questions unaddressed. First, what is the substantive content of an alternative, more democratic and egalitarian vision of political economy to counteract the underlying values and judgments apparent in these headline cases? And second, what is a theory of change through which this alternative can be made real, and to what extent does this project necessarily have to involve the Court at all?

This Paper addresses these questions by drawing on the political and legal thought emerging from the critique of Lochner-era political economy. During the Progressive Era, the battle against the intellectual edifice that lay behind Lochner—ideas of laissez-faire constitutionalism and political economy, which emphasized the ideal of market-based equality and expressed a hostility towards various attempts at economic regulation— catalyzed an explosion of scholarship and reform activism among a cohort of lawyers, economists, philosophers, and activists. In the legal academy, we are most familiar with the legal realist movement which emerged during this time critiquing the kind of judicial power expressed in Lochner while revealing the realities of ideology and politics operating beneath the veneer of neutral, formalist legal reasoning on the courts. This intellectual movement would go on to become a foundational shift in legal thought and scholarship going forward. But legal realism was part of a broader intellectual ecology that produced more than just this critique of judicial behavior. Within this ecology of debate, there existed a strand of more radical critique and reform politics that offers important insights for our own normative and institutional challenges today.

Drawing from Progressive Era political thought, this Paper makes three arguments. First, by taking its cue from the critiques developed by Progressive Era and legal realist thinkers, this Paper offers a normative framework for understanding the problems of economic inequality. The problem, I will argue, is not just about income inequality; rather it is a deeper problem of what we can understand as domination—the accumulation of unchecked, arbitrary economic or political power over others. Just as Progressive Era thinkers saw the problem of industrialization as one of concentrated economic and political power—of domination—so too can we understand the challenges of the postcrisis economy in similar moral terms. If the root problem is one of disparate power then the remedy lies in rebalancing the terms of economic and political power. This in turn suggests that the moral problem of domination requires a counteracting defense of the moral value of democracy, of the capacity for we the people to hold such exercises of economic and political power accountable through collective political action.

By placing legal realism in its political-economic context of reformers and thinkers struggling with the upheavals and inequities of industrialization, this argument also offers an important reinterpretation of legal realism as more than just a critique of judicial formalism, and instead as part of a larger effort to imagine a more egalitarian and democratic political economy. By “political economy” I mean to evoke a moral and institutional conception of how our politics and economics relate to one another, how they are structured by law and institutions, and how they ought to be structured in light of fundamental moral values. The political economy of the Roberts Court, like that of the Lochner era, evinces a particular view of markets and politics that exacerbates underlying inequities of power. In contrast, this Progressive Era-inspired view suggests an alternative account of democratic political economy. Second, I argue that this vision of democratic political economy also suggests a particular theory of social change. The moral focus on domination and democracy orients us towards reform strategies that look to the ways in which law structures economic and political processes to allocate power, capabilities, and opportunities. These underlying structures emerge as critical sites of contestation, reform, and change. Thus, we might shift the terms of economic power through legislative and regulatory moves like antitrust and public utility; and we may magnify the democratic political power of citizens by creating alternative vehicles for voice and participation at the national or local level.

Third, this vision of social change in turn suggests a very different reading of the role of constitutionalism and constitutional theory in political-economic debates. The Progressive Era thinkers discussed below were, for the most part, rabidly hostile to courts and judges. While we may not adopt the full extent of their antijudicial stance, it is nevertheless instructive for considering the role of law and constitutionalism in today’s debates over inequality and domination. I will argue below that the kind of constitutionalism we can glean from these thinkers is not the “big-C” Constitutionalism of Supreme Court doctrine, precedent, or textual interpretation. This mode of constitutionalism is indeed important, but ultimately it is responsive to longer-term trends in ideas, values, and granular, accumulated policy changes on the ground. Rather, I suggest we turn to a different, “small-c” notion of constitutionalism. This is the constitutionalism of social movements, of public philosophy**,** and of the laws and regulations that literally constitute our politics and our economics. Constitutional political economy, on this view, is the concern not just of courts but of we the people. And its primary tools for change are not just judicial decisions, but legislative, regulatory, and other forms of ordinary governance. These changes need not be small-scale or incremental; indeed they can be structural and far-reaching. But they fundamentally operate through different channels of governance outside the courts.

In so doing, this Paper offers an account of constitutionalism and social change that, on the one hand, deliberately diminishes the import of the “high politics” of constitutional theory and Court doctrine, while on the other hand, evaluates the stature and importance and moral stakes of the “vernacular politics” of regulation, legislation, movement organizing and advocacy, and day-to-day governance. Indeed, just as the legal realist movement emerged out of the political and economic pressures of the first Gilded Age, our current era of economic and political inequality, a New Gilded Age of its own, is helping drive a similar explosion of dynamic and rich legal scholarship that, from different subfields and through different methodologies, revolves around these core concerns of how law and institutions construct our modern economic, political, and social life; how they shape inequities in those arenas; and how central movements, legislation, and regulation are developing a response. This “fourth wave” of legal realism is an important development that can help deepen the diagnosis and reform agenda for a more democratic political economy—one that draws not only on the moral and structural force of constitutional theory, but also is oriented towards the concrete and granular impact of law as it functions in economic, regulatory, and other forms of governance.

#### Public/private dichotomy constructs the world in neoclassical terms. Starting with public value creation challenges the vision of the private sector as the source of value.

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2. FROM MARKET FAILURE TO MARKET SHAPING

The dominant approach to public policy is derived from neoclassical economic theory, in particular microeconomic theory and welfare economics. This approach 4 emphasizes the idea that, given certain assumptions, individuals pursuing their own self-interest in competitive markets gives rise to the most efficient outcomes (Samuelson, 1947; Mas-Colell et al., 1995: 539‒40). Efficiency is understood in a utilitarian sense, whereby an activity is efficient if it enhances someone’s welfare without making anyone else worse off (so-called Pareto efficiency). Under these conditions, the role of government intervention is in practice often limited to addressing instances where the market is unable to deliver Pareto-efficient outcomes.

These ‘market failures’ arise when there are information asymmetries, transaction costs and frictions to smooth exchange, non-competitive markets (e.g. monopolies) or externalities whereby an activity harms another agent not directly connected with the market transaction (e.g. pollution), or coordination and information failures hamper investment (Rodrik, 1996). In the 1960s, public-choice theory considered how the actions of agents (voters, bureaucrats, politicians) involved in policy could be considered from an economic efficiency perspective, as those agents, including government agents, were assumed to be self-interested (Buchanan and Tullock, 1964). While in markets the existence of competition and the profit motive tends to enforce efficient decision-making, in collective decision-making processes (i.e. politics and public administration) the same disciplining framework does not exist. Policymaking is thus subject to capture by certain interest groups, in particular those most able to influence policymakers for reasons of power or money. In public administration, the lack of competitive pressures leads to ‘bureau-maximizing’ behaviour, whereby departments and agencies look after their own survival rather than the ‘common good’.

Public-choice theory argues that even where there are clear examples of market failure, it is not always the case that government intervention would result in a more efficient outcome. Rather, there could also be ‘government failure’, whereby decisions aimed at improving welfare make things even worse than they would have been under conditions of market failure (Le Grand, 1991). For policymaking processes such an approach creates a bias towards inaction. If the default assumption is that the market will find the best outcome, even if it doesn’t the overriding concern is that government intervention may worsen existing outcomes; the default prescription for government policy is to maintain the status quo. There is a danger that analytical frameworks become focused more on justifying and measuring the non-failure of public policies than on the attainment of wider policy goals.

In development theory and practice, the market-failure-based approaches coalesced in the 1990s around the so-called Washington Consensus policies focused on deregulation, opening up domestic markets, and relying on foreign direct investments and exports to drive economic transition and growth (Williamson, 2002). The Washington Consensus main assumption was that as all development problems are of the same nature, the solutions are bound to be the same as well. This removes the question of directionality of growth away from domestic policymaking and leaves global markets in charge (Kattel et al., 2016). The market failure perspective also creates a particular orientation towards innovation, industrial policy, and structural economic change. While certain 5 elements of innovation policy, in particular early-stage R&D, can be considered to be public goods and thus a case for public policy provision can be justified, in the main it is assumed that the private sector is the more efficient innovator, possessing greater entrepreneurial capacity and better able to take risks given the pressure created by competition. In contrast, the state is viewed as risk averse and in danger of creating government failure if it becomes too involved in industrial policy by ‘picking winners’. Its role is to level the playing field for commercial actors— mostly through supply-side inputs such as better skills or the removal of market frictions— and then get out of the way. This has led to rather diverse debates and the development of policy practices aimed at finding ever more precise policy targets through better measurement of failures and of the impact of policies trying to fix those failures. Instead, policy discussions in particular should focus on ‘heterodox’ policy approaches that recognize both market and government imperfections and failures—as well as the fact that it is impossible or even undesirable to attempt to remove all of them at once—and the need for policies that support scale economies, dynamic learning effects, and cross-sectoral spillovers (Rodrik, 2009).

In order to expand such heterodox notions to grand challenges, we need a positive theory of public valuethat begins with a notion of the public good not as a correction to a failure, but as an objective in itself—an objective that can only come about if linked to a process through which value is created. In this sense a new building block is needed to guide and legitimize public policy. As indicated by Kenneth Arrow (1962), while a market failure approach can be utilized to understand why, for example, private firms underinvest in R&D, it is not so useful for guiding public investment in R&D, because of the inherent uncertainty involved in the outcomes of such investment. Indeed, Arrow called for alternative approaches to analysing public investment and policies for innovation.

Critically, the market-failure justification implies that pure private markets/private goods can exist independently of public or collective action. While the role of institutions is admitted (North, 1991), the role of different voices coming together to form the notion of the public itself is left mainly to sociology, not economics. Nelson notes that ‘there is no satisfactory normative theory regarding the appropriate roles of government in a mixed economy’ (1987: 556) and no theory that captures the complex variety of institutional arrangements that people have developed to solve collective problems. Just as pure public goods are rare, so too are pure private goods. Babysitters or sharing everyday appliances such as lawnmowers involves no government intervention or regulations, but does involve collective or ‘public’ negotiation. Hence the ‘market failure’ dichotomy is not particularly useful.

We propose an alternative approach, which begins with the notion of public value as collectively generated by a range of stakeholders including the market, the state, and civil society. Key here is the emphasis on value creation at the core: not ‘public’ value but value itself—with a clear delineation of the role of the different actors that are central to its formation. While in economics value is, in essence, created inside businesses and only facilitated by the public sector, in this view value is co-created and requires a stakeholder understanding of capitalism itself. This view draws on the work of Elinor Ostrom (2005), who shows that a radical state/private division is, to use her word, barren. In developed economies there are many types of organizations. Non-partisan government regulators, statefunded universities, and state-run research projects, for example, are quite different. Besides, the crude binary state/private division fails to capture the many ways in which all institutions create and destroy value. In addition, Ostrom’s (1990) emphasis on pooled common resources and her interest in shaping systems so that they take into account collective behaviour, can help shape new policy tools.

This more collective view also benefits from a different understanding of the market itself, with the market as an outcome of the interactions of individuals, firms, and the state, as discussed in the work of Karl Polanyi (1957), and ‘embedded economies’, as discussed by Granovetter (1985). If value is created collectively, a first question becomes: what capabilities, resources, and capacities are needed for this value to be created inside all the different organizations, including those in the public sector, private sector, and civil society? In the same way that a theory of private value creation benefits from a resource-based theory of the firm (Penrose, 1959), so does a public-value notion. Indeed, it is by sidelining the notion of value as only created in business and facilitated or redistributed by the public sector that the question of capabilities is missed. The work by Teece (1990) on the dynamic capabilities of the firm becomes equally necessary for the public sector, as we have argued elsewhere (Kattel and Mazzucato, 2018).

A collective theory of value creation requires understanding by all actors of investment and production capacity. Indeed, as discussed by Mazzucato and Sekera (2019), a theory of public value needs to also understand the productive capacity and capabilities of the state. And if the state loses that capacity it will lose its absorptive capacity—and hence be unable to understand technological and market opportunities (Cohen and Levinthal, 1990).

#### Liberalism is not a monolith – retrieving it for a radical democratic agenda challenges unjust hierarchies of domination.

Charles W. **MILLS** Professor of Philosophy @ CUNY **’12** “Occupy Liberalism,” Chapter 2 in *Black Rights/White Wrongs: The Critique of Racial Liberalism* [h](https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780190245412.001.0001/acprof-9780190245412-chapter-2)

The “Occupy Wall Street!” movement stimulated a long listing of other candidates for radical “occupation.” This chapter proposes as a target for radical occupation the somewhat unusual candidate of liberalism itself. It argues for a constructive engagement of radicals with liberalism in order to retrieve it for a radical egalitarian agenda. The premise is that the foundational values of liberalism have a radical potential that has not historically been realized, given the way the dominant varieties of liberalism have developed. Ten reasons standardly given as to why such a retrieval cannot be carried out are examined and argued to be fallacious.

The “Occupy!” movement, which has made headlines around the country, has raised the hopes of young American radicals new to political engagement and revived the hopes of an older generation of radicals still clinging to nostalgic dreams of the glorious ’60s. If the original and still most salient target was Wall Street, a long list of other candidates for “occupation” has since been put forward. In this chapter, I want to propose as a target for radical occupation the somewhat unusual candidate of liberalism itself. But contrary to the conventional wisdom prevailing within radical circles, I am going to argue for the heretical thesis that liberalism should not be contemptuously rejected by radicals but retrieved for a radical agenda. Summarized in bullet-point form, my argument is as follows:

• The “Occupy Wall Street” movement provides an opportunity unprecedented in decades to build a broad democratic movement to challenge plutocracy, patriarchy, and white supremacy in the United States.

• Such a movement is more likely to be successful if it appeals to principles and values most Americans already endorse.

• Liberalism has always been the dominant ideology in the United States.

• Liberalism in the United States has historically been complicit with plutocracy, patriarchy, and white supremacy, but this complicity is a contingent function of dominant group interests rather than the result of an immanent conceptual logic.

• Therefore, progressives in philosophy (and elsewhere) should try to retrieve liberalism for a radical democratic agenda rather than rejecting it, thereby positioning themselves in the ideological mainstream of the country and seeking its transformation.

Let me now try to make this argument plausible for an audience likely to be aprioristically convinced of its obvious unsoundness.

Preliminary Clarification of Terms

First we need to clarify the key terms of “radicalism” and “liberalism.” While of course a radicalism of the right exists, here I refer to radicals who are progressives. But “progressive” cannot just denote the left of the political spectrum, since the whole point of the “new social movements” of the 1960s onward was that the traditional left-right political spectrum, predicated on varying positions on the question of public versus private ownership of the means of production, did not exhaust the topography of the political. Issues of gender and racial domination were to a significant extent “orthogonal” to this one-dimensional trope. So I will use “radicalism” broadly, though still in the zone of progressive politics, to refer generally to ideas/concepts/principles/values endorsing pro-egalitarian structural change to reduce or eliminate unjust hierarchies of domination.

“Liberalism” may denote both a political philosophy and the institutions and practices characteristically tied to that political philosophy. My focus will be on the former. The issue of how bureaucratic logics may prove refractory to reformist agendas is undeniably an important one, but it does not really fall into the purview of philosophy proper. My aim is to challenge the radical shibboleth that radical ideas/concepts/principles/values are incompatible with liberalism. Given the deep entrenchment of this assumption in the worldview of most radicals, refuting it would still be an accomplishment, even if working out practical details of operationalization are delegated to other hands.

In the United States, of course, “liberalism” in public parlance and everyday political discourse is used in such a way that it really denotes left-liberalism specifically (“left” by the standards of a country whose political center of gravity has shifted right in recent decades). In this vocabulary, right-liberals are then categorized as “conservatives”—in the market sense, as against the Burkean sense. On the other hand, some on the right would insist that only they, the heirs to the classic liberalism of John Locke and Adam Smith, are really entitled to the “liberal” designation. Later welfarist theorists are fraudulent pretenders to be exposed as socialist intruders unworthy of the title. Rejecting both of these usages, I will be employing “liberalism” in the expanded sense typical of political philosophy, which links both ends of this spectrum. “Liberalism” then refers broadly to the (p.12) anti-feudal ideology of individualism, equal rights, and moral egalitarianism that arises in Western Europe in the seventeenth-eighteenth centuries to challenge the ideas and values inherited from the old medieval order, and which is subsequently taken up and developed by others elsewhere, including many who would have been explicitly excluded by the original conception of the ideology. Left-wing social democrats and right-wing market conservatives, fans of John Rawls on the one hand and Robert Nozick on the other, are thus both liberals.1

From this perspective, it will be appreciated that liberalism is not a monolith but an umbrella term for a variety of positions. Here are some examples—some familiar, some perhaps less so:

Varieties of Liberalism

Left-wing (social democratic) vs. Right-wing (market conservative)

Kantian vs. Lockean

Contractarian vs. Utilitarian

Corporate vs. Democratic

Social vs. Individualist

Comprehensive vs. Political

Ideal-theory vs. Non-ideal-theory

Patriarchal vs. Feminist

Imperial vs. Anti-imperial

Racial vs. Anti-racial

Color-blind vs. Color-conscious

Etc.2

It is not the case, of course, that these different species of liberalism have been equally represented in the ideational sphere or equally implemented in the institutional sphere. On the contrary, some have been dominant while others have been subordinate, and some have never, at least in the full sense, been implemented at all. But nonetheless, I suggest they all count as liberalisms and as such they are all supposed to have certain elements in common, even those characterized by gender and racial exclusions. (My motivation for making these last varieties of liberalism rather than deviations from liberalism is precisely to challenge liberalism’s self-congratulatory history, which holds an idealized liberalism aloft, untainted by its actual record of complicity with oppressive social systems.) So the initial question we should always ask people making generalizations about “liberalism” is this: What particular variety of liberalism do you mean? And are your generalizations really true about all the possible kinds of liberalism, or only a subset? (p.13)

Here is a characterization of liberalism from a very respectable source, the British political theorist, John Gray:

Common to all variants of the liberal tradition is a definite conception, distinctively modern in character, of man and society… . It is individualist, in that it asserts the moral primacy of the person against the claims of any social collectivity; egalitarian, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; universalist, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and meliorist in its affirmation of the corrigibility and improvability of all social institutions and political arrangements. It is this conception of man and society which gives liberalism a definite identity which transcends its vast internal variety and complexity.3

What generate the different varieties of liberalism are different concepts of individualism, different claims about how egalitarianism should be construed or realized, more or less inclusionary readings of universalism (Gray’s characterization sanitizes liberalism’s actual sexist and racist history), different views of what count as desirable improvements, conflicting normative balancings of liberal values (freedom, equality) and competing theoretical prognoses about how best they can be realized in the light of (contested) socio-historical facts. The huge potential for disagreement about all of these explains how a common liberal core can produce such a wide range of variants. Moreover, we need to take into account not merely the spectrum of actual liberalisms but also hypothetical liberalisms that could be generated through novel framings of some or all of the above. So one would need to differentiate dominant versions of liberalism from oppositional versions, and actual from possible variants.

Once the breadth of the range of liberalisms is appreciated—dominant and subordinate, actual and potential—the obvious question then raised is this: even if actual dominant liberalisms have been conservative in various ways (corporate, patriarchal, racist) why does this rule out the development of emancipatory, radical liberalisms?

One kind of answer is the following (call this the internalist answer): because there is an immanent conceptual/normative logic to liberalism as a political ideology that precludes any emancipatory development of it.

Another kind of answer is the following (call this the externalist answer): it doesn’t. The historic domination of conservative exclusionary liberalisms is the result of group interests, group power, and successful group political projects. Apparent internal conceptual/normative barriers to an emancipatory liberalism can be successfully negotiated by drawing (p.14) on the conceptual/normative resources of liberalism itself, in conjunction with a revisionist socio-historical picture of modernity.

Most self-described radicals would endorse—indeed, reflexively, as an obvious truth—the first answer. But as indicated from the beginning, I think the second answer is actually the correct one. The obstacles to developing a “radical liberalism” are, in my opinion, primarily externalist in nature: material group interests, and the way they have shaped hegemonic varieties of liberalism. So I think we need to try to justify a radical agenda with the normative resources of liberalism rather than writing off liberalism. Since liberalism has always been the dominant ideology in the United States and is now globally hegemonic, such a project would have the great ideological advantage of appealing to values and principles that most people already endorse. All projects of egalitarian social transformation are going to face a combination of material, political, and ideological obstacles, but this strategy would at least reduce somewhat the dimensions of the last. One would be trying to win mass support for policies that—and the challenge will, of course, be to demonstrate this—are justifiable by majoritarian norms, once reconceived and put in conjunction with facts not always familiar to the majority. Material barriers (vested group interests) and political barriers (organizational difficulties) will of course remain. But they will constitute a general obstacle for all egalitarian political programs, and as such cannot be claimed to be peculiar problems for an emancipatory liberalism.

But the contention will be that such a liberalism cannot be developed. Why? Here are ten familiar objections, variants of internalism, and my replies to them.

Ten Reasons Why Liberalism Cannot Be Radicalized (And My Replies)

1. Liberalism Has an Asocial, Atomic Individualist Ontology

This is one of the oldest radical critiques of liberalism; it can be found in Marx’s derisive comments—for example, in the Grundrisse—about the “Robinsonades” of the social contract theory whose “golden age” (1650–1800) had long passed by the time he began his intellectual and political career:

The individual and isolated hunter or fisher who forms the starting-point with Smith and Ricardo belongs to the insipid illusions of the eighteenth century. They are Robinson Crusoe stories … no more based on such a naturalism than is Rousseau’s contrat social which makes naturally independent individuals come in contact and have (p.15) mutual intercourse by contract… . Man is in the most literal sense of the word a zoon politikon, not only a social animal, but an animal which can develop into an individual only in society. Production by individuals outside society … is as great an absurdity as the idea of the development of language without individuals living together and talking to one another.4

But several replies can be made to this indictment. To begin with, even if the accusation is true of contractarian liberalism, not all liberalisms are contractarian. Utilitarian liberalism rests on different theoretical foundations, as does the late nineteenth-century British liberalism of T. H. Green and his colleagues: a Hegelian, social liberalism.5 Closer to home, of course, we have John Dewey’s brand of liberalism. Moreover, even within the social contract tradition, resources exist for contesting the assumptions of the Hobbesian/Lockean version of the contract. Rousseau’s Discourse on the Origins of Inequality (1755) (nowhere cited by Marx) rethinks the “contract” to make it a contract entered into after the formation of society, and thus the creation of socialized human beings. So the ontology presupposed is explicitly a social one. In any case, the contemporary revival of contractarianism initiated by John Rawls’s 1971 A Theory of Justice makes the contract a thought-experiment, a “device of representation,” rather than a literal or even metaphorical anthropological account.6 The communitarian/contractarian debates of the 1980s onward recapitulated much of the “asocial” critique of contractarian liberalism (though usually without a radical edge). But as Rawls pointed out against Michael Sandel, for example, one needs to distinguish the figures in the thought-experiment from real human beings.7 And radicals should be wary about accepting a communitarian ontology and claims about the general good that deny or marginalize the dynamics of group domination in actual societies represented as “communities.” The great virtue of contractarian liberal individualism is the conceptual room it provides for hegemonic norms to be critically evaluated through the epistemic and moral distancing from Sittlichkeit that the contract, as an intellectual device, provides.

2. Liberalism Cannot Recognize Groups and Group Oppression in Its Ontology—I (Macro)

The second point needs to be logically distinguished from the first, since a theory could acknowledge the social shaping of individuals while denying that group oppression is central to that shaping. (So #1 is necessary, but not sufficient, for #2.) The Marxist critique, of course, was supposed to encapsulate both points: people were shaped by society and society (post-“primitive (p.16) communism”) was class dominated. The ontology was social and it was an ontology of class. Today radicals would demand a richer ontology that can accommodate the realities of gender and racial oppression also. But whatever candidates are put forward, the key claim is that a liberal framework cannot accommodate an ontology of groups in relations of domination and subordination. To the extent that liberalism recognizes social groups, these are basically conceived of as voluntary associations that one chooses to join or not join, which is obviously very different from, say, class, race, and gender memberships.

But this evasive ontology, which obfuscates the most central and obvious fact about all societies since humanity exited the hunting-and-gathering stage—that is, that they are characterized by oppressions of one kind or another—is not a definitional constituent of liberalism. Liberalism has certainly recognized some kinds of oppression: the absolutism it opposed from the seventeenth to the nineteenth century, the Nazism and Stalinism it opposed in the twentieth century. Liberalism’s failure to systematically address structural oppression in supposedly liberal-democratic societies is a contingent artifact of the group perspectives and group interests privileged by those structures, not an intrinsic feature of liberalism’s conceptual apparatus.

In the preface to her recent Analyzing Oppression, Ann Cudd makes a striking point: that hers is the first book-length treatment of the subject in the analytic tradition.8 Philosophy, the discipline whose special mandate it is to illuminate justice and injustice for us, has had very little to say about injustice and oppression because of the social background of the majority of its thinkers. In political theory and political philosophy, the theorists who developed the dominant varieties of liberalism have come overwhelmingly from the hegemonic groups of the liberal social order (bourgeois white males). So it is really not surprising that, given this background, their socio-political and epistemic standpoint has tended to reproduce rather than challenge group privilege.

Consider Rawls, famously weak on gender and with next to nothing to say about race. Rawlsian “ideal theory,” which has dominated mainstream political philosophy for the last four decades, marginalizes such concerns not contingently but structurally. If your focus from the start is principles of distributive justice for a “well-ordered society,” then social oppression cannot be part of the picture, since by definition an oppressive society is not a well-ordered one. As Cudd points out, A Theory of Justice “leaves injustice virtually untheorized,” operating on the assumption “that injustice is merely the negation of justice.”9 But radically unjust societies—those characterized by major rather than minor deviations from ideality—will be different from just societies not merely morally but (p.17) also metaphysically. What Cudd calls “nonvoluntary social groups” will be central to their makeup.

Accordingly, Cudd contends that a conceptualization of “nonvoluntary social groups” must be central to any adequate account of social oppression: “without positing social groups as causally efficacious entities, we cannot explain oppression.” Contra the conventional wisdom in radical circles, however, she is insistent that the ontology of such groups can be explained “[using] current social science, in the form of cognitive psychology and modern economic theory, and situat[ing] itself in the Anglo-American tradition of liberal political philosophy.”10 Identifying “intentionalist” and “structuralist” approaches as the two broad categories of competing theorizations of social groups, she recommends as the best option a compatibilist position, holding that while all action is intentionally guided, many of the constraints within which we act are socially determined and beyond the control of the currently acting individual; to put a slogan on it, intentions dynamically interact within social structures… . My theory of nonvoluntary social groups fits the description of what Philip Pettit calls “holistic individualism,” which means that the social regularities associated with nonvoluntary social groups supervene on intentional states, and at the same time, group membership in these and voluntary social groups partly constitutes the intentional states of individuals.11

If Cudd is right, then, such a theorization can indeed be developed within a liberal framework, using the resources of analytic social and normative theory. But such a development of the theory is not merely permissible but should be seen as mandatory, given liberalism’s nominal commitment to individualism, egalitarianism, universalism, and meliorism. These values simply cannot be achieved unless the obstacles to their realization are identified and theorized. Social-democratic (left) liberalism, feminist liberalism, black liberalism all historically represent attempts to take these structural realities into account for the purposes of rethinking dominant liberalism.12 They are attempts to get right, to map accurately, the actual ontology of the societies for which liberalism is prescribing principles of justice. What Cudd’s book demonstrates is that it is the ignoring of this ontology of group domination that is the real betrayal of the liberal project. A well-ordered society will not have nonvoluntary social groups as part of its ontology. So the path to the “realistic utopia” Rawls is supposedly outlining would crucially require normative prescriptions for eliminating such groups. That no such guidelines are offered is undeniably an indictment of ideal-theory liberalism, which is thereby exposed as both epistemologically and ontologically inadequate. But that does not rule out a reconceptualized (p.18) liberalism, a non-ideal-theory liberalism that, starting from a different social metaphysic, requires a different normative strategy for theorizing justice.

3. Liberalism Cannot Recognize Groups and Group Oppression in Its Ontology—II (Micro)

But (it will be replied) liberalism suffers from a deeper theoretical inadequacy. Even if it may be conceded that liberal theory can recognize oppression at the macro-level, it will be argued that its individualism prevents it from recognizing how profoundly, at the micro-level, individuals are shaped by structures of social oppression. Class, race, and gender belongings penetrate deeply into the ontology of the individual in ways rendered opaque (it will be claimed) by liberalism’s foundational individualism.

But what those seeking to retrieve liberalism would point out is that we need to distinguish different senses of “individualism.” The individualism that is foundational to liberalism is a normative individualism (as in the Gray quote above), which makes individuals rather than social collectivities the locus of value. But that does not require any denial that individuals are shaped in their character (the “second nature” famously highlighted by left theory) by oppressive social forces and related group memberships. Once the first two criticisms have been refuted—that liberal individuals cannot be “social,” and that the involuntary group memberships central to the social in oppressive societies cannot be accommodated within a liberal framework—then this third criticism collapses also. One can without inconsistency affirm both the value of the individual and the importance of recognizing how the individual is socially molded, especially when the environing social structures are oppressive ones. As already noted, dominant liberalism tends to ignore or marginalize such constraints, assuming as its representative figures individuals not merely morally equal, but socially recognized as morally equal, and equi-powerful rather than group-differentiated into the privileged and the subordinated. But this misleading normative and descriptive picture is a function of a political agenda complicit with the status quo, not a necessary implication of liberalism’s core assumptions. A revisionist, radical liberalism would make the analysis of group oppression, the denial of equal standing to the majority of the population, and their impact on the individual’s ontology, a theoretical priority. Thus Cudd’s book, after explicating the ontology of involuntary groups, goes on to detail the various different ways—through violence, economic constraint, discrimination, group harassment, and the internalization of psychological oppression—that the subordinated are shaped by group domination.13 But nothing in her account is meant to imply either that they (p.19) thereby cease to be individuals or that their involuntary group memberships preclude a normative liberal condemnation of the injustice of their treatment.

4. Liberal Humanist Individualism Is Naïve about the Subject

A different kind of challenge is mounted by Foucault (though arguably originating in such earlier sources as the “anti-humanism” of Althusserian Marxism).14 Here, as John Christman points out, in contrast to the “thick” conception of the person advocated by communitarianism, in critique of liberalism, we get the theoretical recommendation that “the notion of a singular unified subject of any sort, however thin the conception, [must be] abandoned.”15 As Foucault writes:

How, under what conditions, and in what forms can something like a subject appear in the order of discourse? What place can it occupy in each type of discourse, what functions can it assume, and by obeying what rules? In short, it is a matter of depriving the subject (or its substitute) of its role as originator, and of analyzing the subject as a variable and complex function of discourse.16

The subject is not merely molded by power, but produced by power, and, in effect, vanishes.

I agree that liberalism cannot meet such a challenge, but I think the premise of the challenge should be rejected. Here I am in sympathy with Christman, who, reviewing various critiques of the classic liberal humanist conception of the self, argues for a socio-historical conception that concedes the absurdity of the notion of people springing from their own brow (“originators”) while nonetheless making a case for “degrees” of self-creation:

Selves should be seen as to a large extent formed by factors not under the control of those reflective agents themselves… . This will help accomplish two things: to provide grounds for the rejection of models of agency and citizenship that assume Herculean abilities to fashion ourselves out of whole cloth; and to force us to focus more carefully on what powers of self-shaping we therefore are left with… . The point must be that the role of the self’s control of the self (and the attendant social elements of both ‘selves’) will be circumscribed by the ways in which our lives are shaped for us and not by us.17

A commitment to humanism does not, as pointed out above, require the denial of the obvious fact that human beings—especially the (p.20) oppressed—are constrained by material structures and social restrictions in what they can accomplish, nor that, as products of particular epochs and group memberships, their consciousness will have been shaped by dominant concepts and norms. Marx emphasized long ago that though people make history, they do not make it under conditions of their own choosing, that agency is constrained by structure and circumstance. But, contra Althusser, this was never intended as a rejection of the claim that it is still people who ultimately assert their personhood in struggle.

And in my opinion, the retort applies to the Foucauldian version of the thesis also. To make the familiar left critiques: such an analysis not only deprives us of a normative basis for indicting structures of oppression, not only deprives the subject of agency, but is flagrantly inconsistent with the actual history of people’s resistance to the systems that have supposedly “produced” them as subjects. The anti-colonial struggle, the anti-Fascist and anti-Stalinist struggles, the civil rights struggles of white women, people of color, gays, the recent “Arab spring” all give the lie to such a diagnosis. Radical liberalism is capable of recognizing both the extent of our socialization by the existing oppressive social order and the ways in which, nonetheless, many people resist and struggle against this oppressive social order.

5. Liberalism’s Values (Independently of the Ontology Question) Are Themselves Problematic

Even if the ontological challenge can be beaten back, though, another front remains open. It will be argued that liberal humanist values are themselves problematic in nature and incapable of advancing a radical agenda. But the obvious reply is, Which values? And what exactly is the problem supposed to be: (a) that the values are intrinsically problematic? (b) that the values involved have historically been extended in an exclusionary discriminatory way? (c) that the values have been developed in a fashion that is predicated on the experience of the privileged? These are all different claims.

Start with the first. Admittedly, some values associated with the liberal tradition could be judged to be intrinsically problematic, such as the “possessive individualism” C. B. Macpherson famously attributed to Hobbes and Locke.18 But this is a value specific to right-wing liberalism, not liberalism in general (it does not appear on Gray’s list), and would be opposed by left-wing/social democratic liberalism. Such values as “freedom,” “equality” (moral egalitarianism), and “fraternity/sorority” classically emblematic of the liberal tradition have not usually been seen as problematic by radicals and have indeed been emblazoned on radical banners. Freedom from oppression, equal rights/equal pay/equal citizenship (“I AM A MAN”), (p.21) fraternity/sorority with the subordinated (“Am I not a man and a brother? Am I not a woman and a sister?”) have all served as values for progressive movements seeking social emancipation.

To be sure, it is a familiar point to radicals, if somewhat less so to the non-radical majority, that the population as a whole has not historically been recognized as deserving the protections of these norms, so that the opponents of emancipation have all too often themselves been liberals. Freedom has been construed as justifiably resting on the enslavement of some; equality has been restricted to those deemed worthy of it (i.e., those more equal than others); fraternity has been literal, an all-boys’ club. Domenico Losurdo’s recently translated Liberalism: A Counter-History provides a devastating exposé of “liberal thought [not] in its abstract purity, but liberalism, and hence the liberal movement and liberal society, in their concrete reality.” It is an illuminatingly sordid history of the ideology’s complicity with racial slavery, white working-class indentureship, colonialism and imperialism (“A ‘Master-Race Democracy’ on a Planetary Scale,” in one chapter’s title), and the conceptual connection between the Nazi “final solution” and Europe’s earlier extermination programs against indigenous peoples.19

Yet it is noteworthy that in his concluding pages, Losurdo still affirms the “merits and strong points of the intellectual tradition under examination.” His “counter-history” has been aimed at dispelling the “habitual hagiography” that surrounds liberalism, and the related “myth of the gradual, peaceful transition, on the basis of purely internal motivations and impulses, from liberalism to democracy, or from general enjoyment of negative liberty to an ever wider recognition of political rights.”20 In reality, he emphasizes, “the classics of the liberal tradition” were generally hostile to democracy; the “exclusion clauses” required “violent upheavals” to be overcome; progress was not linear but a matter of advances and retreats; external crisis often played a crucial role; and white working-class and black inclusion in the polity came at the cost of their participation in colonial wars against native peoples.21 Nonetheless, his final paragraph insists:

However difficult such an operation might be for those committed to overcoming liberalism’s exclusion clauses, to take up the legacy of this intellectual tradition is an absolutely unavoidable task… . [L]‌iberalism’s merits are too significant and too evident for it to be necessary to credit it with other, completely imaginary ones. Among the latter is the alleged spontaneous capacity for self-correction often attributed to it… . Only in opposition to [such] pervasive repressions and transfigurations is the book now ending presented as a “counter-history”: bidding farewell to hagiography is the precondition for landing on the firm ground of history.22

So for Losurdo one can accept the indictment of actual historic liberalism, and its failure to live up to its putative universalism, without going on to conclude either that liberalism must therefore be abandoned or that liberalism’s own internal dynamic will naturally correct itself. Rather, the appropriate conclusion is that liberalism can be retrieved, but that it will take political struggle to do so.

Finally, even when the “exclusion clauses” are formally overcome, their legacy may well remain in the form of values now nominally extended to everybody, but in reality articulated in such a fashion as to continue to reproduce group privilege—for example, a “freedom” that repudiates caste status but does not recognize illicit economic constraint as unfairly limiting liberty, or an “autonomy” that does not acknowledge the role of female caregiving in enabling human development, or a “justice” resolutely forward-looking that blocks issues of rectification of past injustices. But what such tendentious conceptual framings arguably call for is a critique and a rethinking of these values and principles in the light of these exclusions (as with left, feminist, and black liberalism). That does not refute their normative worth; it just underlines the necessity for taking the whole population into account in revising them and developing a blueprint of their internal architecture adequately sensitized to the differential social location and social history of such groups, particularly those traditionally oppressed.

6. Liberalism’s Enlightenment Origins Commit It to Seeing Moral Suasion and Rational Discourse as the Societal Prime Movers

Liberalism is often associated with a historical progressivism, but a belief in the possibility and desirability of meliorism (see Gray) certainly does not commit one to Whiggish teleologies. One can oppose conservative fatalism and pessimism in its different versions—Christian claims about original sin, Burkean distrust of abstract reason, biological determinism in its ever-changing and ever-renewed incarnations—without thinking that there is any inevitability about the triumph of progress and reason. A liberalism that is “radical” will necessarily need to draw on the left tradition’s demystified analysis of the centrality of group domination to the workings of the social order.23 As earlier noted (sections 2 and 3 above), a revisionist ontology that recognizes as key social players nonvoluntary social groups in structural relations of domination and subordination will perforce have a more realistic view of the (in)efficacy of moral suasion than an ontology of atomic individuals. (p.23)

Such a revisionist liberalism will acknowledge the role of hegemonic ideologies and vested group interests in the preservation of the status quo, and their refractoriness to appeals to reason and justice. Indeed, it will often be precisely in the names of a “reason” and “justice” shaped by the norms and perspectives of group privilege—of class, gender, and race—that egalitarian social change is resisted. As Losurdo makes clear, no immanent developmentalist moral dynamic drives liberalism’s evolution. It is not at all the case that an endorsement of democratized liberal norms implies any corollary belief that the democratic struggle for a more egalitarian social order is guaranteed to be successful. Progress is possible; defeat and rollback are also possible. In general, a radical liberalism should, in some sense, be “materialist,” recognizing the extent to which both people and the social dynamic are shaped by material forces and not over-estimating the causal role of rational argumentation and moral suasion on their own. Radical liberalism takes for granted that political and ideological struggle will be necessary to realize liberal values against the opposition of those who all too frequently think of themselves as the real liberals. Radical liberalism can be descriptively realist (realizing the centrality of interest-based politics) without being normatively realist (abandoning morality for realpolitik).

7. Liberalism Is Naïve in Assuming the Neutrality of the State and the Juridical System

Again, while such a claim may be true of dominant varieties of liberalism, it need not be true of all. (Note that nowhere in Gray’s characterization is any such assumption made.)

The neutrality of the juridico-political system is a liberal ideal, a norm to be striven for to reflect citizens’ equal moral status before the law and entitlement to equal protection of their legitimate interests. To represent it as a sociological generalization of liberal theory about actual political systems, including systems self-designated as liberal, would be to confuse the normative with the descriptive. Liberalism has certainly historically had no trouble in seeing the illicit influence of concentrated group power in the socio-political systems it opposed (see section #2). The original critique of “feudal” absolutism, the twentieth-century critique of “totalitarianism,” relied in part on the documentation and condemnation of the extent of legally backed state repression in curbing individual freedom. Liberalism’s blind spot has been its failure to document and condemn the enormity of the historic denial of equal rights to the majority of the population ruled by self-styled “liberal” states: the “absolutism” and “totalitarianism” directed against white women and white workers, and the nonwhite enslaved (p.24) and colonized. Patriarchal democracy, bourgeois democracy, Herrenvolk democracy have all been represented as “democracy” simpliciter, with no analysis of the mechanisms of structural subordination that have characterized such polities, or the ideological sleights-of-hand that have rationalized them. But to claim a necessary conceptual connection between such evasions and liberal assumptions is to confuse the contingent necessities of the discourse of hegemonic liberalism—aimed at preserving, whether by justifying or obfuscating, patriarchal, bourgeois, and racial power—with what is taken to be some kind of transworld essence of liberalism. In recent decades, a large body of literature has developed that investigates the impact of class, race, and gender dynamics in the actual functioning of the state and the legal system.24 Radical liberalism would draw on this body of literature in seeking to put in place the safeguards necessary for guaranteeing equal protection not merely on paper but in reality.

8. Liberalism Is Necessarily Anti-Socialist, So How “Radical” Could It Be?

“Socialism” is used in different senses. Assuming that a romanticized return to pre-industrial communal systems is not in the cards for a globalized world of seven-plus billion people, there are three main alternatives so far (two tried, one theorized about): state-commandist socialism, social democracy, market socialism. State-commandist socialism (a.k.a. “communism”) is indeed incompatible with liberalism but would seem to have been refuted as an attractive ideal by the history of the twentieth century.25 Social democracy is just left-liberalism, whether in Rawls’s version or in versions further left, like Brian Barry’s, more worried about the inequalities Rawls’s two principles of justice leave intact.26 Market socialism is yet to be implemented on a national level, but many of the hypothetical accounts of how it would work emphasize the importance of respecting liberal norms.27 In other words, market socialism’s putative superiority to capitalism is not defended by invoking distinctively socialist values but by showing how such uncontroversial and traditional liberal values as democracy, freedom, and self-realization are not going to be achievable for the majority under the present system (or through the appeal to more recent values like sustainability, generated by awareness of the impending ecological disaster, which the present order will make achievable for nobody!)28 Other possibilities are not ruled out, but their proponents would have to explain how their models have learned the lessons of the past in both (a) being economically viable and (b) respecting human rights, the common global moral currency of the postwar epoch, which is best developed in the liberal tradition. Criticism (p.25) of the existing order is not enough; one has to show how one’s proposed “socialist” alternative will be superior (and in more than a vague hand-waving kind of way).

9. The Discourse of Liberal Rights Cannot Accommodate Radical Redistribution and Structural Change

Marxism’s original critique of liberalism, apart from deriding its (imputed) social ontology, represented liberal rights—for example, in “On the Jewish Question”29—as a bourgeois concept. But that was more than a century and a half ago. Lockean rights-of-non-interference centered on private property, “negative” rights, are indeed deficient as an exclusivist characterization of people’s normative entitlements, but such a minimalist view has been contested by social democrats (some self-identifying as liberal) for more than a century. A significant literature now exists on “welfare” rights, “positive” rights, “social” rights, whose implementation would indeed require radical structural change. The legitimacy of these rights as “liberal” rights is, of course, denied by the political right. But that’s the whole point, with which I began—that liberalism is not a monolith but a set of competing interpretations and theorizations, fighting it out in a common arena.30 The US hostility to such rights is a manifestation of the historic success of conservatives in framing the normative agenda in this country, not a necessary corollary of liberalism as such. As earlier emphasized, liberalism must not be collapsed into neo-liberalism. Nor is it a refutation to point out that having such rights on paper does not guarantee their implementation, since this is just a variation of the already discussed imputation to liberalism of a necessarily idealist conception of the social dynamic (section #6), in which morality is a prime mover. But such a sociological claim is neither a foundational nor a derivative assumption of liberalism.

Moreover, in the specific case of the redress of racial injustice, one does not even need to appeal to such rights, since the situation of, for example, blacks in the United States is arguably the result of the historic and current violation of traditional negative rights (life, liberty, property), which are supposed to be the uncontroversial ones in the liberal tradition, as well as the legacy of such practices as manifest in illicitly accumulated wealth and opportunities. Here again the hegemony of Rawlsian “ideal theory” over the development of the mainstream political philosophy of the last forty years has had pernicious consequences, marginalizing such issues and putting the focus instead on principles of distributive justice for an ideal “well-ordered” society. But an emancipatory liberalism would be reoriented from (p.26) the start toward non-ideal theory and would correspondingly make rectificatory justice and the ending of social oppression its priority.31

10. American Liberalism in Particular Has Been so Shaped in Its Development by Race that Any Emancipatory Possibilities Have Been Foreclosed

Liberalism in general (both nationally and internationally) has been shaped by race, but that does not preclude reclaiming it.32 Moreover, it is precisely such shaping that motivates the imperative of recognizing the multiplicity of liberalisms, not merely for cataloging purposes but in order to frame them as theoretical objects whose dynamic requires investigation. The conflation of all liberalisms with their racialized versions obstructs seeing these ideologies as historically contingent varieties of liberalism, which could have developed otherwise. A Brechtian “defamiliarization” is necessary, a cognitive distancing that “denaturalizes” what is prone to appear as the essence of liberalism. Jennifer Pitts’s A Turn to Empire, for example, which is subtitled The Rise of Imperial Liberalism in Britain and France, and Sankar Muthu’s Enlightenment against Empire, both seek to demarcate within liberalism the existence of anti- as well as pro-imperialist strains, thereby demonstrating that liberalism is not a monolith.33 Admittedly, other scholars have been more ambivalent about some of their supposed exemplars; see, for example, Losurdo, already cited, and John Hobson’s recent The Eurocentric Conception of World Politics, which develops a detailed and sophisticated taxonomy of varieties of Eurocentrism and imperialism that demonstrates the compatibility of racism, Eurocentrism, and anti-imperialism.34 (For instance, many European liberal theorists were anti-imperialist precisely because of their racism—their fears that the white race would degenerate as a result of miscegenation with inferior races and the deleterious consequences of prolonged residence in the unsuitable tropical climates of colonial outposts.) But the mere fact of such a range of positions illustrates that a liberalism neither Eurocentric nor imperialist is not a contradiction in terms.

In the United States in particular, as Rogers Smith has demonstrated, liberalism and racism have been intricately involved with one another from the nation’s inception, a relationship Smith conceptualizes in terms of conflicting “multiple traditions,” racism versus liberal universalism, and which I see as a conflict between “racial liberalism” and non-racial liberalism.35 My belief is that formally identifying “racial liberalism” as a particular evolutionary (and always evolving) ideological phenomenon better enables us to understand the role of race in writing and rewriting the most important political philosophy in the nation’s history, from the overtly racist liberalism (p.27) of the past to the nominally color-blind liberalism of the present. From the eighteenth- to nineteenth-century accommodation to racial slavery and aboriginal expropriation to the twentieth-century tainting of welfare and social democracy on this side of the Atlantic,36 race has refracted crucial terms, concepts, and values in liberal theory so as to remove any cognitive dissonance between the privileging of whites and the subordination of people of color. Correspondingly, the shaping of white moral psychology by race and the distinctive patterns of uptake of abstract liberal values (“equality,” “individualism”) in such a psychology then become legitimate objects of investigation for us.37 One begins from the assumption that these norms will be color-coded in their actual operationalization, so that any efficacious framing of an interracial political project will need to anticipate and correct for this differential understanding rather than being naively surprised by it. But such racialization (as popular interpretation and reception) is going to be a common problem for any American ideology with emancipatory pretensions. Liberalism is certainly not unique in that respect, as the history of the white American left and socialist movements illustrates. As Jack London famously put it at a meeting of the Socialist Party in San Francisco “when challenged by various members concerning his emphasis on the yellow peril”: “What the devil! I am first of all a white man and only then a Socialist!”38 Herrenvolk socialism existed no less than Herrenvolk liberalism.