# 1AC

### 1AC – Anti-Domination

#### Antitrust is inherently political – grappling with its ideological underpinning and struggling to define its content is key to counter corporate power

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Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?” *The Yale Law Journal Forum*, 4 June 2018, pp. 985-994, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

II. ANTITRUST IS NOT AND CANNOT BE “APOLITICAL”

Antitrust law is unavoidably political. Of course, the enforcement of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.22 Rather, antitrust is political in its content. In designing a body of law, Congress, federal agencies, and the courts must answer the basic questions of whom the law benefits and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single “correct” answer and cannot be resolved through “neutral” methods or decided with an “apolitical” answer.23

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law’s aims and its methods, suggesting there is no “apolitical,” universal concept of antitrust. Rather than aspire for an impossible utopia of “apolitical” antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a “spontaneous order” is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile.24 This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy through the creation and protection of property rights25 and the enforcement of contracts.26 As sociologist Greta Krippner writes, “there can be no such excavation of politics from the economy, as this is the substratum on which all market activity—even ‘free’ markets—rests.”27 In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally conducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law’s sole protected group, how should the law protect consumers? Antitrust could protect consumers’ short term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.28

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different configurations of state action and different sets of beneficiaries.29 More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

#### Status quo antitrust represents the strategic masking of politics from law – the development of the consumer welfare standard by conservative courts was a set of political choices that we can and should reject

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B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,30 the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is qualitatively different from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers’ interest in competitively-priced goods,31 freedom for small proprietors,32 and dispersal of private power.33 The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.34 It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.35 Recognizing this goal of decentralization, the federal judiciary adopted strict limits on business conduct with anticompetitive potential, including mergers36 and exclusionary practices.37

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a rightward shift in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,38 these institutions curtailed the reach of antitrust law, scaling back its objectives39 and rewriting legal doctrine to preserve the autonomy of powerful businesses—all in the name of protecting consumers.40

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the meaning of consumer welfare is still not settled. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.41 The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic surplus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.42

C. Who Should Decide the Political Content of Antitrust?

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an “apolitical” antitrust jurisprudence is futile at best and a cynical effort to conceal political choices at worst. The choice is not between “apolitical” antitrust and “political” antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively “the technocrats”) or democratically-elected members of Congress should decide this political content.43

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Americans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

This congressional indifference to antitrust is not inevitable. Despite prolonged quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes. 51 The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

#### Those political choices are explicitly market fundamentalist – they exemplify the belief that the role of government is to stay out of the market

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III. THE CONSUMER WELFARE MODEL IS NOT ANCHORED IN CONGRESSIONAL INTENT AND REFLECTS A NARROW CONCEPTION OF MONOPOLY AND OLIGOPOLY

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is not “above politics.” It is a political construct that features at least two serious deficiencies. First, the consumer welfare model contradicts the legislative histories of the principal antitrust statutes; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations.

Congress’s original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over not only consumers but also competitors, workers, producers, and citizens is essential for preserving at least a modicum of economic and political equality in a democratic society

A. In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare

The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.52 The Congresses that passed these landmark statutes recognized that economics and politics are inseparable. Congress originally sought to structure markets to advance the interests of ordinary Americans in multiple capacities, not just as consumers. Consumer welfare antitrust reflects, at best, a selective reading of this legislative history and, at worst, an intentional distortion of this historical record. Contrary to Robert Bork’s historical analysis, the legislative histories show no congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.53

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.54 Key members of the House and Senate condemned the prices that powerful corporations charged consumers as “robbery”55 and “extortion.”56 The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.57 In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.58

Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the antitrust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.59 In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.60 Senator John Sherman warned his colleagues that “[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”61

B. The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an emaciated conception of corporate power. With its foundation in neoclassical economics, the consumer welfare model privileges shortterm consumer interests. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and does not account for long-term dynamics. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, prizes short-term price harms to consumers and sellers and discounts longer-term injuries.62

Furthermore, the consumer welfare model legitimizes the existing distribution of resources by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A wealthy consumer commands power in the market; a poor consumer, in comparison, has little or no clout in the market.63

The consumer welfare model, moreover, affords little or no importance to corporations’ ability to dictate the development of entire markets. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws “protect[] competition, not competitors.”64 Although the expression is arguably empty,65 it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,66 which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.67 Under consumer welfare antitrust, businesses can use their muscle to exclude rivals and strangle economic opportunity so long as this exclusion is not likely to injure consumers. In practical terms, consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning. 68

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory decisions.69 The ongoing—and frenzied—contest between states and cities to attract Amazon’s second headquarters is indicative of a giant business’s weight.70 In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.71 Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and managed to preserve their institutional power.72 An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.73 Large businesses also set the parameters of political debate through control of the media,74 sponsorship of supportive figures and organizations,75 and marginalization of critical voices.76 Consumer welfare antitrust itself is, at least in part, a product of big business’s reaction against the relatively vigorous antitrust program of the postwar decades.77

With its narrow analytical frame, the consumer welfare model of antitrust accepts and legitimizes many forms of state-supported corporate power. Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that hurt competitors and citizens. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is not an apolitical choice, but a charter of liberty for dominant businesses.

#### Antitrust is not unique – market fundamentalism led to the development of a libertarian skepticism in government more broadly, which justifies the use of proceduralism to undermine the administrative state, all under the guise of political neutrality

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Administrative law comprises a set of procedural rules that affect the pace and composition of government action. That same government action--whether it involves dispensing public benefits or regulating private conduct--allocates resources, risk, and power within the United States. The manner in which administrative law operates will thus favor some interests over others. That's not an indictment: any set of rules has the same character. Increasing the stringency of judicial review for new agency regulations, for example, will tend to aid those who have the most to lose from government action. By the same token, curbing judicial review will help those who stand to gain. There is no neutral, value-free way to calibrate the stringency of judicial review, and the point holds for administrative procedure more generally. The distribution of resources, risk, and power in the United States is partly a function of an administrative law that is supposed to be agnostic as to that distribution.

With increasing urgency over the past two decades, congressional Republicans have advanced proposals to discipline a regulatory state that, in their view, does too much and with too little care. These proposals travel under an array of names and acronyms, but they embrace a common tactic: they pile procedure on procedure in an effort to create a thicket so dense that agencies will either struggle to act or give up before they start. 1 The Regulatory Accountability Act (RAA), for example, would subject high-impact rules to an oral hearing, complete with cross-examination and a formal record; ban agencies from engaging in public outreach to advocate for their rules; stitch centralized executive oversight and rigorous cost-benefit analysis into law; impose onerous new rules on the issuance of guidance documents; and make adherence to all of these procedures subject to judicial review. 2 By tilting the scales against agency action, Republicans hope to end "job-killing regulations" and invigorate the free market. Not coincidentally, that means favoring industry over environmentalists, banks over consumer advocates, and management over labor.

The point is not that these are bad priorities. The point is that they are political priorities. Democrats understand as much. "By hamstringing the dedicated public servants charged with ensuring everything from safe infant [\*347] formula to clean drinking water to a fair day's pay for a fair day's work," writes Sam Berger, a former official in the Obama White House, "this bill would put corporate profits before people's lives and livelihoods." 3 William Funk notes that the RAA will "slow down, if not make impossible, the development of regulations that have major effects on the economy. It does not matter how many lives the regulation might save." 4 But the opposition from the left presents a puzzle. If adding new administrative procedures will so obviously advance conservative priorities, might not relaxing existing administrative constraints advance liberal ones? What if dedicated public servants are already hamstrung? What if it already does not matter how many lives a regulation might save?

Yet there is no Democratic version of the RAA, and little organized energy behind the idea that relaxing administrative procedures will be good for the environment, consumers, and workers. The game is strictly defensive: to protect administrative law, not to transform and rethink it. Actually, matters are worse than that. Some liberals are so enchanted with administrative procedures that they are calling for more. Democrats Heidi Heitkamp and Joe Manchin were Senate cosponsors of the RAA, arguing that it would make regulations "smarter." 5 Cass Sunstein also supports the bill, though not without reservation, and in so doing has thrown his support behind the imposition of the same procedures that Republicans hope will frustrate agency action. 6 Even those who are especially sensitive to the deficiencies of modern administrative law--Jon Michaels comes to mind--endorse court-centered proceduralism as part of their cure. 7

[\*348] Why aren't progressives clamoring to loosen administrative law's constraints? It's not for want of targets. Administrative law is shot through with arguably counterproductive procedural rules. In past work, for example, I have argued that the Office of Information and Regulatory Affairs imposes a drag on regulation without adequate justification; 8 that the presumption in favor of judicial review of agency action, and particularly the presumption in favor of preenforcement review, should be reevaluated; 9 and that the reflexive invalidation of defective agency action is wasteful and unnecessary. 10 But the list goes on. The judicially imposed rigors of notice-and-comment rulemaking, the practice of invalidating guidance documents that are "really" legislative rules, the Information Quality Act, the logical outgrowth doctrine, nationwide injunctions against invalid rules--all could and perhaps should be reconsidered.

In today's political landscape, however, "regulatory reform" is strictly the province of Republican policymakers, so much so that the anodyne phrase has acquired an antiregulatory connotation. Republicans have a reform agenda. Democrats don't. 11 What's more, the left's hesitation is not a response to Republican control of the federal government. When Democrats held both Congress and the White House in 2009 and 2010, they didn't press to streamline or rethink administrative law.

Liberal quiescence can be traced, instead, to two stories about the administrative state that have become deeply embedded in our legal culture. Fidelity to procedures, one story runs, is essential to sustain the fragile legitimacy of a powerful and constitutionally suspect administrative state. 12 On the other story, procedures assure public accountability by shaping the decisions of an executive branch that might otherwise be beholden to factional [\*349] interests. 13 Taken together, these stories suggest we should be thankful for the procedures we have and nervous about their elimination.

But this legitimacy-and-capture narrative is overdrawn--indeed, it is largely a myth. Proceduralism has a role to play in preserving legitimacy and discouraging capture, but it advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address. In building this argument, I hope to call into question the administrative lawyer's instinctive faith in procedure, to reorient discussion to the trade-offs at the heart of any system designed to structure government action, and to soften resistance to the relaxation of unduly burdensome procedural rules. Notwithstanding academic claims that the Administrative Procedure Act (APA) has attained a kind of quasi-constitutional status, 14 administrative law remains very much an object of political contestation. Any convention that Congress can't tinker with the APA is quickly eroding, if indeed any such convention ever existed. We should acknowledge that fact even if we lament its loss.

In this, I hope to bring the practice of administrative law into conversation with a line of revisionist academic work that questions the left's embrace of court-centric legalism. That work, among other things, recovers how Progressive and New Deal state-builders embraced a results-oriented, nonlegalistic approach to administrative power. They understood--more clearly than we do now--that strict procedural rules and vigorous judicial oversight could be mobilized to frustrate their efforts to curb market exploitation, protect workers, and press for a fairer distribution of resources. 15 "Substantial justice," declared President Franklin Roosevelt in vetoing a predecessor bill to the APA, "remains a higher aim for our civilization than technical legalism." 16

The left's antiproceduralist orientation shifted in the wake of Brown v Board of Education, when the fight for civil rights moved into a legalistic register--a shift that, in the revisionist telling, both narrowed the scope of the civil rights movement's ambitions and hampered its efforts to address yawning racial inequalities. 17 Progressive reformers in the 1960s and the 1970s [\*350] drew inspiration from the civil rights example, and adopted the tools of adversarial legalism (to use Robert Kagan's phrase) 18 in an effort to spur the vigorous enforcement of new environmental and consumer protection laws. 19 That legalism, which opponents of state action avidly supported, 20 is our inheritance from that era. 21

Along the way, a positive vision of the administrative state--one in which its legitimacy is measured not by the stringency of the constraints under which it labors, but by how well it advances our collective goals--has been shoved to the side. 22 [FN22] See Kessler, supra note 15, at 733 (recalling the views of progressive reformers who "believed that an autonomous administrative state was necessary to achieve a more just distribution of the nation's resources, and that the achievement of this political economic goal, along with democratic support and expert guidance, were the sufficient conditions of the state's legitimacy"). [End FN] I recognize that now may not be the most auspicious time to press the point, when liberals have seized on administrative law as a means to resist the Trump Administration. But President Trump is temporary; administrative law is not. And an administrative law oriented around fears of a pathological presidency may itself be pathological--a cure worse than the disease. A decade after a financial crisis roiled the financial markets, in a century when climate change threatens environmental catastrophe, and in an era of growing income and wealth inequality, the wisdom of allowing procedural rules to hobble federal agencies is very much open to question. Administrative law may be about good governance, but it is also about power: the power to maintain the existing state of affairs, and the power to change it. It's well past time for more skepticism about procedure.

#### Administrative state is key to solve multiple existential risks – we should reject judicial supremacy in favor of popular sovereignty

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Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 2-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

We face no less than four urgent crises: an ongoing pandemic1; racial injustice and its consequent civil unrest2; an economic depression approaching the pain inflicted in 1929; and the accumulating, existential threat of climate change.4 Citizens must rely on their state to tackle these burning perils.5 Yet critics both left 6 and right 7 would tear down its institutional capacity to do so. Some denounce the exercise of administrative power as illiberal, unconstitutional and obnoxious to the rule of law.8 Others impugn it as undemocratic, paternalistic, and corrupt.9 Yet without some kind of agent to carry out collective solutions, these perils may very well proceed unabated.

Pushing an anti-administravist10 agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power. 19 Such critics would lend administration some democratic credentials by bootstrapping them to the president’s electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.20 It thus, arguably, solves a separation-of-powers problem by introducing a new one.21 More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.22 The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left. 23 They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature24; corruption, privatization and regulatory capture25; the depoliticization of economic issues and the subsidization of globalized financial capitalism26 and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.27 Their preferred solutions include democratizing agency decision-making28 and constraining Congress’ capacity to delegate its lawmaking function. 29 While their interventions are welcome, they may deprive government of the nimble expertise necessary to address environmental and economic crises.30 Moreover, as illustrated by the president’s extraordinary powers to shape national immigration policy despite its “notoriously complex and detailed statutory structure,” increasing the amount of formal legislation may only expand agencies’ enforcement discretion.31 Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional lawmaking. 32

In this essay, I contend that this multi-pronged anti-administravist attack stands upon shaky conceptual foundations. Each builds atop a theory of constitutionalism that embraces a too-literal conception of popular sovereignty.33 It is a conception that posits that there is, in fact, a “people” with a sovereign “will.” It is a “will” that can be clearly identified (through elections); straightforwardly transcribed (through lawmaking); mechanically applied (by administrators) and constrained (by judges). 34 But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.35 It is even more impossible that it could ever be accurately expressed through the lawmaking of elected representatives.36 As a result, critics of administration often grant statutory lawmaking more democratic credentials than it deserves. 37 The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

Critics commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they incorrectly posit two separate, autonomous processes: the collective formation of ends (lawmaking) and the implementation (execution) and application (adjudication) of those ends. 38 But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore political, judgments.39 “They who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.40 It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.41 Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc. 42 As a result, the theories overemphasize and distort the purpose of separating powers.43

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation. 44 They isolate elections and lawmaking from the process of enforcing rights and the rule of law – as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself – a reliance inappropriate for contemporary secular polities.45 They therefore lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, I argue that administration does indeed carry constitutional liberal democratic credentials – credentials borne out by political theory’s “representative turn.”46 By understanding agencies as embedded in a system of representative democracy that aims to set the conditions by which citizens can relate to each other as political equals, we can assess the legitimacy of government agencies without any “idolatrous”47 commitments to a fictitious popular sovereign or legal formalism. I suggest that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as co-equal participants in the collective decision-making process.

#### And, administrative state is key to substantive equality – our political commitments should embrace anti-domination as a method of redressing disparities in power

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K. Sabeel Rahman, “Book Review: Reconstructing the Administrative State in an Era of Economic and Democratic Crisis,” *Harvard Law Review*, vol. 131, 2018, pp. 1682-1689, https://harvardlawreview.org/wp-content/uploads/2018/04/1671-1712\_Online.pdf.

A. Privatization and the Challenge of Contesting Economic and Social Structure

The regulatory state did not simply come into being because of the complexity of modern governance; rather, in its key moments of institutional innovation and development, the rise of modern administration has always been closely tied to substantive aspirations to counteract inequalities, hierarchies, and disparities of power generated by a changing social and economic order. As Michaels writes, the socioeconomic upheavals of industrialization led an "increasingly inclusive and mobilized public" to demand "greater protection from the vagaries, deceptions, and dangers of the marketplace" (p. 41). As a result, a "State newly tasked with these weighty and extensive responsibilities (and newly attuned to the disciplining effects of a more demanding, empowered, and diverse electorate) could no longer get away with being small or amateurish" (p. 41). The outcome of these demands was a burst of institutional innovation and state formation that created the explosion of new administrative bodies, commissions, and bureaucrats in the Progressive Era, accelerating with President Roosevelt's New Deal. While Michaels is certainly right to highlight the ways in which the professionalization and proceduralization of these new administrative powers were central to their legitimation, the rise of the modern regulatory state -- and its political and normative valence -- has to be understood in context of these substantive aspirations and concerns arising from the industrial economy.

The upheavals of industrialization generated more than simple economic dislocation; they provoked a deep political crisis. 26 Late nineteenth-century thinkers, lawyers, and reformers saw industrial capitalism as a fundamental threat to existing institutions and political ideals. Industrialization produced widespread immiseration, dislocation, and precarity. 27 But it also produced very clear and threatening new forms of economic power: the power of managers over workers and the rise of new corporate titans like J.P. Morgan, the Vanderbilts, and the Rockefellers, whose corporate control over finance, rail, oil, and other foundational goods and services placed whole towns and business sectors at their mercy. 28 At the same time, political institutions themselves were already viewed as captured, corrupt, or otherwise incapable of meeting these challenges: legislative corruption was a widespread concern, and a conservative judiciary posed a threat to basic state police powers aimed at protecting workers, health, and safety -- and curbing these new forms of corporate power. 29 This context generated social movements across the country, from the Farmers' Alliance (which would become the widespread Populist movement), to the largely urban, middle-class Progressive movement, to the growing organized labor movement. 30

While these movements were themselves highly diverse and heterogeneous in their members and demands, they shared a common set of ideas: that the industrial economy was a highly unequal one shaped by new forms of domination and power, and that for economic and political liberty to survive industrialization, new institutions would have to be created to empower the public and check the excesses of industrialization. First, the problem of industrial capitalism was not just one of income inequality or maldistribution. More critically, it was a problem of economic power. 31 For antitrusters and crusaders like Louis Brandeis, a key problem was that a variety of private actors, from monopolies and trusts, to finance, to corporations more broadly, had accumulated a degree of quasi-sovereign control over the economic vitality and well-being of individuals and communities -- yet were not subject to the kinds of checks and balances and norms of public justification that would have accompanied equivalent exercises of public power. 32 This problem of economic power also appeared in Progressive Era critiques of the market system itself. On this view, as thinkers like Robert Hale and John Dewey suggested, what might appear as impersonal "market forces" that, for example, drove wages down or prices up, were in fact the cumulative result of thousands of microscale transactions and bargains, each of which took place under (legally determined) disparities of power. Law constructed markets -- and thus shaped market forces themselves. 33

Second, if the problem of capitalism was really a problem of power, then the remedy required the construction of new forms of civic capacity empowered to contest such private and market power. Thus, for Progressive Era reformers, a key challenge was the challenge of action-ability. 34 As Dewey put it in his influential book, The Public and Its Problems, the problem of the modern public was that it was too scattered, diffuse, and disorganized, incapable of asserting its interests in the face of the pressures of the industrial economy. 35 By its very nature, economic inequality in an industrializing economy could not be counteracted at an individual level; the background disparities of power were systemic and could be altered only by equally systemic changes to the background rules of the marketplace itself. Indeed, this was one of the central insights of legal realist scholars and progressive economists like John Commons, Robert Hale, Richard Ely, and others, who saw the prospects for economic equity as requiring expansive efforts to restructure the background rules of the market itself. 36 By creating new institutions like regulatory bodies, reformers made it more possible to act on these seemingly powerful and diffuse forces; by situating these bodies in a larger context of public-oriented, democratic politics, these agencies could fairly be seen as agents of the public good. Thus, private power would be made contestable and governable by democracy. 37

These are the kinds of aspirations that fueled the experimentation with the expansion of the administrative state: starting at the state and local level with the efforts by cities to municipalize private utility companies and by state governments to create railroad oversight commissions and agencies to address labor, poverty, and public health, and then reaching the federal level as the Progressive Era Administrations of Presidents Theodore Roosevelt and Woodrow Wilson began to experiment with antitrust and economic regulatory oversight. 38 As Professor William Novak has convincingly argued, this proliferation of state and local regulatory experiments shaped a generation of legal scholars and policymakers, giving rise to the modern techniques of administrative governance and making the later New Deal creation of the modern administrative state possible. 39 The rise of administration, then, was inextricably related to the rise of democracy, in two related senses: first, the building of state regulatory capacity provided the democratic public as a whole with new tools through which to make a vision of socioeconomic order possible; second, these tools were at the outset oriented, at least in part, toward a substantive vision of democratic accountability and equality, not just of governmental actors, but perhaps even more importantly, of private economic actors whose unchecked private and market power posed a threat to democratic opportunity.

This relationship between democratic political agency and capacity, substantive ideals of democratic equality, and the administrative state also animated important episodes of regulatory institutional development and innovation in the mid- and late twentieth century. As the growing literature on "administrative constitutionalism" suggests, the frontline battles for economic, racial, and gender equality often involved the building and deploying of bureaucratic capacity, and internal battles between social movements and bureaucrats. 40 It was through the creation of regulatory institutions that labor rights, nondiscrimination protections, and access to federal welfare programs from Medicare to poverty assistance were made possible. Furthermore, it was through the pressures exerted on these bureaucracies by social movements that these regulatory tools were gradually repurposed toward enforcing and implementing equity- and inclusion-enhancing programs.

Consider, for example, Professor Karen Tani's recent work on the administration of welfare rights. As Tani documents, the development of a modern welfare rights regime involved a hard-fought shift away from a view of welfare as charitable support for the needy to welfare as a right that was an entitlement owed to members of the polity. 41 This shift had to be negotiated and was driven in large part by bureaucrats within the Social Security Administration, who asserted their specific vision of welfare as entitlement over the resistance of local welfare system administrators. To make the idea of welfare rights a reality, these bureaucrats experimented with implementing greater process protections for claimants. 42 These federal officers also developed new approaches to training and hiring bureaucrats, socializing them into a way of doing their day-to-day work that took as an axiom this more robust commitment to welfare as entitlement. 43 The success or failure of this effort turned not so much on the role of judicial interpretations of constitutional doctrine or presidential directives, but rather on more bureaucratic concerns: jurisdictional turf battles between local and state administrators more hostile to expanded welfare benefits and federal agencies seeking to expand access, difficulties of sourcing enough trained personnel who shared this larger mission, and the like. 44

A similar story can be told about the construction of equal access to Medicare. As Professor David Smith details in his historical account, it was the politics of regulation that constructed the reality of equal access to Medicare as a universal entitlement. 45 This outcome was neither obvious, nor predetermined. Rather, it was the contingent result of a complex interplay of bureaucratic innovation, social movement pressure, and regulatory policymaking. As Smith argues, in the early days of Medicare, there was a very real threat that the program would be administered in racially discriminatory and exclusionary ways. 46 The health system emerging in the mid-twentieth century reflected the legacy of racial exclusion and hierarchy in the Jim Crow South, marked by segregated and geographically concentrated hospital systems, and driving vastly divergent health outcomes and mortality rates between whites and African Americans. 47 Civil rights movement groups like the NAACP, Southern Christian Leadership Conference, Student Nonviolent Coordinating Committee, and Congress of Racial Equality, made the integration of hospitals and the healthcare system a key focal point -- taking the lead from African American health professionals who drove these campaigns. 48 Pressure from civil rights leaders led to a major shift in Department of Health, Education, and Welfare leadership and culture. By December 1965, the agency issued a new internal memo that declared its mission to include the compliance with an enforcement of civil rights goals, through the administering of Medicare funding for hospital systems. 49 The agency created an Office of Equal Health Opportunity in February 1966 to enforce Title VI compliance for any hospital receiving Medicare payments. 50 This new office in turn hired teams of investigators, coordinating with civil rights groups to train them and to identify hospitals that might be violating civil rights requirements. 51

The rise of the administrative state was thus not a politically neutral endeavor. The checks and balances that legitimate administrative authority in essence make possible (but do not guarantee) the contestation of deep forms of economic and social inequality, subordination, or hierarchy. This is not to say that administrative authority is always equality or inclusion promoting -- hardly. But in a reality where background economic, social, and historical conditions already encode structural disparities of wealth, opportunity, power, and influence, eliminating regulatory agencies and tools that are potentially capable of addressing these disparities (even if they are not always deployed in these ways) precludes much of equality- or inclusion-promoting public policy from getting off the ground in the first place. The dismantling of administrative institutions, then, is similarly nonneutral. Scholars of the administrative process have long warned of the dangers of special interest capture of regulatory agencies, which would cause administrative authority to be redirected to serve some interests over others. 53 But agencies can also be captured and neutered through inaction -- through what political scientists call "drift," where highly resourced and sophisticated players are able to produce substantive policy change simply by holding existing rules in place in the face of changing external conditions. 54 Dismantling agencies altogether would be an even more extreme form of opposition to these potential uses: rather than trying to capture or simply neuter the agency, more radical efforts to deconstruct regulatory institutions cut off the very possibility by eliminating the regulatory capacity itself, a kind of complete and total capture through deconstruction.

This substantive valence of administrative power and its potential deconstruction adds an important layer to Michaels's critique of privatization. Michaels alludes to the ways in which privatization risks permanently dismantling institutional tools and capacities that are difficult to rebuild. As Michaels warns, under privatization, "we will have hollowed out the government sector to such an extent that we may well lack the capacity, infrastructure, and know-how to reclaim that which has increasingly been outsourced or marketized" (p. 12). He rightly notes that privatization emerged as a "pivot[]" strategy in the Reagan era, a "second-best" to dismantling regulatory bodies themselves (p. 97). This is a problem in particular because "the Market, at least in its pure, idealized state, is not democratic, deliberative, or juridical. . . . It is the world of Schumpeter and Coase, not Montesquieu or Madison" (p. 5). Private corporate governance, meanwhile, cannot replicate the kinds of checks and balances that the separation of powers principles require (p. 164).

Dismantling administration and returning to private ordering is therefore troubling for democracy in three senses. First, given prior background structural patterns of exclusion and disparities of wealth, power, and opportunity, a return to private economic and social ordering is by definition a return to economic inequality, social hierarchy, and exclusion. Second, the dynamics of market competition or of corporate governance cannot replicate or replace public institutions of democracy or of checks and balances. They operate fundamentally differently and are not substitutes. Third, a dismantling of regulatory institutions removes some of the most vital and effective mechanisms through which we as a democratic public seek to contest and reshape these background structural inequities and exclusions: without tools of general administrative policymaking and enforcement, these structural inequities are harder to overcome and reshape.

#### Market fundamentalism is the new divine right of kings – failure to reclaim power ensures massive structural violence and extinction

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Robert B. Reich, *The System: Who Rigged It, How We Fix It*, pub. 2020, Ch. 13, p. E-book

HISTORY SHOWS that oligarchies cannot hold on to power forever. Oligarchies are inherently unstable. This was as true in ancient Rome as it was in America’s antebellum South, where fewer than four thousand families owned about a quarter of America’s capital in the form of enslaved human beings. For a time, oligarchies maintain themselves through sheer brute force. They have a monopoly on militias and weapons. But when a vast majority of people come to view an oligarchy as illegitimate and an obstacle to its own well-being, oligarchies become vulnerable to subversion, social unrest, terrorism, wars, and revolutions.

This is why oligarchies depend on ways other than brute force to hold power. The three most common are: (1) systems of belief—religions, dogmas, and ideologies—intended to convince most people of the righteousness of the oligarchy’s claim to power; (2) bribes to the most influential people to gain their support and thereby legitimize the oligarchy; and (3) manufactured threats—supposed foreign enemies or “enemies within,” as well as immigrants and minority populations—to divert attention from the oligarchy so the diverse elements within the majority won’t join together against it.

Today’s American oligarchy deploys all three.

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Among the oldest methods to maintain control are belief systems that portray wealth and power in the hands of a few as natural and inevitable. King James I of England and France’s Louis XIV, among other monarchs, asserted that kings received their authority from God and were therefore not accountable to their earthly subjects. The doctrine of divine right of kings ended with England’s Glorious Revolution in the seventeenth century and the American and French revolutions in the eighteenth.

The modern equivalent of the divine right of kings might be termed “market fundamentalism,” a creed that has been promoted by the American oligarchy with no less zeal than the old aristocracy advanced divine right. It holds that if the free market has caused a few at the top to aggregate vast wealth and power, the result must be right and good because it is natural and inevitable. One of market fundamentalism’s founders was the philosopher Ayn Rand. Former Fed chair Alan Greenspan was a follower of Rand, and, as we’ve seen, his doctrinaire views almost sank the American economy. Today’s oligarchs are not as rigidly doctrinaire, but they still regard the economy as a holy grail.

As I’ve said, the oligarchy wants Americans to view the system as a neutral meritocracy in which anyone can make it with enough guts, gumption, and hard work. The standard platitudes of market fundamentalism are that people “pull themselves up by their bootstraps” and that America is a nation of “self-made men” (and women), both of which translate into a moral code: People deserve whatever they earn in the market. Income and wealth are measures of worth. If you amass a billion dollars, then you must deserve it because that’s what the market awarded you. If you barely scrape by, then you have only yourself to blame. It is assumed that the system, and how power is allocated within it, plays no role whatsoever.

Of course, the oligarchy doesn’t want Americans to see its mounting wealth as the engorged winnings of a game whose rules it has decided on. It wants everyone to believe the oligarchy deserves what it has accumulated, even as it denies much of the rest of society the opportunities it enjoys. As the theologian Reinhold Niebuhr has written, “The most common form of hypocrisy among the privileged classes is to assume that their privileges are the just payments with which society rewards specially useful or meritorious functions,” while accusing the underprivileged of “lacking what they have been denied the right to acquire.”

The truth is that in America today your life chances depend largely on where your parents fit in the system—how much they earn, how much education they have, who they know. The phrase “pulling yourself up by the bootstraps” dates back to an eighteenth-century fairy tale, a metaphor for an impossible feat of strength. In fact, it’s more difficult for poor and working-class kids in America to rise economically through their working careers than it is for poor and working-class kids to rise in any other advanced nation. Over 40 percent of American children born into poor families will be poor as adults. Roughly the same share of children who are born into the richest fifth of families will remain in the richest fifth as adults.

Consider the intensifying competition to get into elite colleges, largely because of potentially huge incomes awaiting their graduates. According to data from the Department of Education, ten years after starting college, the highest-earning 10 percent of graduates from all universities have a median salary of $68,000. The top 10 percent from the ten most prestigious universities are raking in $220,000. In 2019, the Justice Department indicted dozens of wealthy parents for using bribery and fraud to get their children admitted to elite colleges. Yet the real scandal is not bribery by a few wealthy parents but how commonplace it has become for almost all wealthy parents to shell out big bucks for essay tutors, testing tutors, admissions counselors, and “enrichment” courses designed to get their kids into the college of their choice.

Elite colleges are doing their part to accelerate the trend. At a time when the courts have all but ended affirmative action for black children seeking college admission, high-end universities provide preferential admission to the children of wealthy alumni—legacies, as they’re delicately called. Some prestigious colleges have even been known to make quiet deals with wealthy non-alums—admission for their kids with the expectation of a large donation to follow. Jared Kushner’s father reportedly pledged $2.5 million to Harvard just as Jared was applying. The young man gained admission despite rather mediocre grades.

The most brazen affirmative-action program for children of the wealthy is the preference baked into elite admissions for graduates from private prep schools. While only 2.2 percent of American students graduate from nonsectarian private high schools, preppies account for 26 percent of students at Harvard and 28 percent of students at Princeton. All told, about 40 percent of the children of the richest 0.1 percent of American families now attend an Ivy League or other elite university. At some upscale campuses—including Dartmouth, Princeton, Yale, Penn, and Brown—more students now come from the richest 1 percent of American families than from the bottom 60 percent put together. By contrast, less than one-half of 1 percent of children from the bottom fifth of American families attend an elite college. Fewer than half attend any college at all.

A worse scandal is K–12 education, where geographic segregation by income is leaving poor school districts—partly reliant on local property taxes, which don’t generate much revenue—with fewer resources per pupil than richer districts. Race is clearly involved. School districts that are predominantly white get $23 billion more funding each year than districts that serve predominantly students of color. When it comes to early childhood education—which experts agree is vital to the future life chances of the very young—the gap has become a chasm. Wealthy parents spare no expense stimulating infant and toddler brains with happy human interactions through words, music, poetry, games, and art. Yet all too often the offspring of poorer parents have little to do other than sit long hours in front of a television.

As I have noted, we now have an education system in which the oligarchy can effectively buy college admission for its children, a political system in which the oligarchy can buy Congress, a health-care system in which it can buy care others can’t, and a justice system in which the oligarchy can buy its way out of jail. Consider the Wall Street executives who defrauded America in the years leading up to the 2008 financial crisis, yet went unpunished. An even more flagrant example is Ethan Couch, a Texan teenager who killed four people and severely injured another while driving drunk in June 2016. Prosecutors sought a twenty-year prison sentence, but a psychologist who testified in Couch’s defense argued that the teenager suffered from “affluenza,” a psychological affliction said to result from growing up with wealth and privilege. Couch served a 720-day sentence. Most poor and working-class kids accused of committing a crime can’t afford a high-priced attorney. They often plead guilty in exchange for a shorter sentence than they’d get had they gone to trial and been represented by an overworked public defender. This means some end up serving far more than 720 days in prison for committing no crime at all.

In September 2019, actress Felicity Huffman was sentenced to fourteen days in jail for shelling out $15,000 to rig her daughter’s SAT scores so she could get into a top university. In 2011, Kelley Williams-Bolar, a single black mother living in public housing in Akron, Ohio, was charged with multiple felonies and sentenced to two five-year sentences for using her father’s address to enroll her daughters in a better public school. That same year, Tanya McDowell, a homeless black mother living in Bridgeport, Connecticut, was sentenced to five years in prison for enrolling her five-year-old son in a neighboring public school.

The myth of rugged individuals making it on their own has helped mask all of this. It has allowed the oligarchy to dismantle unions, unravel safety nets, and slash taxes on itself. And it has deterred average Americans from demanding what the citizens of every other advanced country receive—paid family and medical leave, access to child care, good schools for all, affordable health care and drugs, workable transportation and communications systems, and policies that lift every family out of poverty. As long as most Americans are convinced that they alone are responsible for their fates, they won’t call for basic systemic changes—making corporations responsible to all their stakeholders, breaking up monopolies, strengthening unions, and protecting the economy from financial plundering—that would empower them to receive all these things and more.

Like the divine right of kings, market fundamentalism relies on faith rather than experience. It pretends that power has nothing to do with who wins and who loses. It proselytizes beliefs that are belied by recent history—that everyone gains from boosts in productivity and efficiency even though the oligarchy has received the lion’s share; that national competitiveness increases American wages even though it has mainly increased the profits of global corporations headquartered in the United States; that the stock market is the best measure of progress even though the unbridled pursuit of profits is putting our democracy under siege and threatening the very existence of life on Earth, and most of the stock market gains since the late 1980s have come out of the paychecks of workers.

Just as with the divine right of kings whose power was thought to come from God, those who embrace market fundamentalism want Americans to ignore how a powerful few have shaped the system for their own benefit. The creed doesn’t acknowledge that the rules of the free market come from government officials whose jobs increasingly depend on an oligarchy that benefits from those decisions. It doesn’t accept that laws are routinely violated by corporations and CEOs that treat fines as a cost of doing business. Adherents to market fundamentalism don’t see the ruthless profit-seeking behind the smooth public relations con of corporate social responsibility. They reject “socialism” without acknowledging how the oligarchy has cushioned itself against downside losses and insulated itself from personal accountability. They even view climate change as a problem of costs and inefficiencies rather than what it is—an existential threat to the future of humanity. A report issued in March 2019 by Morgan Stanley tallied $650 billion in climate-related disasters over the past three years, and predicted $54 trillion in damages worldwide by 2040. “We expect the physical risks of climate change to become an increasingly important part of the investment debate for 2019,” the bank’s strategists dryly write.

Market fundamentalism is as self-deluding and self-perpetuating as the divine right of kings, and with much the same result. “One of man’s oldest exercises in moral philosophy,” observed economist John Kenneth Galbraith, “is the search for a superior moral justification for selfishness. It is an exercise which always involves a certain number of internal contradictions and even a few absurdities. The conspicuously wealthy turn up urging the character-building value of privation for the poor.”

#### And, elite capture locks in civilizational collapse – try or die to put political and economic power in the hands of the citizens

MacKay 18 – Professor of Sociology, Mohawk College

Kevin MacKay, also a union activist & executive director of a sustainable community development cooperative, The Ecological Crisis is a Political Crisis, 2018, https://www.resilience.org/stories/2018-09-25/the-ecological-crisis-is-a-political-crisis/

With each passing day, reports on global climate change become increasingly bleak. Recent research has affirmed that the glaciers are melting faster than anticipated1, and that acidification, with its catastrophic effect on ocean ecosystems, is also proceeding faster than feared2. As the concentration of atmospheric carbon continues to rise, so does the likelihood we’ve passed the tipping point for irreversible climate change.3

When one looks at other critical earth ecosystems, the danger is equally apparent. Soil is being destroyed.4 Fresh water shortages are wracking several continents and leaving billions of people without reliable access to clean drinking water.5 Fish stocks are plummeting.6 Oceans are clogged with plastic garbage.7 Biodiversity is disappearing at an alarming rate.8 In the face of this full-spectrum ecological assault, a growing number of scientists have been saying that the collapse of civilization is now unavoidable.9

Stopping the destructive effects of industrial, capitalist civilization has now become the defining challenge of our age. If we don’t radically change our society’s course within the next 30 years, then a deep collapse and protracted Dark Age are all but assured. In order to confront this challenge, we need to understand what is causing civilization’s crisis, and most importantly, how the crisis can be resolved. At stake is nothing less than a viable future on this planet.

The Five Horsemen of the Modern Day Apocalypse

In my book, Radical Transformation: Oligarchy, Collapse, and the Crisis of Civilization, I argue that industrial civilization is being driven toward collapse by five key forces – related to terminal dysfunction within its ecological, economic, socio-cultural, and political sub-systems:

Dissociation: globalized production and distribution systems disrupt people’s ability to put their own actions, and the actions of elites, into a coherent causal and ethical framework. Actions by individuals, institutions, and systems of governance are therefore disconnected from their effect on the natural world and on other peoples. Without this critical feedback, even well-intentioned actors can’t make rational and ethical choices regarding their behaviour.

Complexity: the world-spanning nature of industrial capitalist civilization, and the massive number of interrelationships it represents, make predicting the effect of any given change on the system as a whole devilishly difficult. Disastrous tipping points loom in several of civilization’s systems – from the collapse of ocean ecology to the threat of nuclear war. In addition, because the crisis cannot be contained in one part of the globe, the dysfunctions can’t be dealt with in isolation.

Stratification: a profoundly unequal distribution of wealth – both globally and within nations – leads to mass human poverty, displacement, and to premature death through disease and continuous warfare. Stratification also leads to political instability, eroding a society’s social cohesion and undermining decision-making structures.

Overshoot: the economic practices of industrial capitalism are exceeding ecological limits. Our civilization is critically degrading the biosphere, burning through non-renewable energy sources, and shifting the entire climatic balance.

Oligarchy: in states worldwide, political decision-making is controlled by a numerically small, wealthy elite. This form of government serves to lock in patterns of conflict, oppression, and ecological destruction.

Societies as Decision-Making Systems

Each of the horsemen presents a significant threat to civilization’s viability. However, oligarchy is particularly important as it deals with a society’s decision-making systems. In his 2005 book Collapse: How Societies Choose to Fail or to Succeed, geographer Jared Diamond argued that many past civilizations have collapsed due to their inability to make correct decisions in the face of existential threats.10 Diamond drew on the work of archaeologist Joseph Tainter, who in his 1998 book The Collapse of Complex Societies, argued that civilizations fail due to a constellation of factors.11

To Tainter, the ultimate mistake failed civilizations made was to continually solve problems by adding social complexity, and as a result, increasing the society’s energy needs. Eventually, Tainter argued that civilizations encounter a “thermodynamic crisis” in which they are unable to sustain an energy-intensive level of complexity. The result is collapse – ecological devastation, political upheaval, and mass population die-off.

The tendency for societies to collapse under excessive energy demands is an important insight. However, what Tainter and Diamond failed to appreciate is how oligarchy is an even more fundamental cause of civilization collapse.

Oligarchic control compromises a society’s ability to make correct decisions in the face of existential threats. This explains a seeming paradox in which past civilizations have collapsed despite possessing the cultural and technological know-how needed to resolve their crises. The problem wasn’t that they didn’t understand the source of the threat or the way to avert it. The problem was that societal elites benefitted from the system’s dysfunctions and prevented available solutions.

Oligarchic Control in “Democratic” States

Citizens in countries such as Canada, the United States, Australia, or the Eurozone members, would generally consider themselves to be living in democratic societies. However, when the political systems of Western democracies are scrutinized, clear and pervasive signs of oligarchy emerge.

A 2014 study by American political scientists Martin Gilens and Benjamin Page revealed that the great majority of political decisions made in the United States reflect the interests of elites. After studying nearly 1,800 policy decisions passed between 1981 and 2002, the researchers argued that “both individual economic elites and organized interest groups (including corporations, largely owned and controlled by wealthy elites) play a substantial part in affecting public policy, but the general public has little or no independent influence.”12

Today, oligarchic control over decision-making, and its catastrophic ecological effects, have never been clearer. In the U.S., Donald Trump and his billionaire-dominated cabinet are seeking to dismantle the Environmental Protection Agency13, to question climate science14, and to pursue a policy of “American energy dominance” that will dramatically expand production of fossil fuels.15

U.S. energy companies are also having a profound impact on domestic energy policy by accelerating the development of hard-to-access fuel sources through hydraulic fracturing, deep-sea oil drilling, and mountain-top removal coal mining.16 At the same time, fossil fuel oligarchs are working overtime to dismantle green energy initiatives, such as the Koch brothers’ war on the solar industry in Florida, and in other cities across the continent.17

In Canada, often thought of as more progressive than its southern neighbor, the situation hasn’t been much different. Under prime minister Stephen Harper’s two terms, the Canadian state became an unapologetic cheerleader for extracting some of the world’s dirtiest oil –Tar Sands bitumen. Harper accelerated Tar Sands production, leading to the clear-cutting of thousands of acres of boreal forest, the diversion of millions of gallons of freshwater, and the creation of miles of toxic tailings ponds, filled with water contaminated by the bitumen extraction process.18

Like the Trump administration, the Harper government silenced federal climate scientists.19 The government also targeted environmental charities and non-profits, using funding cuts and the threat of audits to undermine climate advocacy.20 When a movement of national outrage swept Harper from power in 2015, Canadians were hopeful that climate change would once more be taken seriously. However, the new government of Justin Trudeau, while embracing the international discourse on global warming, has shown a continued allegiance to the fossil-fuel oligarchy by committing over $7 billion in federal funds to purchase the failing Kinder-Morgan Trans Mountain pipeline.21

What is To Be Done?

To create a sustainable future, we must first learn the lessons of the past, and what archaeological research shows is that throughout history, civilizations that have been captive to the interests of an oligarchic elite have all collapsed.22 Today’s industrial, capitalist civilization is trapped in this same deadly cycle.

As long as a self-interested elite controls decision-making in modern states, we will be far too late to avoid the effects of steadily contracting ecological limits. In addition, we will be unable to avert the downward spiral of economic crisis, conflict, and warfare that will result as oligarchs scramble to maintain their wealth and power in the face of dwindling resources and mounting crisis.23

Breaking free from this destructive pattern will require us to take political and economic power back from the 1% and return it to the hands of citizens. This means that advocates for ecological sustainability must move far beyond individual actions, lobbying, or reform of existing political and economic institutions. If we are to have a chance, we must ensure that governments make decisions based on the public good, not on private profit.

Radically transforming industrial, capitalist civilization won’t be easy. It will require movements for environmental sustainability, social justice, and economic fairness to come together, and to realize their common interest in dismantling the system of oligarchy and building a democratic, eco-socialist society.24 This “movement of movements” must put aside sectarian squabbles, and finally realize that the goals of economic justice, human rights, and ecological sustainability are all intrinsically linked.

Such changes may seem like a tall order, but hope can be found in the deepening struggle being waged to protect our fragile ecosystems. First Nations groups are leading this charge and beginning to win some important victories. The inspiring Water Protectors of Standing Rock were able to disrupt the Dakota Access Pipeline in the face of intense government oppression.25 In Canada, Several British Columbia First Nations recently won an impressive court victory in their opposition to the Trans Mountain pipeline.26

If successful grassroots struggles can be linked with equally hopeful movements for real political change, then there is hope for the future. However, if we continue on with “business as usual” – hoping that change will come from lifestyle choices and the interchangeable representatives of elite political parties, then the future looks grim indeed.

#### We must accept an alternative to markets – the state constructed markets and it can readily construct alternative institutional arrangements

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Terry Hathaway, Neoliberalism as Corporate, Power, *Competition & Change* Vol. 24(3–4): 315–337, 2020, <https://journals.sagepub.com/doi/10.1177/1024529420910382>

The slipperiness and contradictions of neoliberalism has been reflected in the practice-informed accounts of ‘actually-existing neoliberalism’ (Hardin, 2014: 210). Foundational to this practice-based literature is a critique of what has been termed the idealist, or ideational, view of neoliberalism. In its ideational form, neoliberalism can be summed as a faith in market provision and a lack of faith in state provision. Intellectually, it relies on a (odd) mixture of neoclassical and Austrian economic thought, and the widely-promoted view of economics as a scientific, technical and value-free discipline (Chang, 2010: 32). Rhetorically, it is advanced through claims to freedom and liberty – that the freer the market, the freer the society. In the hands of its most skilled rhetoricians, neoliberalism becomes synonymous with freedom of the individual, cosmopolitan globalism, and a dynamic meritocratic society. These ideas have successfully been advanced around the world, and now neoliberal concepts represent ‘the ruling ideas of the time’ (Harvey, 2005: 36).

In terms of stated policy goals on a national level, neoliberalism has advanced deregulation, non-intervention, privatization, lower taxes, and a reduction in the size of the state. These policies have been implemented around the world, starting first in Chile under Pinochet and garnering more attention when they were applied to the UK and USA under Thatcher and Reagan respectively – with these two latter countries often considered as being the most neoliberalized states around the world (Connell and Dados, 2014: 122). In addition, on an international level the neoliberal agenda has been forwarded through the promotion of greater interconnectedness through trade facilitated by a reduction of barriers to trade. It is these policy areas – deregulation, non-intervention, privatization, lower taxes, smaller states, and free trade – that can be seen as a definitive core of neoliberalism. However, the ideational view of neoliberalism has, and the discourse around these core polices have, been deeply misleading for both proponents and critics alike, as Cahill (2014: viii) writes

Many commentators mistakenly believed the capitalist world economy had come to resemble the free market, small government laissez-faire vision of such neoliberal thinkers and think tanks... . Such an understanding reflects an idealist, or ideas-centred, conception of reality ... [that offers] an unhelpful portrayal of the dynamics of neoliberalism in practice.

Similarly, as Bruff (2017) notes, because critics have tended to take the rhetoric of neoliberalism too seriously ‘the unspoken assumption is that the fight against neoliberalism is synonymous with the fight against free markets.’ Taking the rhetoric of neoliberalism literally has obscured key features of the politico-economic transformation that has occurred over the last 40 years. In particular, the demise of small, entrepreneurial firms and the concurrent rise of oligopolistic transnational corporations are difficult to discuss in the same breath as free, competitive markets (Cahill and Konings, 2017: 98).

Even when ideas-centred scholars have not been seduced by the rhetoric of neoliberalism, their accounts have paid insufficient attention to the translation and implementation of neoliberal ideas. For example, in the work of Mirowski (2013) – the foremost historian of neoliberal thought – ideas were generated in the ‘neoliberal thought collective’ (which had the Mont Pelerin Society at its core) and then transmitted down into society. The relationship presented is hierarchical and works with an implicit assumption that the author of an idea maintains some control over the idea as it spreads out into society. Such an account underplays the significance, or even possibility, of interest-based transformation of ideas during the process of translation of ideas into practice, and the subsequent capability of this transformation of practice to inform later understandings of an idea: that is to say, that while ideas influence practice, practice also influences ideas, and powerful interests within society will work to influence both.

Neoliberalism in practice, then, is an entirely different beast to how it is portrayed. This point is not new, and there have been various responses to neoliberalism’s contradictory character. Gill (1995: 405) uses the term ‘oligopolistic neoliberalism’, which for him involves ‘oligopoly and protection for the strong and a socialisation of their risks, market discipline for the weak.’ Similarly, more recently Bruff (2017) has termed it ‘authoritarian neoliberalism’, which is about the ‘about the coercive, non-democratic and unequal reorganization of societies’. These understandings of the contradictory character of neoliberalism are grappling with the central problem of neoliberalism, which is that between its discourse and its practice, as Peck (2010: 65) notes, ‘it can live neither with, nor without, the state.’ The core contradiction of neoliberalism is that its project of removing the state from the economic sphere is simply impossible, because the economic sphere is created by the state. The state creates the market through, for example, the provision of private property rights, of company law, and of contract law, and through using the coercive power of the state to enforce such rights and laws.

This point is generally societally obscured due to the dominance of neoclassical economic thought, which operates with an idea that the market is natural and eternal (Chang, 2002). Neoliberal practitioners have echoed this naturalist view of the market, holding to ‘the idea that the market has a nature of its own, has its own laws and mechanisms, and constitutes an autonomous reality which left to its own has the capability to provide for the wellbeing of its people’ (Zuidhof, 2014: 161). Yet, at the same time, neoliberalism has been about the construction of markets; alongside market naturalistic rhetoric, there is competing practical logic of market constructivism. Neoliberal market constructivism is about the extension of the economic sphere and the imposition of a ‘market logic’ to a greater range of activities. As Zuidhof (2014: 162–163) notes, neoliberalism ‘turns the market into a norm for government action, dictating market-like forms of government ... [whereby] social problems are best governed by creating markets or market-like institutions.’ Hence, traditionally non-economic institutions – such as prisons, schools, and even the military – have faced privatization, outsourcing, and the attempted creation of quasi-market structures during the neoliberal period (Schnyder and Siems, 2013).

There is thus a dual approach to markets whereby intellectually and rhetorically a naturalist view prevails, while practically markets are being constructed. The power of this layered thinking between rhetoric and practice is that it shuts down debate within society about political economy, about market institutional arrangements, and about a whole range of basic yet important questions such as ‘what is a market?’, ‘what is competition?’ ‘where does the economic sphere end?’, while society is transformed. If it was recognized that a market can take a variety of institutional forms, then the market constructivist logic is revealed and ‘there is no alternative’ collapses. In such a situation the neoliberal project of ‘depoliticization through economization’ (Madra and Adaman, 2014) would fail.

Neoliberalism, then, is at first glance easily-recognizable, with a clear set of core policies. However, the central contradiction of neoliberalism’s relationship to the state, the impossibility of a free market, and its dual constructivist-naturalist understanding of the market reveals neoliberalism more as a bricolage of ideas and practices (Ferguson, 2010: 183), rather than a unified, coherent and consistent political ideology that informs a uniform set of practices which can be rolled out across the world to produce cookie-cutter neoliberal states. As is demonstrated below within this bricolage of practices and ideas the general construction of neoliberal regimes, and the practice of neoliberal global governance, has empowered corporations.

#### Plan: the United States federal government should substantially increase prohibitions including on horizontal mergers, refusals to deal, exclusive dealing, and predatory pricing.

#### Plan restores the original vision of antitrust laws – that addresses concentrated power rather than consumer welfare

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Sandeep Vaheesan, “Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages,” *Maryland Law Review*, vol. 78, no. 4, 2019, pp. 816-825, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3832&context=mlr.

IV. How Remaking Antitrust Law Could Help End the New Gilded Age

Congress, the antitrust agencies, and federal courts should restore the original anti-monopoly, pro-worker vision for the antitrust laws. For much of their history, these laws had a pro-capital, anti-worker orientation. Notwithstanding this record, these laws can be reoriented to police capital and accommodate labor in accord with the intent of Congress. In passing these laws, Congress aimed to curtail the power of capital and also preserve space for workers to organize. 392 The antitrust agencies and federal courts should reject the ahistorical and deficient efficiency paradigm and embrace the political economy framework of the sponsors of the antitrust laws. Specifically, they need to reinterpret antitrust to restore competitive market structures and limit the power of large businesses over consumers, producers, rivals, and citizens. Along with imposing checks on the power of large businesses, Congress, the agencies, and the courts must preserve freedom of action for workers acting in concert.

New statutes and executive and judicial reinterpretation of antitrust law, in accord with congressional intent, would help remedy many economic and political injustices in the United States today. Monopoly and oligopoly appear to contribute to a host of societal ills. These include increased inequality, 393 diminished income for workers 394 and other producers, 395 and declining business formation. 396 At the same time, protecting workers' collective action against antitrust challenges would create more space for workers to organize and claim a fairer share of income and wealth. 397 Restoring antitrust law to its original goals would likely produce a more just and equitable society. Although no means a panacea for what ails the United States, antitrust law should be part of a broader social democratic agenda that reduces the yawning inequalities in wealth and power today. 398

Reinterpreting and reviving antitrust law will require new legislation from Congress, 399 a radical remaking of the federal antitrust agencies and the courts, or some combination of both. Congress, the DOJ, the FTC, and the courts would have to undo a thick accretion of pro-business, anti-worker case law and guidelines. 400 The current Supreme Court and the Trump administration are, if anything, likely to entrench the consumer welfare antitrust that failed consumers and workers, to continue to tolerate the abuses of monopolies and monopsonies, and to deploy antitrust against the powerless. 401 Yet, administrations and the composition of the Supreme Court are not destined to remain the same.

Already signs of progress are clear. Along with bills on strengthening antitrust in Congress, a number of members of Congress and candidates for Congress are making antitrust a centerpiece of their agenda. 402 At least on the Democratic side, antitrust and anti-monopoly appear likely to be important themes in the contest to be the party's presidential nominee in 2020. And if and when an administration committed to the revival of antitrust and control of corporate power is elected, it would have an opportunity to pursue a different course on antitrust through both appointments to the federal antitrust agencies and to the judiciary. In relying on the executive branch and the courts, the conservative reinterpretation - and retrenchment - of antitrust offers one model for reviving the field. 403 And even in the near term, litigation can yield important advances. Some lower courts appear receptive to reinvigorating or at least honoring mid-century precedents the Supreme Court has not overruled. 404

A. Confronting the Power of Capital

A reinterpretation of the antitrust laws needs to be founded on the political economy embodied in the legislative histories of the principal antitrust laws. The Congresses that enacted these statutes were not concerned with narrow economics or some abstract notion of competition. Instead, they sought to control the power of the new monopolies and trusts that dominated the American political economy. They had a broad conception of the power of large-scale enterprise and considered - and condemned - the trusts' power over consumers, producers, competitors, and citizens. 405 A review of the legislative histories reveals economic and political ideas that are consonant with popular concerns about corporate power today. 406

Permissive merger and monopoly policy resulted in a highly concentrated industrial structure. 407 Numerous sectors across the economy became more concentrated over the past two decades. 408 A few examples are illustrative. In the airline industry, the number of major carriers declined from nine to four since 2005. 409 Two duopolies dominate railroads - one east of the Mississippi and one west of it. 410 The wireless industry has four major players, 411 with AT&T and Verizon accounting for approximately seventy percent of market share by revenue. 412 In agriculture, concentration increased dramatically in markets throughout the supply chain, starting with inputs such as fertilizer and seeds through processing of farmers' crops, livestock, and poultry and food retailing. 413 Most local labor markets in the United States, and in rural areas in particular, are highly concentrated (as defined by the Horizontal Merger Guidelines) 414 and have become more concentrated since the 1970s. 415

Consumer welfare antitrust failed even on consumer welfare grounds. In metropolitan areas across the country, hospital mergers created highly concentrated markets for hospital services and contributed to higher costs in health care. 416 John Kwoka has shown that the antitrust agencies often failed to challenge mergers that had subsequent anticompetitive effects (higher short-term consumer prices). 417 Furthermore, Kwoka found that merger remedies, especially behavioral remedies, often failed to preserve competition. 418 Other research has also shown that increased market concentration contributes to higher consumer prices. 419

The failures of consumer welfare antitrust become even clearer when a broader set of economic and political interests are examined. Higher consumer prices are one manifestation of business power but only one and arguably not the most important one. Concentration in labor and product markets contributes to lower wages. 420 Just from a consumer angle, dominant online platforms, with their huge troves of user data and lack of effective competition, pose serious threats to personal privacy. 421 Companies that control infrastructure that support a range of activity, whether they are the electric grid or a search engine monopoly, have the power to shape large swaths of the economy over time. 422

The economic power of large business can also translate into great political power. 423 Empirical research found that big business exercises disproportionate influence over the political system. 424 John Browne, the former CEO of oil and gas giant BP, explained the nexus between economic power and political power. In an interview with The Wall Street Journal in 2003, he described how BP's size gives it political power:

We do get the seat at the table because of our scope and scale. Whether we are the second or the third largest (oil) company is of very little import, but we're certainly up there and we operate in places which are important to the United States government, and the United States government is important to us... . We have large numbers of employees in the United States. That's very important in a political system. And they are highly concentrated. So we have a very significant presence in Texas, Illinois, Alaska, California. These are important because our employees are voters. 425

Economic power extends beyond influence over politicians, regulators, and other public officials. Comcast and Google illustrate this hegemonic power. These giants use their power and wealth to shape the terms of debate through financial support for academics and non-profit organizations, including organizations with otherwise progressive reputations. 426 In their funding of academics and think tanks, these companies are representative of large-scale capital, rather than outliers. Large businesses outside telecommunications and technology also use their wealth and power to manipulate the parameters of public discussion, 427 including by attempting to discipline critical voices. 428

Current legal standards fail to provide a check on the prerogatives of large businesses and do not even protect consumers from the burden of monopoly and oligopoly. Antitrust legal standards, such as the rule of reason and the analytically comparable Horizontal Merger Guidelines, impose onerous burdens on plaintiffs challenging anticompetitive conduct and call for complicated, speculative inquiries into whether a business practice or merger led to or will likely lead to consumer harm in the near term. 429 These standards ensure plaintiffs rarely win and help protect monopolistic and oligopolistic domination of markets. 430 Largely quantitative analysis, likely defective even for the consumer welfare standard, 431 cannot do justice to the qualitative manifestations of business power identified in the legislative histories of the Sherman, Clayton, and FTC Acts. 432 These standards cannot protect the open markets or the American political system from private business power. And these standards, by elevating complexity over simplicity, favor well-heeled interests who can afford to retain the most expensive lawyers and consultants - the monopolies and oligopolies themselves. 433

To limit the power of large corporations, Congress, the antitrust agencies, and the courts must embrace clear rules and presumptions and reject the prevailing rule of reason approach. The Supreme Court once recognized the importance of rules in antitrust law and the unworkability of complicated standards. 434 For antitrust enforcement to be effective and efficient, per se rules and presumptions of illegality must become the default in antitrust law. 435 At present, rules are the norm only for price fixing and similar forms of horizontal collusion. 436 Per se rules or presumptions of illegality should govern a range of conduct that threatens structurally competitive markets. Conduct that carries this competitive threat includes horizontal and vertical mergers in concentrated markets and predatory pricing, exclusive dealing, and tying by monopolists and near-monopolists. Under these presumptions, certain firm conduct would be illegal unless the business could present credible business justifications.

#### Plan results in action by the political branches to emphasize market structure over individual actions

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Lina Khan and Sandeep Vaheesan, “Market Power and Inequality: The Antitrust Counterrevolution and Its Discontent,” *Harvard Law & Policy Review*, vol. 11, 2017, pp. 285-287, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2769132.

C. Possession of Highly Damaging Monopoly and Oligopoly Power Should Be Challenged

The antitrust agencies should use their existing legal authorities or seek additional authorities from Congress to challenge the possession of damaging monopoly and oligopoly power by firms. The specific types of monopoly and oligopoly power that should be challenged are those that last for an extended period of time or result in substantial harm, such as in a market for essential goods and services with highly inelastic demand. In contrast to the present law governing dominant firms, this legal power would not require “bad acts” on the part of the firm possessing market power;351 rather, an uncompetitive market structure that imposes substantial injury on the public would itself be challenged. Under the proposed “no-fault” monopoly and oligopoly doctrine, firms found to possess monopoly or oligopoly power that inflicts substantial injury and cannot be justified on operational grounds, such as economies of scale, would face antitrust liability.

Market power that persists for an extended period of time—say, for at least five years—imposes substantial costs on the public in the form of overcharges on consumer prices or depressed payments to producers or workers. Sometimes this monopoly or oligopoly power persists due to a discrete set of bad acts by the monopolists or oligopolists that exclude competitors. Examples of such bad acts include below-cost pricing and preventing rivals from accessing customers or essential distribution channels. In these instances, eliminating these artificial barriers to competition can restore competition to the market. In other cases, monopoly and oligopoly power persist due to no apparent bad practice352 or myriad bad practices enabled by the firms’ underlying power.353 Under these circumstances, the options under current law are either to do nothing or to initiate lengthy litigation that guarantees little except steady income for lawyers and economists.354 Because current law is ill-equipped to tackle these particular problems, let alone quickly, the public suffers under the burden of monopoly355 and oligopoly power that persists.

In other instances, monopoly or oligopoly power may arise intermittently or only temporarily but inflict tremendous harm. A classic example is market power in restructured electricity markets. Due to the highly inelastic nature of demand for electricity, generators with market power can unilaterally raise market prices. During the California electricity crisis in 2000 and 2001, generators created artificial shortages of electricity to drive up its price—without any indication of collusion.356 Similar unilateral withholding could occur in markets for essential medicines.357 The dramatic increase in the price of the EpiPen, for example, appears to be the product of monopoly power.358 Although, as currently interpreted, the antitrust laws require evidence of collusion or other bad act before condemning this type of withholding behavior,359 the harm to the public is real and often severe. The electricity price spikes and rolling blackouts that hit California fifteen years ago,360 and the monopolistic pricing of the EpiPen, illustrate the consumer costs of market power.361

The focus on durable monopoly and oligopoly would also shift the focus of current dominant firm law away from bad acts and toward market structure. The antitrust agencies should only challenge the market power of firms that impose substantial injury on the public, due either to persistent market power over a prolonged period of time or to large magnitude of harm in a short period of time. And even firms found to possess this type of market power would be allowed to show that asset divestitures and other restructurings would result in the loss of operational efficiencies.362 Given these demanding legal standards for when firms could be found liable, the risk that no-fault monopoly and oligopoly cases would diminish the competitive zeal of businesses—most of which are unlikely ever to possess anything even approaching injurious monopoly or oligopoly power—appears remote.363

#### The plan is an example of anti-domination – monopoly power guarantees racialized economic subordination – expansion of antitrust laws solve

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Jeremie Greer and Solana Rice, “Anti-Monopoly Activism: Reclaiming Power Through Racial Justice,” *Liberation in a Generation*, March 2021, pp. 3-14, https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism\_032021.pdf.

In spite of this suffering and sacrifice, the future for predominantly white corporate monopolists has never been brighter. Excessive and unrestrained capitalism has enriched a small group of wealthy elite corporations and individuals by concentrating the nation’s economic and political power under their control—a mutually reinforcing, vicious cycle. Between March 18 (the unofficial beginning of the pandemic in the US) and November 24, 2020, 644 billionaires increased their combined wealth by $931 billion dollars (from $2.95 trillion to $3.88 trillion, or a rise of 31.6 percent).2 This occurred even as poverty deepened and the October unemployment rate hit nearly double its pre-pandemic low. Some in this elite class of corporations and individuals have used their accumulated power to concentrate markets that are fundamental to human thriving (e.g., technology, agriculture, financial services, and health care) by forming massive corporate monopolies.

Corporate monopoly is bad for workers, consumers, and for our democracy. Our nation’s founders were keenly aware of the danger of monopoly. In fact, the US revolution was sparked by anger directed at the monopolistic power of the British Crown. Though popularly taught as being about unjust taxation, the Boston Tea Party was actually a rebellion ignited by rage directed at the East Indian Trading Company, a monopoly chartered by the British monarchy.3 Additionally, in 1787, Thomas Jefferson wrote to James Madison that the proposed US Constitution should include a Bill of Rights that explicitly excluded monopolies.4 Though the language did not make it into the final Constitution, this letter demonstrates that the distrust of monopoly is justified and runs deep in our nation’s ethos.

Efforts to rein in the “robber barons” of the Gilded Age (i.e., Andrew Carnegie, J.D. Rockfeller, Cornielius Vanderbelt, and J.P. Morgan) are monumental in the history of anti-monopoly government action in the US. Victories following this period include government action to break up several large monopolies in the railroad and oil and gas industries. Additionally, this period normalized many worker protections that we take for granted today, such as a 40-hour workweek and overtime pay.

Unfortunately, though the start of the 20th century saw robust anti-monopoly government action, the government rapidly retreated from anti-monopoly enforcement in the second half of the century. Since, the federal government and the federal courts have aided—not prevented—the exponential growth in monopoly power in nearly every sector of our economy, including technology, telecommunications, food supply chains, banking, and health care. In 2015, for example, the US saw a record number of corporate mergers, totalling $3.8 trillion in merger and acquisition activity.5 Mergers that year involved massive companies, such as Time Warner Cable, AnheuserBusch, and Berkshire Hathaway, becoming more massive. In 2020, T-Mobile—the third-largest wireless carrier in the US— acquired Sprint,6 and Morgan Stanely acquired online stock trading company E-Trade.7

The economic problems created by monopoly power have been widely studied, and many solutions to curtail it have been developed by experts. Unfortunately, like so many large-scale and so-called “race-neutral” policy efforts, anti-monopoly policy ideation and implementation have left people of color behind. In researching this paper we found limited research or policy ideation on the impact of monopoly power on people of color. We believe that the absence of grassroots leaders of color in anti-monopoly policy conversations can be attributed to this disconnect.

It is critical that grassroots leaders of color are positioned to lead on anti-monopoly policy, as they are uniquely positioned to understand its impact on people of color at the household, community, and societal levels. This gives them a unique perspective in policy ideation efforts that should be valued and validated. These leaders also possess the unique skills to mobilize the people and public power that are necessary to force the government to reclaim its historic role of reining in runaway corporate monopoly power.

We at Liberation in a Generation believe that the power to change our economic systems rests with the organizers of color who are building the political strength of communities of color. Anti-monopoly research and advocacy need to better quantify, center, and reflect what people of color are experiencing and the ways that they are being harmed by monopoly power’s reach. These efforts should also better connect anti-monopoly policy and advocacy as tools to advance the existing priorities of leaders of color, such as the Green New Deal, Medicare for All, closing the racial wealth gap, and a Homes Guarantee. This paper aims to contribute a major step in the long journey of bridging the divide between anti-monopoly researchers and policy advocates and grassroots leaders of color. The first step on that journey is knowledge.

Recognizing that anti-monopoly work is a new policy issue to many grassroots leaders of color, this paper will serve as a primer to 1) educate grassroots leaders on the issue of corporate concentration, 2) connect the issue to racial justice, and 3) recommend a path forward for grassroots leaders as well as the researchers and advocates who need to embrace them. Our hope is that this paper provides a foundation of knowledge that grassroots leaders of color can use to build race-conscious solutions and mobilize for action to rein in runaway corporate monopoly power. To that end, the paper is organized into six sections.

SECTION 1 Monopoly Power Is Corporate Power Magnified and Maximized

In 1975, millions flooded theaters to see the blockbuster thriller Jaws. The story follows a police chief in a small resort town as he risks his life to protect beachgoers from a monstrous man-eating great white shark.

Monopolies are a lot like the shark in Jaws. While enormous, ruthless, dangerous, and scary, the movie’s monster is just a shark, and the police chief uses tools and community to defeat it. Comparatively, while also enormous, ruthless, dangerous, and even scary, monopolies are just corporations, and we, together, can confront them. Their massive power controls the wages we earn, the prices we pay, and the actions of the politicians who are supposed to represent us in DC, the statehouse, and city hall. In a representative democracy, we the people are at the top of the food chain, and it is within our power to make these monopolies fear us— and end their existence in the first place.

Grassroots leaders of color are highly experienced and uniquely skilled at challenging corporate power, and these capacities can and should be used to curb monopoly power. For example,8 the Athena Coalition has successfully leveraged grassroots power to challenge the monopoly power of Amazon, and Color of Change9 has effectively used grassroots digital organizing to challenge the monopoly power of social media platforms such as Facebook. Putting monopolies in the crosshairs of organizers is critical because they best understand the real human and structural devastation caused by monopoly power, which is otherwise all too easily neglected.

Though we believe that grassroots leaders of color have the experience and expertise necessary to challenge monopoly power, the question remains: Why should they lead this fight? Grassroots leaders of color are already engaged in high-stakes battles with the forces of corporate power on fundamental issues, including environmental justice, worker justice, housing justice, prison and police abolition, and voter and democratic justice. We believe that these efforts can be bolstered if anti-monopoly policy development and advocacy were incorporated into these existing efforts but then followed the lead of organizers. For example, the primary opponents of prison and police abolition are private prison monopolies, such as GEO Group and CoreCivic, which profit from the arrest and incarceration of Black and brown people. Opponents of the Green New Deal include energy monopolies BP and ExxonMobile, whose profits are derived from polluting Black and brown communities.10 Finally, opponents of the Homes Guarantee, and its call for creating 12 million units of social housing outside of the for-profit housing market, include big banks that profit from the commodification of affordable and low-income housing. Challenging these opponents by diminishing their monopoly power could prove to be a powerful weapon in the fight to dismantle unchecked corporate power and its real-life economic impact on people of color.

How Corporate Monopolies Show Up in Today’s World

The distinguishing features of monopolies, when compared to your run of the mill corporation (large or small), are the reach and intensity of the corporate power that they wield. Monopoly power turbocharges the ills of corporate power and creates a wider impact of the overlapping consequences for people. In many ways, monopolies are created when corporate power becomes governing power.11 Their sheer size and market dominance allow them to govern markets, and their expansive wealth gives them the power to manipulate prices, crush workers, and steamroll governments. Ultimately, monopolies’ extreme economic power—which they use to gain outsized political power and then more economic power—undermines the collective power of workers, consumers, small businesses, local communities, and governments.

It has become difficult, and inadequate, to rely on legal definitions to identify monopolies. The legal definition of monopolization is highly technical and complicated by centuries of conflicting jurisprudence. It's been narrowed to exclusively focus on the negative impact that anticompetitive actions have on consumers.12 This narrower focus intentionally shielded monopolies from any accountability for anticompetitive harm inflicted on workers, the environment, local communities, government, and democracy. Federal enforcement of monopoly power is confined to the highly specialized legal practice of antitrust law enforcement.13 However, centuries of political power wielded by corporate monopolies and their acolytes (e.g., universities, think tanks, trade associations, and major law firms) have rendered much of antitrust law enforcement toothless.14

In the late 19th and early 20th century, the definition of monopoly was much wider and comprehensive. In this paper, we will expand the definition as well. Recognizing that this definitional work is in many ways a work in progress, we offer our definition as a point of discussion and debate for the larger field of anti-monopoly advocates.

In this paper, we define monopoly as a corporate entity (a single corporation or a group of corporations) whose sheer size and anticompetitive behavior grant it disproportionate economic power and governing influence. This negatively affects the well-being of workers, consumers, markets, local communities, democratic governance, and the planet.

Below are a few major industries that reveal how corporate concentration and monopolistic industries harm the economic lives of workers, consumers, and communities of color.

Big Tech

Four corporations comprise what has come to be known as “Big Tech”: Amazon, Apple, Facebook, and Alphabet (the parent company of Google). Each of these technology firms dominate an enormous share of their respective technology markets. Google, for example, controls 90 percent of the internet search market, and it controls the largest video sharing platform on the internet through its ownership of YouTube. Apple controls 50 percent of the cellphone market,15 and Amazon controls 50 percent of all ecommerce. Facebook and its many subsidiaries (such as WhatsApp and Instagram) dominate the social media and online advertising marketplace.16 Other technology firms, including Uber, Lyft, Microsoft, and Netflix, also demonstrate monopolistic, anticompetitive behavior in their respective markets. In many ways, these companies, and the people who control them, are the “robber barons” of our time.

Big Pharma

The world's largest pharmaceutical corporations, including Johnson & Johnson, Pfizer, Merck, Gilead, Amgen, and AbbVie, together comprise “Big Pharma.” These monopolies build their profits by controlling the prices of critical life-saving pharmaceuticals (e.g., insulin, drugs that regulate blood pressure, and critical antibiotics) and life-altering medical devices (e.g., heart stents and joint replacement devices). Between 2000 and 2018, a disproportionately small number of pharmaceutical companies made a combined $11 trillion in revenue and $8.6 trillion in gross profits.17 In 2014, the top 10 pharmaceutical companies had 38 percent of the industry’s total sales revenue.18 Much of these profits were gained driving up the price of critical drugs , extorting research and development (R&D) funding from the government, and leveraging Big Pharma’s political influence to weaken government oversight of the industry.19

Big Agriculture

Big Agriculture, or “Big Ag,” refers to monopolies that control major aspects of the global food supply chain. This includes companies such as Cargill, Archer Daniels Midland Company (ADM), Bayer, and John Deere. Though once a diffuse network of small farmers and supply chain companies, recent mergers have created a system comprising a small number of corporations that are crowding out smaller, family-run companies including small farms. Similar to Big Pharma, government subsidies are a massive component of the obscene profits made by Big Ag. Further, as often the largest employer in many small rural towns, these corporations often ruthlessly wield their monopoly power to drive down wages and benefits to workers, skirt government safety regulations, and bully (and even buy out) small farmers.

Big Banks

Known as the “Big Five,” five banks control almost half of the industry’s nearly $15 trillion in financial assets: JPMorgan Chase, Bank of America, Wells Fargo, Citigroup, and US Bancorp. Their collective importance to the nation’s financial system has led some to consider them “too big to fail.”20 In fact, in response to the financial crisis of 2008, the federal government provided trillions of dollars in relief to ensure that they did not collapse under the weight of the crisis.21 The Big Five have an incredible influence over the flow of money throughout our economy. They finance critical goods and services, such as housing, higher education, infrastructure, and renewable energy. They also finance extractive elements of our economy, such as fossil fuels and private prisons. But, most importantly, they set the rules for who can and cannot access loan capital, and their exclusionary practices have been widely linked to the growth of racial wealth inequality (as described in Section 3).

These are just four examples of industries that have been taken over by monopolies, but they are in no way exclusive. Many other critical industries in our economy have been corrupted by monopolies, including the energy, health insurance, hospital, for-profit college, and delivery service industries.

One note of caution on monopolies: While all corporate monopolies are harmful, some government monopolies can be critical to providing essential programs and services. Examples of government monopolies include public K–12 schools, publicly owned utilities, and the United States Postal Service (USPS). In fact, the USPS is codified in the US constitution to ensure that all people—even those in remote rural areas—can send and receive mail. Today, the USPS is an important employer to people of color, particularly Black people, in providing competitive wages and quality health and retirement benefits.

The predation of corporate monopolies creates racial wealth inequality. Low-wage employers that employ people of color, such as Walmart—the nation’s largest private employer—often set the wage floor for local communities and the nation.22 Agribusinesses and pharmaceutical monopolies set prices at a “poverty premium” where people of color pay more for food and life saving drugs. Also, bank monopolies set the prices that people of color pay for basic financial services, and they provide capital to predatory lenders, including payday and car title lenders.

#### Centering a critique of domination is critical to countering structural inequities – the Supreme Court’s embrace of market fundamentalism explains jurisprudence’s rejection of the state’s distributional power

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I. Lochnerism and Laissez-Faire Political Economy

The invocation of Lochner, while a potent charge against the Roberts Court, risks obscuring the ways in which Lochner-style constitutionalism exacerbates disparities of economic and political power. What unites the Lochner era with the constitutional political economy of the Roberts Court is not a pattern of raw partisan or ideological adjudication, but something more subtle and far-reaching: an underlying faith in markets as a system for aggregating preferences and promoting welfare efficiently, fairly, and on the basis of (at least one particular notion of) equality. On this view, equality and freedom are best secured by nominally fair and voluntary transactions.

In the economic arena, this approach suggests that voluntary transactions are, by definition, fair and equal - and therefore regulatory efforts that disturb these transactions face a higher justificatory bar. Consider cases like Directv v. Imburgia 12 and AT&T v. Concepcion, 13 where the Roberts Court upheld the validity of mandatory arbitration clauses and undermined the scope for class action litigation. 14 These decisions represent a variation on the Lochner-ian freedom of contract. While these cases were not substantive due process cases, they nevertheless exhibit a preference for the purportedly equal and fair market agreements, as in consumer contracts, disfavoring efforts to rebalance the terms of economic power between consumers and large companies through either class actions or access to Article III courts. But the preference for arbitration mechanisms outside of the traditional judicial process systematically favors the interests of corporations over consumers. 15 While consumers nominally enter into these contracts voluntarily, arbitration clauses are often uncontestable clauses. 16 The end result is to valorize the apparently equal nature of voluntary contract at the expense of other legal efforts to balance underlying disparities of economic power in the marketplace.

The same intellectual framework explains the Court's controversial political law. 17 So long as voters retain the freedom of choice over their ballot, the political process may be considered fair. This is arguably what lies beneath the Roberts Court's political-process jurisprudence. The gutting of campaign finance regulations in Citizens United does not necessarily represent a knee-jerk rejection of ideals of political equality. Rather it understands political equality and the democratic process in market-like terms. Candidates, campaigns, and Super PACs are all offering products and advertising on the open market; so long as voters have the freedom to choose their preferred candidate voluntarily - akin to a consumer's ability to choose a preferred product - there is no violation of political equality. Citizens United, like Lochner, seeks to preserve a seemingly neutral, prepolitical baseline of political equality - but in so doing rejects efforts that seek to rebalance the terms of political power by redressing underlying disparities in power and influence. 18 This same pattern helps explain the Roberts Court view of racial discrimination. The Court's dismantling of the Voting Rights Act in Shelby County 19 can be understood as an argument that underlying structural political inequalities that may have justified preclearance are no longer present, and thus ordinary political competition, like market competition, is sufficient to ensure freedom of choice and basic political equality. 20

The problem with this approach to constitutionalism is that what looks on the surface like the fairness and equality of market ordering in effect overlooks, and thus perpetuates, underlying disparities in power, capacity, and opportunity that shape these transactions. 21 Thus, in each of these areas, we see the Court perpetuating structural inequalities - in the economic, political, and social realms - out of an argument that market-style mechanisms of voluntary choice and open competition are sufficient to ensure freedom and equality. The underlying problem in each of these cases is a rejection of any notion of unequal power that may need some kind of systemic redress coupled with an overly optimistic faith in the ability of market systems to operate neutrally and fairly to all individuals.

At the same time, these cases exhibit a judicial hostility towards and skepticism of the legislative process - what Pamela Karlan has criticized as the Roberts Court's "disdain" for Congress, its findings, and its judgments about what kinds of policies might be required, from campaign finance to voting rights to substantive economic policy. 22 The disdain of the Roberts Court is importantly not the knee-jerk, ideological antistatism of the Lochner caricature (even Lochner did not meet that caricature). 23 The Roberts Court has sustained a fairly expansive view of the powers of the federal government in a variety of other administrative law decisions, so long as there remains a clear chain of command linking regulatory efforts to the political branches. 24 The problem here is instead a demanding justificatory bar for legislative and regulatory acts that seem to interfere with superficially neutral and equal market transactions - whether the economic market or the market of political competition. The root flaw is a presumption of a prepolitical, neutral baseline of market equality. 25

But if Supreme Court jurisprudence plays a role in codifying structural inequities, it is not obvious that the Court should necessarily figure prominently in efforts to remedy those inequities. Certainly reversing a decision like Citizens United is a worthy goal, and given the nature of judicial review absent a reversal, Court decisions remain persistent. But it is also important to note that, while high profile, these Court decisions are themselves significantly lagged manifestations of underlying trends in ideas, law, and politics. These conceptions of market equality themselves have a decades-long pedigree, having been incubated in scholarship, and filtering into public discourse, public policy, and law only gradually and slowly. 26 The process of developing an alternative account of political economy and constitutionalism requires a similar long-term trajectory, one that gains traction through intellectual, normative, and granular interventions before penetrating legal discourse and, eventually, judicial doctrine. It is here that the historical critics of Lochner-era jurisprudence offer a starting point for conceptualizing both an alternative vision of political economy and a theory of change for realizing it.

#### The problem of capitalism is domination, not inequality – we must embrace both economic redistribution and popular sovereignty

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The dramatic changes to the American economy a century ago catalyzed a diverse and highly mobilized movement of reformers and thinkers. Confronted by corporate entities of unprecedented scope and power - from railroad monopolies, trusts like Standard Oil, and financial elites like J. P. Morgan - and troubled by the violence of industrialization apparent in recurring strikes, financial panics, and economic dislocation, a number of Progressive Era thinkers developed a rich critique of market capitalism. 30 This context produced a broad intellectual movement, what Barbara Fried and Herbert Hovenkamp have referred to as the "first law and economics movement." 31 Approaching the problem from diverse methodologies including law, philosophy, sociology, and economics, they pioneered a compelling critique of American political economy. Among these more radical Progressive Era thinkers, from the legal realists to institutional economists and philosophers, there emerged a critique of capitalism focused not on efficiency or distribution so much as a more fundamental problem of domination and power. The problem of the market, for these thinkers, was, at root, a problem of disparate economic and political power - power that had to first be identified and unmasked before it could be contested and checked through collective action and reform politics. This conceptual framework can be distilled and understood as comprising of two elements: first, a critique of economic domination, and second, a turn to expanded democratic agency of citizens, movements, and democratic institutions as a response. This view of "democracy against domination" offers a compelling starting point for conceptualizing an alternative democratic political economy.

A. The Problem of Economic Domination

Louis Brandeis captured this concern with large corporations, monopolies, and trusts. Brandeis argued that the immense profits of large corporations juxtaposed with the below-subsistence wages they offered revealed a disparity in political power akin to slavery, where workers were "absolutely subject" to the will of the corporation. 32 Even if corporations acted in the interests of consumers and laborers, this would be at best a "benevolent absolutism," leaving in place the root problem that "within the State [there is] a state so powerful that the ordinary social and industrial forces existing are insufficient to cope with it." 33 The Knights of Labor and the labor movement similarly framed the problem of corporate power in such terms of seeking liberation from the arbitrary power of the master within the workplace. 34 Even Herbert Croly, whose faith in democracy was considerably less than other contemporaries like John Dewey, warned of the problems of rent extraction arising from monopoly and "economic privilege," which, if sufficiently "hostile to the public interest," would require a "shifting of the responsibility" away from these private actors. 35

But problematic exercises of economic power were not limited to large trusts and monopolies; the entire system of market exchange posed similar problems of unequal power. Legal realists like Robert Hale argued that unequal income distributions were a result not of natural forces but of disparities in power: "the relative power of coercion which the different members of the community can exert against one another." 36 Economist Walton Hamilton similarly argued that tyranny constraining individual liberty now took the form of the "bondage" of being dependent on wages [\*1340] for subsistence, subjected to the "tyranny of the system of prices," and to the dictates of large-scale economic development. 37

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.

B. Democratic Agency and Popular Sovereignty

The domination-based critique of capitalism also points to a different account of the remedies to this problem of unaccountable, unchecked power: the need to rebalance the terms of economic and political power in society, whether by checking concentrations of private power on the one hand, or by expanding the democratic agency of citizens and communities on the other.

Indeed, this imperative to open up the seemingly natural and private domain of the market to the demands of democratic legitimation is what lies behind the critique the legal realists advanced of the public-private distinction. While this critique is often noted as a central element of the move away from formalism, 39 it served a much broader function of linking economic power to the same demands for democratic justification, legitimacy, and accountability normally expected of exercises of "public" power. If the exercise of power was not in fact limited to the coercive force of the state but rather omnipresent throughout the seemingly private domain of market transactions, then such private power should be subject to the same kinds of moral and prudential policy considerations that are applied to determining valid exercises of public state power. The free market itself was thus a regulatory system subject to state control and broader policy debate. 40

Thus, philosopher Horace Kallen warned that exercises of private power were often cloaked beneath appeals to liberty and laissez-faire economics, tainting the ideal of freedom "to vindicate tyranny and injustice." 41 Morris Cohen described property rights as a form of sovereign power, compelling obedience in the commercial economy just as state power compelled obedience in politics. 42 As a result, "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government." 43

But this still leaves a further problem. Private power in the form of large corporations and market power in the form of the market system share another trait: they seem to defy the capacities of individual citizens to hold them accountable. Corporations exercise a vast power over workers, consumers, and politicians, far beyond the ability of any one person to counteract. 44 Similarly, the market as a system is so diffuse as to render it inactionable. 45 The challenge, then, lies in creating new vehicles and channels for democratic agency - institutions that can enable citizens to engage in more effective and empowered forms of collective action through which economic power can be contested and reshaped.

This need to create alternative modes of democratic agency is well exemplified by the thought of philosopher John Dewey. Dewey saw the libertarian resort to free markets as fundamentally misconstruing the nature of the modern economy; the market mechanism, with its disparities of economic and political power, was simply one system of allocating power - a particularly inequitable one - that had to be replaced by a "more equal and equitable balance of powers that will enhance and multiply the effective liberties of the mass of individuals." 46 The challenge, however, was that the lay public was too weak to counteract the pressures of an inequitable market economy. The purpose of political institutions, for Dewey, was to make it so a "scattered, mobile and manifold public may so recognize itself as to define and express its interests." 47 Without such public institutions, social and economic arrangements would seem obscured or otherwise beyond the scope of effective citizen action. 48 Dewey defined the public as the domain of "all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for." 49 State institutions served a dual purpose: in addition to making and implementing policies, these institutions were also key "structures which canalize action," providing a "mechanism for securing to an idea [the] channels of effective operation." 50

According to Dewey, the current inability of lay citizens to be effective and knowledgeable policymakers was not evidence against the value of democracy. Rather, these limitations were products of the existing institutional structure which had to be reformed to enable greater educative public discourse and more regular forms of citizen participation in governance, through which they could become more effective participants in self-rule over time. 51 Achieving such expanded citizen political agency and participation required institutional structures that could foster, house, and incubate such political agency. In particular, it would require institutions that went beyond traditional appeals to elections, legislatures, or the separation of powers. As Dewey argued, there was "no sanctity" to particular received "devices" of democratic elections. 52 Instead,

The old saying that the cure for the ills of democracy is more democracy is not apt if it means that the evils may be remedied by introducing more machinery of the same kind as that which already exists, or by refining and perfecting that machinery. But the phrase may also indicate the need of returning to the idea itself, of clarifying and deepening our apprehension of it, and of employing our sense of its meaning to criticize and remake its political manifestations. 53

The link between democratic agency and domination is well exemplified by Brandeis. Consider one of Brandeis's famous dissents in Louis K. Liggett Co. v. Lee, 54 where the Supreme Court struck down a Florida anti-chain store tax provision on Fourteenth Amendment grounds. 55 While this dissent may be seen more narrowly as a defense of federalism, the opinion is driven more centrally by Brandeis's concern with economic domination and with his commitment to combating such private power by expanding the democratic capacities of the people themselves. The opinion begins with a lengthy discussion of the threat corporate power poses to individual liberty. The Florida legislators, in Brandeis's view, were appropriately motivated by the "fear of encroachment upon the liberties and opportunities of the individual[;] fear of the subjection of labor to capital[;] and fear of monopoly." 56 The tax provision represented an attempt to defuse this threat and expand economic opportunity for small businesses and towns under the domination of large corporate chains. 57 Florida's action is important less because of an intrinsic value to states' rights, and more as a vehicle for citizens to experience meaningful [\*1344] democratic agency: "Only through participation by the many in the responsibilities and determinations of business," wrote Brandeis, "can Americans secure the moral and intellectual development which is essential to the maintenance of liberty." 58

Similarly, in New State Ice Co. v. Liebmann, 59 Brandeis dissented again from a majority ruling striking down Oklahoma's chartering of a public utility on Fourteenth Amendment grounds. 60 Like in Liggett, Brandeis's dissent was motivated less out of deference to Oklahoma on federalist grounds, and more as a vital expression of democratic agency of the people seeking to secure equal access to the necessities of life in the face of the extreme hardship, inequality, and insecurity of the Great Depression, which, Brandeis notes in his dissent, represented an "emergency more serious than war." 61 In the face of this structural economic collapse, such democratic agency and experimentation was essential. Predicting an ideal alternative form of economic planning would require "some measure of prophecy," for "man is weak and his judgment is at best fallible." 62 As a result, Brandeis argued, there was no choice but to allow for social learning through the actual experience of policy innovation, development, and experimentation. 63 The Court, as a result, had to be extremely wary of unduly limiting the capacities of citizens to engage in such experimentation.

It is telling that in both cases, Brandeis does not attempt to flip the majority's Fourteenth Amendment argument in favor of a more egalitarian view of substantive due process. But he also does not call for the kind of mechanical judicial deference to political branches that is the conventional Holmesian critique of Lochner-type decisions. Instead, Brandeis couches this deference to the democratic political process of state legislation in a substantive (but not necessarily constitutionally rooted) moral account of the problem of domination that motivates this turn to democratic action in the first place. Brandeis's opinion does not, therefore, exhibit a neutrality of process or a simple appeal to antiformalism. It is a morally substantive, non-neutral critique of private power and an appeal to democratic values. But it is a vision of democracy that places the Court in the position of protecting and thickening, rather than displacing or usurping, the democratic capacities of citizens to counteract domination through political action.

III. Antidomination as a Political Economic Reform Agenda

Taken together, the problem of domination and the value of democratic agency thus offer a valuable normative framework for conceptualizing the challenges of an unequal political economy. This conceptual focus also provides a starting point for imagining the kinds of legal, regulatory, and reform politics needed to rebalance these disparities of economic and political power. The historical examples of Progressive Era reform are not meant to suggest a literal blueprint for reform policies today; we need not directly reapply Progressive Era policies to the modern economy. But they are valuable for revealing an underlying ethos, for showing what kinds of approaches might be useful for combating domination, and for expanding democratic agency.

We can see a hint of what this approach to curbing domination might look like in practice through the reform politics of the Progressive Era itself. In their response to this problem of domination, the reform politics of the Progressive Era represented a large-scale, structural attempt to redress this problem of domination in two respects: first, by restructuring the market system to curb private power; and second, by restructuring the political system to expand popular sovereignty. These reforms sought to both reduce the threat of domination and expand the capacities of the democratic citizenry to better hold economic actors accountable.

A. Reconstituting Economic Structures to Curb Domination

From the standpoint of domination and power, one of the central problems of today's political economy is the increasingly concentrated power of corporations. From too-big-to-fail banks to the battles over net neutrality and anxieties about private power of firms like Google in the information economy, we live in an era marked by new forms of what Brandeis famously called "the curse of bigness." 64 As in Brandeis's time, powerful firms increasingly control the terms of access and distribution for major social services. Some of these firms are monopolies in the conventional sense, following waves of major mergers and consolidations in industries like agriculture, food production, and telecom. 65 But some of these firms exhibit a different form of "platform power," centralizing control over key conduits of economic activity, from Amazon's control of its logistics and marketplace infrastructure to Uber's platform for matching riders and drivers to Comcast's control over the underlying infrastructure linking Internet content to end users. 66

Just as Progressive Era political thought points towards a normative diagnosis of these problems as rooted in domination, the reform politics of the Progressive Era suggests avenues for redressing such private power, specifically by radically restructuring the dynamics of the modern economy. While we are accustomed to viewing the Progressive Era as the rise of ideals of regulatory expertise in areas like consumer protection and worker safety, the more far-reaching innovations of this period came from attempts to radically restructure the dynamics of the market economy and the powers and capacities of corporations themselves. These efforts sought to curb private power and subject it to more direct public oversight.

Consider for example the rise of corporate governance as a field of law. In 1932, Adolf Berle and Gardiner Means argued in their seminal Modern Corporation and Private Property that the rise of large corporations owned by many diffuse shareholders represented a new form of property right where the owners of the corporation, the shareholders, lacked the power to command the corporation's actions. 67 This fact meant the creation of a new form of corporate power characterized by this separation of ownership (by shareholders) from control (by managers). 68 Today, Berle and Means are often cited as a starting point for modern corporate governance literature and for the emphasis on shareholder rights as a driving framework for justifying financial markets, mergers and takeovers, and corporate law more generally. 69 But for Berle and Means, the driving concern was not shareholder theories of the firm so much as it [\*1347] was the antecedent diagnosis of the problem of quasi-sovereign, concentrated private power exercised by corporations over workers and society as a whole, absent the kinds of checks and balances that accompany the exercise of public power in republican governance. 70 Indeed, attempts to shift corporate governance today could become vehicles not for maximizing growth or efficiency but rather for creating modes through which stakeholders, not just shareholders, can contest and hold accountable such exercises of concentrated private power. 71

The emergence and potential of antitrust law can be understood in a similar vein. The antitrust movement was a major political and intellectual force, seeking ways to redress the concentration of economic power among monopolies, trusts, and large corporations from Standard Oil to the railroads to finance. While modern antitrust is understood in a more narrow context of prioritizing consumer welfare, antitrust for these reformers was a fundamentally political project, seeking to undo concentrations of economic power and limit the ways in which large firms could exercise undue and unchecked influence on prices, economic opportunity, and the political process itself. 72 Antitrust is thus best understood as an antidomination strategy, a battle not over consumer welfare but rather private power. In contrast to modern day antitrust law, Progressive Era politics saw antitrust as critical to the maintenance of liberty against such private power. Their disagreements emerged not over whether to regulate such power but over how best to do it.

Today, we might seek a renewed push for antitrust enforcement to address these concentrations of economic power in an effort to restructure markets to be more open to competition and economic opportunity. As a number of journalists and scholars have increasingly argued, we are in a new era of private power and monopoly, as firms in industries from agriculture to food production to finance have concentrated power to shape market dynamics and to influence politics and public policy. 73 The antitrust ethos that has been steadily deconstructed over the course of the twentieth century may have relevance again in the twenty-first. 74

A third reform strategy among Progressive Era activists involved a different kind of economic restructuring: through the creation of public utilities. Where corporate governance sought to redress private power through changes to the internal dynamics of firms and antitrust remedied private power by breaking up large corporations, the public utility model represented an approach whereby Progressive reformers could accept economies of scale in some instances, but still ensure that the good or service would be provided fairly and at reasonable rates. 75 Reformers established utilities in industries as wide-ranging as ice, milk, transportation, communications, fuel, banking, and more. 76 Today we think of public utilities as natural monopolies with increasing returns to scale (such as electricity or water provision). 77 But Progressives saw public utilities as required where a good was of sufficient social value to be a necessity and where the provision of this necessity was at risk of subversion or corruption if left to private or market forces. 78 Indeed, many Progressive reformers experimented with the "municipalization" of key sectors like electricity production and water, founding the first public utilities. 79 As William Novak has argued, "for progressive legal and economic reformers, the legal concept of public utility was capable of justifying state economic controls ranging from statutory police regulation to administrative rate setting to outright public ownership of the means of production." 80 The central goal was accountability and oversight, but they also saw the need to balance oversight with maintaining efficiency of actual production. In practice, these thinkers saw the need to make context-specific judgments about the degree of public oversight and ownership on an industry-by-industry basis, rather than advocating outright nationalization across the board.

The concept of the public utility suggests another avenue through which we might restructure the modern economy as a way to combat domination, by regulating firms that provide critical necessities to ensure equal access, fair pricing, and that public needs are more directly met. The public utility framework has already been revived in the net neutrality effort to ensure common-carriage-type obligations for Internet service providers, preventing extractive discrimination of content by the firms controlling the [\*1350] backbone infrastructure of the Internet. 81 Public utility obligations may offer a way to reassert public oversight and direction over electrical utilities to better combat climate change, 82 or to create a "public option" for banking to better provide fair, cheap, and accessible access to basic financial services, 83 or to ensure fair dealing and better labor conditions among online "platforms" like Uber or Amazon. 84 The public utility approach provides both a limit on private power and a greater access to core goods and services - public goods, in a moral and social sense rather than an economistic one. This shifts economic power in both directions, limiting the potential for domination by private actors controlling these goods, and expanding the independence of individuals by ensuring equal and fair access to foundational goods and services.

B. Political Agency and Democratic Institutions

The creation of new regulatory institutions to implement these economic policies and to govern the modern economy points to another set of strategies employed by Progressive Era thinkers to counteract domination: changes to the structure of the political process. The creation of regulatory agencies and commissions at state, local, and national levels offered reformers the hope of an effective new tool for managing the increasingly complex modern economy, asserting the public good against powerful private actors such as trusts or corporations, and sidestepping the problems of political corruption and capture within legislatures. To expand democratic agency to counteract economic domination, these reformers effectively reinvented the fundamental structure of the political process itself, creating new channels for the expression of popular sovereignty. Thus reformers succeeded in institutionalizing ballot, recall, initiative, and referendum procedures in many state constitutions from 1890 to 1912. 85 Others established, for the first time, home rule powers for local government bodies as a way to expand participation and bypass the corruption of state legislatures and party machines. 86

In a similar vein, today we might address the problem of disparate political power by seeking alternative vehicles for democratic collective action through which to build the power of ordinary citizens and communities. The battle for reviving democratic accountability and responsiveness is not exhausted by a sole focus on campaign finance reform or voting rights, though of course both are critical to rebalancing political power. There are other forms of building democratic political power. Today, we see a similar revival of interest in cities as spaces for policy experimentation, as offering smaller-scale footholds where reformers can put into practice alternative economic arrangements, with an eye towards larger national debate and eventual policy change. 87

Regulatory agencies, though often understood in technocratic, expertise-oriented terms, might similarly become spaces for democratic action, participation, and accountability. Recent developments in legal history document the ways in which regulatory agencies have served as critical spaces in which democratic politics have taken place, and modern policy regimes and normative understandings of rights have been forged out of contestation between different stakeholders and policymakers. 88 Administrative agencies are therefore routinely in the forefront of developing novel applications of moral and political claims that we might otherwise think are the province of legislatures and courts, from the administration of welfare benefits to the implementation of fair-housing principles. 89 Such "administrative constitutionalism" involves the creative interpretation and evolution of legal norms and moral-rights claims by bureaucrats faced with pressure from social movements, often operating beyond or even despite the commands of the President, Congress, or the courts. 90

Agencies can be reformed to provide more direct forms of stakeholder representation. 91 In both cities and regulation, we also see attempts to create more participatory policymaking processes that can help redress disparities of influence and power, from participatory budgeting to technology-facilitated modes of voice and citizen monitoring of government actions. 92

Finally, across both of these domains of economic and political restructuring, a key driver of redressing power comes from the mobilization and organization of social movements. If the reform politics of the Progressive Era and the critique of domination were interrelated with the emergence of the antitrust movement, labor republicanism, populism, and urban reformism, the prospects for economic and political restructuring today depend crucially on new forms of civic power developed by movements and civil society organizations. 93 Many activists and reformers in this period sought to mobilize citizens through political association as a way to create a more equitable balance of political power. 94

#### Anti-domination is the best alternative – law is a project made meaningful by the people

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IV. Constitutional Political Economy and Fourth-Wave Legal Realism

This admittedly brief recasting of legal realist and Progressive Era thought highlights some valuable starting points for developing an alternative conceptualization of political economy. While there is much more to be said about how exactly we might adapt and apply antidomination regulatory strategies like antitrust and public utility or expand democratic agency through urban, regulatory, or social-movement-driven governance, for our purposes what matters is this central conceptual framework animating these different approaches to reconstituting economic and political processes. In this framework, the problem of capitalism is understood as a problem of domination and economic power. The response to such power must entail attempts to expand the democratic capacities of citizens. This approach to political economy offers a substantive alternative to the laissez-faire political economy of the Roberts Court. It also importantly departs from conventional traditions of New Deal liberalism. While the New Deal, in many ways, gave voice and reality to Progressive Era aspirations for expanded government regulation of the economy and for creating economic opportunity through the forging of the modern social contract, it also represented a significantly thinner vision of political economy, placing too much emphasis on economic growth and technocratic management in place of more robust commitments to full economic equality, inclusion, and democracy. 95 The focus on domination and democracy suggests a more far-reaching vision of political economy.

What, then, is the relationship between constitutionalism and this antidomination, democratic-agency account of political economy? The Progressive Era thinkers, referenced above as catalysts for constructing this vision of political economy, were also notably hostile to courts and judges. 96 While we may temper somewhat our own views of the judiciary in comparison to theirs, we can take note of the theory of change suggested by Progressive Era reformers. Certainly there are important points of tangency between the kind of economic and political restructuring needed to redress problems of domination and expand democratic agency and major interpretive battles over the Constitution itself, from campaign finance to voting rights to class actions and questions of congressional power and federalism, not to mention the continued battles over equality, discrimination, and fundamental rights under the Fourteenth Amendment. But this account suggests a different mode of constitutionalism and social change - one where courts might still play a role, but a secondary and downstream one. At the level of ideas, it was the intellectual battle over laissez faire that was paramount; for the Progressives this meant unmasking the realities of power operating under the surface in the market economy and arguing for the value of popular sovereignty. At the same time, change also manifested through reforms that focused on the underlying structures of economy and politics - through attempts to shift the basic legislative, regulatory, and legal foundations of modern capitalism. The primary sites of contest are therefore in the realms of public philosophy, legislation, and regulatory governance.

Constitutionalism appears at two levels. First, it appears at the level of fundamental values. The critique of domination and the value of democratic agency help give further content to core moral values of equality, freedom, and democracy that animate so much of constitutional discourse. The second way in which this account of political economy is constitutional stems from its view of how power is distributed and can be reallocated: through radical changes to the basic structure of economic and political order. Thus, while many of the Progressive Era thinkers profiled above were deeply skeptical of judges and courts, they nevertheless offered a constitutional vision of political economy in this particular sense. Their constitutionalism was not the constitutionalism of text, interpretation, and doctrine. Rather, their account sought to make real fundamental public values of freedom, democracy, and equality; and it sought to do so through reforms that would literally reconstitute basic economic, political, and social structures to make these values real. From economic structural changes like antitrust and public utility regulation to radically different political structures like regulatory agencies and municipal Home Rule, the democratic political economy excavated above was thus deeply constitutional.

This is not the "big-C" constitutionalism of constitutional text, doctrine, or Supreme Court jurisprudence. It is rather what we might think of as the "small-c" constitutionalism of our basic economic and political structures: how we constitute the market economy through laws that define its basic forces and dynamics, and how we constitute the polity through regulations and processes that shape the allocation of political power. So on this understanding of constitutionalism, looking for a constitutional claim of right under the constitutional text is, in a sense, looking in the wrong place. Instead, constitutional political economy has its impact by informing diagnosis, critique, and reform through the vectors of legislation, regulation, and social movements. Thus, we might turn to the constitution of the market, looking to legislative and regulatory regimes like antitrust and public utility to curb private power. We might see the impact of constitutional political economy in efforts to rebalance the political power of new forms of worker association and grassroots social movements, and more democratically participatory vehicles for governance and policymaking through regulation and local government. We might also see shifting public discourse and norms through the contestation and mobilization of civil society and social movement actors.

There is an important reason why we might want to understand constitutionalism in this way - as values and as basic structure. Reconceptualizing constitutionalism and constitutional political economy in this vein helps pull the high politics of constitutionalism outside of its narrow province in the courts and in constitutional theory, deemphasizing the primacy of courts, doctrine, and text. It also helps to elevate legislation, regulation, public philosophy, and social movements as sites of law, politics, and contestation that implicate our most critical normative values and shape our most foundational economic and political structures. These are not merely domains of "ordinary politics" or technical public policy. Imbuing them with the stature of constitutionalism appropriately elevates the moral and structural concerns that are at stake in these domains.

Joseph Fishkin and William Forbath's forthcoming The Anti-Oligarchy Constitution and the Essays in this Symposium represent exactly this kind of effort to reimagine our fundamental constitutional values of democracy and equality in context of our New Gilded Age of economic and political inequality. Their account of constitutional political economy is most compelling in these two senses: as engaging the fundamental moral questions of what freedom, opportunity, and democracy mean in today's society, and as securing this moral vision through laws that alter the basic structure of our economy and politics. Such moral and structural change can be accomplished through a particular approach to law and social change, prioritizing the synergies between normative arguments, social movements, and legislative and regulatory changes to the basic structure. Nor are Fishkin and Forbath alone in this. In the aftermath of the financial crisis and in the face of the Roberts Court, this emerging wave of legal scholarship can open up a variety of avenues for deeper critique and reform. While some of these legal and policy arguments do involve battles in the Supreme Court, many of them take place more directly on the terrain of regulation, legislation, state-and local-level policy, and social movement advocacy.

Indeed, this wave of legal scholarship might be considered another heir to the legal realism of the early twentieth century. Like the legal realists of a century ago, there is a growing cascade of scholarship that takes as its focus the investigation of the deep underlying structures of our economy and political process, and is closely linked with questions of public policy and social change. In addition to this very Symposium, consider for example the rich new scholarship unpacking the legal and intellectual foundations of political economy and modern capitalism, 97 or the booming scholarship since the 2008-2009 financial crisis on how law constitutes the financial system, and how this system can be reconstituted to create a better balance between private power and public values. 98 We also are seeing new literature on political-process design in the context of regulatory agencies, in particular, along the front lines of participatory and democratic institutional design. 99 Many other areas of law might be cited as well. The point is that, like the legal realists reacting to the First Gilded Age, we see in legal scholarship today a wide array of scholars in diverse subfields employing different methodologies to critique, unpack, and deconstruct contemporary political economy - all with an eye towards deconstructing problematic forms of economic and political power - and recovering the ideas, policies, and reforms that might shift us in a more democratic and egalitarian direction.

In context of the broader moral challenges of political and economic inequality, these trends suggest what we might call a "fourth wave" of legal realism. Conventionally, the legal realist movement is understood to have two primary successors, each of which revolutionized legal scholarship: law and economics, and critical legal studies. Each of these movements in turn developed a key aspect of the original legal realist method, yet faced important limitations as they developed. The turn to empirical social science and expertise is modeled by the rise of law and economics, while the antiformalist critique has helped fuel the deconstructive project of critical legal studies. 100 Yet the law-and-economics revolution of the late twentieth century, with its focus on efficiency, welfare, and neoclassical economic models, has been rightly criticized as a revived formalism. 101 Similarly, the antiformalism of legal realism was more deeply developed by the critical legal studies (CLS) movement, 102 which unmasked the many ways in which law reproduced hierarchies of power and unfreedom. Yet CLS suffered from its own limitations: while it was effectively disruptive of both legal-process and law-and-economics accounts, as a whole it ultimately did not provide a constructive alternative vision for a more egalitarian and democratic political economy. As Roberto Unger himself argued, CLS "largely failed in its most important task: to turn legal thought into a source of insight into the established institutional and ideological structure of society and into a source of ideas about alternative social regimes." 103

In the last twenty-five years or so, there has been a third wave of legal realism, a hybrid combination of these two heirs into a more pragmatic focus on policy and institutional design. Legal realism in this wave manifested itself, in the leveraging of behavioral, empirical, and institutional analysis, to suggest changes to policy-making processes to make them more efficient and just. 104 This third wave of legal realism repurposed the critique of formalism as a way to open space for policy expertise - expertise which can be achieved by leveraging the insights of social science, including law and economics. 105 The critical project of revealing how law constructs inequalities along racial, gendered, or class lines is, therefore, now paired with an analytical focus on policy design, and on assessing comparative institutional competencies. 106 Similarly, the insights of law and economics, on this view, can be seen not as a hostile ideology against democratic or egalitarian values, but rather as a way to analyze micro-scale behaviors and macro-scale costs and benefits of different institutional systems. 107

But as the anxieties about neo-Lochnerism and the Supreme Court underscore, the challenges for law and public discourse in this New Gilded Age of economic and political inequality go beyond the scope of pragmatic policy design. We need to harness these institutional design insights towards the substantive ends of counteracting domination, rebalancing economic and political power, expanding opportunity, and reviving democratic agency. The techniques of contemporary legal scholarship, from behavioral analyses to contextually rich studies of law and society to comparative institutional analyses, offer tremendous potential. But absent a fuller engagement with the normative question of values, these approaches risk falling into an overly narrow or seemingly neutral policy science. 108 A fourth wave of legal realism could build on these traditions, linking the analysis of underlying ideas and structures to a substantive moral vision of democratic political economy.

The import of this kind of a project points to a final mode in which we might understand this focus on values and structures as "constitutional" - in the political aspiration to literally reconstitute American political economy today. The timing of Fishkin and Forbath's project - and of the remarkable confluence of scholarly interest in issues of inequality, power, structure, and democracy on display at the symposium - suggests as much. Arguably we find ourselves in a unique moment today, often referred to as a "Second Gilded Age," where the country faces a confluence of economic and political inequality. But I suspect that the reason why so many scholars are gravitating towards these questions of inequality, exclusion, oligarchy, and power is because many of us sense that this moment is also unique in its capacity to shift - perhaps radically - our broad understandings and structures of political economy. We are living in a moment of rupture. And so the stakes of this moment are not just in its negative dimensions, in the problems of inequality and disparities of power and opportunity we see all around us. The stakes are in the as-yet-unrealized potential for the emergence of new constitutional understandings and basic structures. We may be in a Second Gilded Age, but done right, the politics and potential of this moment could be a Third Reconstruction - or a new refounding.

The Populists, Progressives, and Labor Republicans of the late nineteenth century certainly understood themselves as participating in a battle to redefine the fundamental and literal constitution of the country (the 1892 People's Party platform, for example, styled itself deliberately as a Second Declaration of Independence). This ferment eventually produced the ideas that became the New Deal settlement a generation later. These projects of constitutional political economy appearing in a variety of forms and disciplines in legal scholarship today could help contribute, in some small way, to a similar constitutional shift - one that, if we are lucky and if done right, would not merely recreate the New Deal settlement, but instead reinvent it for a radically different social, economic, and political context.

#### Rejection alone fails – lack of a coherent alternative locks in the neoliberal consensus

--The Aff is the economic and political equivalent of the Apollo program!

Monbiot 16 – Political & environmental activist, recipient of the UN Global 500 Award for outstanding environmental achievement, author of several award-winning books on environmental crises and corporate capture in politics, reporter for The Guardian Neoliberalism.

George Monbiot, “Neoliberalism – the ideology at the root of all our problems,” *The Guardian*, 15 April 2016, <https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot>.

Imagine if the people of the Soviet Union had never heard of communism. The ideology that dominates our lives has, for most of us, no name. Mention it in conversation and you’ll be rewarded with a shrug. Even if your listeners have heard the term before, they will struggle to define it. Neoliberalism: do you know what it is?

Its anonymity is both a symptom and cause of its power. It has played a major role in a remarkable variety of crises: the financial meltdown of 2007‑8, the offshoring of wealth and power, of which the Panama Papers offer us merely a glimpse, the slow collapse of public health and education, resurgent child poverty, the epidemic of loneliness, the collapse of ecosystems, the rise of Donald Trump. But we respond to these crises as if they emerge in isolation, apparently unaware that they have all been either catalysed or exacerbated by the same coherent philosophy; a philosophy that has – or had – a name. What greater power can there be than to operate namelessly?

So pervasive has neoliberalism become that we seldom even recognise it as an ideology. We appear to accept the proposition that this utopian, millenarian faith describes a neutral force; a kind of biological law, like Darwin’s theory of evolution. But the philosophy arose as a conscious attempt to reshape human life and shift the locus of power.

Neoliberalism sees competition as the defining characteristic of human relations. It redefines citizens as consumers, whose democratic choices are best exercised by buying and selling, a process that rewards merit and punishes inefficiency. It maintains that “the market” delivers benefits that could never be achieved by planning.

Attempts to limit competition are treated as inimical to liberty. Tax and regulation should be minimised, public services should be privatised. The organisation of labour and collective bargaining by trade unions are portrayed as market distortions that impede the formation of a natural hierarchy of winners and losers. Inequality is recast as virtuous: a reward for utility and a generator of wealth, which trickles down to enrich everyone. Efforts to create a more equal society are both counterproductive and morally corrosive. The market ensures that everyone gets what they deserve.

We internalise and reproduce its creeds. The rich persuade themselves that they acquired their wealth through merit, ignoring the advantages – such as education, inheritance and class – that may have helped to secure it. The poor begin to blame themselves for their failures, even when they can do little to change their circumstances.

Never mind structural unemployment: if you don’t have a job it’s because you are unenterprising. Never mind the impossible costs of housing: if your credit card is maxed out, you’re feckless and improvident. Never mind that your children no longer have a school playing field: if they get fat, it’s your fault. In a world governed by competition, those who fall behind become defined and self-defined as losers.

Among the results, as Paul Verhaeghe documents in his book What About Me? are epidemics of self-harm, eating disorders, depression, loneliness, performance anxiety and social phobia. Perhaps it’s unsurprising that Britain, in which neoliberal ideology has been most rigorously applied, is the loneliness capital of Europe. We are all neoliberals now.

The term neoliberalism was coined at a meeting in Paris in 1938. Among the delegates were two men who came to define the ideology, Ludwig von Mises and Friedrich Hayek. Both exiles from Austria, they saw social democracy, exemplified by Franklin Roosevelt’s New Deal and the gradual development of Britain’s welfare state, as manifestations of a collectivism that occupied the same spectrum as nazism and communism.

In The Road to Serfdom, published in 1944, Hayek argued that government planning, by crushing individualism, would lead inexorably to totalitarian control. Like Mises’s book Bureaucracy, The Road to Serfdom was widely read. It came to the attention of some very wealthy people, who saw in the philosophy an opportunity to free themselves from regulation and tax. When, in 1947, Hayek founded the first organisation that would spread the doctrine of neoliberalism – the Mont Pelerin Society – it was supported financially by millionaires and their foundations.

With their help, he began to create what Daniel Stedman Jones describes in Masters of the Universe as “a kind of neoliberal international”: a transatlantic network of academics, businessmen, journalists and activists. The movement’s rich backers funded a series of thinktanks which would refine and promote the ideology. Among them were the American Enterprise Institute, the Heritage Foundation, the Cato Institute, the Institute of Economic Affairs, the Centre for Policy Studies and the Adam Smith Institute. They also financed academic positions and departments, particularly at the universities of Chicago and Virginia.

As it evolved, neoliberalism became more strident. Hayek’s view that governments should regulate competition to prevent monopolies from forming gave way – among American apostles such as Milton Friedman – to the belief that monopoly power could be seen as a reward for efficiency.

Something else happened during this transition: the movement lost its name. In 1951, Friedman was happy to describe himself as a neoliberal. But soon after that, the term began to disappear. Stranger still, even as the ideology became crisper and the movement more coherent, the lost name was not replaced by any common alternative.

At first, despite its lavish funding, neoliberalism remained at the margins. The postwar consensus was almost universal: John Maynard Keynes’s economic prescriptions were widely applied, full employment and the relief of poverty were common goals in the US and much of western Europe, top rates of tax were high and governments sought social outcomes without embarrassment, developing new public services and safety nets.

But in the 1970s, when Keynesian policies began to fall apart and economic crises struck on both sides of the Atlantic, neoliberal ideas began to enter the mainstream. As Friedman remarked, “when the time came that you had to change ... there was an alternative ready there to be picked up”. With the help of sympathetic journalists and political advisers, elements of neoliberalism, especially its prescriptions for monetary policy, were adopted by Jimmy Carter’s administration in the US and Jim Callaghan’s government in Britain.

After Margaret Thatcher and Ronald Reagan took power, the rest of the package soon followed: massive tax cuts for the rich, the crushing of trade unions, deregulation, privatisation, outsourcing and competition in public services. Through the IMF, the World Bank, the Maastricht treaty and the World Trade Organisation, neoliberal policies were imposed – often without democratic consent – on much of the world. Most remarkable was its adoption among parties that once belonged to the left: Labour and the Democrats, for example. As Stedman Jones notes, “it is hard to think of another utopia to have been as fully realised.”

It may seem strange that a doctrine promising choice and freedom should have been promoted with the slogan “there is no alternative”. But, as Hayek remarked on a visit to Pinochet’s Chile – one of the first nations in which the programme was comprehensively applied – “my personal preference leans toward a liberal dictatorship rather than toward a democratic government devoid of liberalism”. The freedom that neoliberalism offers, which sounds so beguiling when expressed in general terms, turns out to mean freedom for the pike, not for the minnows.

Freedom from trade unions and collective bargaining means the freedom to suppress wages. Freedom from regulation means the freedom to poison rivers, endanger workers, charge iniquitous rates of interest and design exotic financial instruments. Freedom from tax means freedom from the distribution of wealth that lifts people out of poverty.

As Naomi Klein documents in The Shock Doctrine, neoliberal theorists advocated the use of crises to impose unpopular policies while people were distracted: for example, in the aftermath of Pinochet’s coup, the Iraq war and Hurricane Katrina, which Friedman described as “an opportunity to radically reform the educational system” in New Orleans.

Where neoliberal policies cannot be imposed domestically, they are imposed internationally, through trade treaties incorporating “investor-state dispute settlement”: offshore tribunals in which corporations can press for the removal of social and environmental protections. When parliaments have voted to restrict sales of cigarettes, protect water supplies from mining companies, freeze energy bills or prevent pharmaceutical firms from ripping off the state, corporations have sued, often successfully. Democracy is reduced to theatre.

Another paradox of neoliberalism is that universal competition relies upon universal quantification and comparison. The result is that workers, job-seekers and public services of every kind are subject to a pettifogging, stifling regime of assessment and monitoring, designed to identify the winners and punish the losers. The doctrine that Von Mises proposed would free us from the bureaucratic nightmare of central planning has instead created one.

Neoliberalism was not conceived as a self-serving racket, but it rapidly became one. Economic growth has been markedly slower in the neoliberal era (since 1980 in Britain and the US) than it was in the preceding decades; but not for the very rich. Inequality in the distribution of both income and wealth, after 60 years of decline, rose rapidly in this era, due to the smashing of trade unions, tax reductions, rising rents, privatisation and deregulation.

The privatisation or marketisation of public services such as energy, water, trains, health, education, roads and prisons has enabled corporations to set up tollbooths in front of essential assets and charge rent, either to citizens or to government, for their use. Rent is another term for unearned income. When you pay an inflated price for a train ticket, only part of the fare compensates the operators for the money they spend on fuel, wages, rolling stock and other outlays. The rest reflects the fact that they have you over a barrel.

Those who own and run the UK’s privatised or semi-privatised services make stupendous fortunes by investing little and charging much. In Russia and India, oligarchs acquired state assets through firesales. In Mexico, Carlos Slim was granted control of almost all landline and mobile phone services and soon became the world’s richest man.

Financialisation, as Andrew Sayer notes in Why We Can’t Afford the Rich, has had a similar impact. “Like rent,” he argues, “interest is ... unearned income that accrues without any effort”. As the poor become poorer and the rich become richer, the rich acquire increasing control over another crucial asset: money. Interest payments, overwhelmingly, are a transfer of money from the poor to the rich. As property prices and the withdrawal of state funding load people with debt (think of the switch from student grants to student loans), the banks and their executives clean up.

Sayer argues that the past four decades have been characterised by a transfer of wealth not only from the poor to the rich, but within the ranks of the wealthy: from those who make their money by producing new goods or services to those who make their money by controlling existing assets and harvesting rent, interest or capital gains. Earned income has been supplanted by unearned income.

Neoliberal policies are everywhere beset by market failures. Not only are the banks too big to fail, but so are the corporations now charged with delivering public services. As Tony Judt pointed out in Ill Fares the Land, Hayek forgot that vital national services cannot be allowed to collapse, which means that competition cannot run its course. Business takes the profits, the state keeps the risk.

The greater the failure, the more extreme the ideology becomes. Governments use neoliberal crises as both excuse and opportunity to cut taxes, privatise remaining public services, rip holes in the social safety net, deregulate corporations and re-regulate citizens. The self-hating state now sinks its teeth into every organ of the public sector.

Perhaps the most dangerous impact of neoliberalism is not the economic crises it has caused, but the political crisis. As the domain of the state is reduced, our ability to change the course of our lives through voting also contracts. Instead, neoliberal theory asserts, people can exercise choice through spending. But some have more to spend than others: in the great consumer or shareholder democracy, votes are not equally distributed. The result is a disempowerment of the poor and middle. As parties of the right and former left adopt similar neoliberal policies, disempowerment turns to disenfranchisement. Large numbers of people have been shed from politics.

Chris Hedges remarks that “fascist movements build their base not from the politically active but the politically inactive, the ‘losers’ who feel, often correctly, they have no voice or role to play in the political establishment”. When political debate no longer speaks to us, people become responsive instead to slogans, symbols and sensation. To the admirers of Trump, for example, facts and arguments appear irrelevant.

Judt explained that when the thick mesh of interactions between people and the state has been reduced to nothing but authority and obedience, the only remaining force that binds us is state power. The totalitarianism Hayek feared is more likely to emerge when governments, having lost the moral authority that arises from the delivery of public services, are reduced to “cajoling, threatening and ultimately coercing people to obey them”.

Like communism, neoliberalism is the God that failed. But the zombie doctrine staggers on, and one of the reasons is its anonymity. Or rather, a cluster of anonymities.

The invisible doctrine of the invisible hand is promoted by invisible backers. Slowly, very slowly, we have begun to discover the names of a few of them. We find that the Institute of Economic Affairs, which has argued forcefully in the media against the further regulation of the tobacco industry, has been secretly funded by British American Tobacco since 1963. We discover that Charles and David Koch, two of the richest men in the world, founded the institute that set up the Tea Party movement. We find that Charles Koch, in establishing one of his thinktanks, noted that “in order to avoid undesirable criticism, how the organisation is controlled and directed should not be widely advertised”.

The words used by neoliberalism often conceal more than they elucidate. “The market” sounds like a natural system that might bear upon us equally, like gravity or atmospheric pressure. But it is fraught with power relations. What “the market wants” tends to mean what corporations and their bosses want. “Investment”, as Sayer notes, means two quite different things. One is the funding of productive and socially useful activities, the other is the purchase of existing assets to milk them for rent, interest, dividends and capital gains. Using the same word for different activities “camouflages the sources of wealth”, leading us to confuse wealth extraction with wealth creation.

A century ago, the nouveau riche were disparaged by those who had inherited their money. Entrepreneurs sought social acceptance by passing themselves off as rentiers. Today, the relationship has been reversed: the rentiers and inheritors style themselves entre preneurs. They claim to have earned their unearned income.

These anonymities and confusions mesh with the namelessness and placelessness of modern capitalism: the franchise model which ensures that workers do not know for whom they toil; the companies registered through a network of offshore secrecy regimes so complex that even the police cannot discover the beneficial owners; the tax arrangements that bamboozle governments; the financial products no one understands.

The anonymity of neoliberalism is fiercely guarded. Those who are influenced by Hayek, Mises and Friedman tend to reject the term, maintaining – with some justice – that it is used today only pejoratively. But they offer us no substitute. Some describe themselves as classical liberals or libertarians, but these descriptions are both misleading and curiously self-effacing, as they suggest that there is nothing novel about The Road to Serfdom, Bureaucracy or Friedman’s classic work, Capitalism and Freedom.

For all that, there is something admirable about the neoliberal project, at least in its early stages. It was a distinctive, innovative philosophy promoted by a coherent network of thinkers and activists with a clear plan of action. It was patient and persistent. The Road to Serfdom became the path to power.

Neoliberalism’s triumph also reflects the failure of the left. When laissez-faire economics led to catastrophe in 1929, Keynes devised a comprehensive economic theory to replace it. When Keynesian demand management hit the buffers in the 70s, there was an alternative ready. But when neoliberalism fell apart in 2008 there was ... nothing. This is why the zombie walks. The left and centre have produced no new general framework of economic thought for 80 years.

Every invocation of Lord Keynes is an admission of failure. To propose Keynesian solutions to the crises of the 21st century is to ignore three obvious problems. It is hard to mobilise people around old ideas; the flaws exposed in the 70s have not gone away; and, most importantly, they have nothing to say about our gravest predicament: the environmental crisis. Keynesianism works by stimulating consumer demand to promote economic growth. Consumer demand and economic growth are the motors of environmental destruction.

What the history of both Keynesianism and neoliberalism show is that it’s not enough to oppose a broken system. A coherent alternative has to be proposed. For Labour, the Democrats and the wider left, the central task should be to develop an economic Apollo programme, a conscious attempt to design a new system, tailored to the demands of the 21st century.

# 2AC

## Case

#### Accumulation is a bad frame – oppression occurs thru denial of political freedom

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Lewis Gordon, “2: Re-Imagining Liberations,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 21-24.

Politics involves the power of speech in the production of power through which human beings are able to govern their existence. Notice the distinction here between politics and governing. Government, properly understood, is supposed to be a tool of politics. In this sense, the government achieves its legitimacy from politics, which makes sovereignty not located in government but instead in the authority brought to it. Here, we find a distinction between “authority” and “authoritative.” A government could be an authority without being authoritative. In such instances, it has lost its legitimacy and, thus, relies purely on force. Where it is authoritative, the people are motivated without coercion. The Spanish philosopher and statesman Ortega Y Gasset called this unique political quality “opinion.”21 Public opinion is central for political life. That is why even dictators worry more about what people believe, think, and claim than what they know. All authoritarian governments depend on spying on their citizens and waging campaigns of misinformation and disinformation.

At the heart of politics, then, is power. What is power? In simple terms, it is the ability to make things happen with access to the means of doing so. The simplest means for human beings is our body and its reach. The human transition into cultural life—with its resources of language, writing, and technology—led to the ability of human beings to reach each other, other creatures, and things beyond the location of our physical bodies. The human world, in other words, is not only infused with power but also the expression of it. Where power is positive, it enables others to make things happen that affect their lives and others in the form of flourishing. The now banal term for this is “empowerment.” Where power is negative, it is horded and results in the disempowering of others. Colonialism, enslavement, racism, sexism, and varieties of other forms of dehumanization and exploitation are forms of disempowering of others through the concentration of powers in special groups. Here, we see a source of great tension—namely, the relationship of rule to politics. Oppressive regimes seek rule over politics.

This dichotomy of rule and politics makes concrete the well-known distinction between what is known over the past few hundred years as the right and the left. The rightwing tends to aim for rule over politics and the leftwing tends to focus on politics more than rule. Oddly enough, this tends to lead to a more concrete distinction in which the right, even when they disavow government, tend to concentrate on law and order, especially in the forms of force, and the left tend to focus on protest and other activities of speech. This connects even more to their responses to moments of social crisis. The impulse of the right is to reestablish order, which always takes the form of a “return” to a supposedly perfect past. The left are divided on this issue. The basic premise of the left is that getting better takes the form of proliferating freedom. Thus, to return to a perfect order would be antithetical to such goals. Looking to the past, the left see people struggling to create a better future. The past, in other words, was never perfect. Moreover, looking at the past and moments of crisis, the left’s aim of proliferating freedom leads inevitably to the distinction between liberty and freedom. Liberty involves the absence of obstacles. The kind of left that focuses on liberty, therefore, often regards government (rule) and at times even society and politics (social world, speech, and power) as threats to liberty. Freedom, however, is complicated. It involves cultivating the ability to make things happen, which means it requires power as empowerment and processes of growth. It also does not regard society as an enemy but instead a necessary condition for human flourishing, which is treated as a rich sense of freedom and other normative aims such as health, justice, and other aims beyond that such as, as we have seen, MAat, in addition to others such as Ubuntu, Uhuru, he (和), etc.22

Liberation from and Liberation for

We return, then, to the question of liberation. As with our discussion of decolonization and decoloniality, liberation raises not only the question of its negative movement—liberation from—but also, in agreement with Catherine Walsh, its positive one—liberation for. The libertarian left tend to be suspicious of the second formulation, which for them often means the personalizing of what to do once liberation from is achieved. This position tends to work well with liberalism, and as that, in its neoliberal, neoconservative, and even conservative forms, stands to the right of liberation for; it is no accident that the libertarian left have a history, in countries such as Australia, Canada, the United Kingdom, and the United States, of allying with the right. This relativism of right and left also means that other forms of left could articulate positions that result in the interests of the right. The critical discussion of moralism, for instance, raises this problem. Moralized subjects in societies where one could only have a legitimate public voice only as a victim undermine the category of political subjects, whose “voice” is a function of political conditions of appearance. What is the difference? Victimization belongs properly to moral and legal resolutions, but political agency belongs to participation in the production of power for all—in a word, citizenship. Liberation from is a response to harm; liberation for is the rallying of creative resources of possibility.

Under Euromodern rule, the harms of colonialism, enslavement, and racism required impositions of rule, which barred politics in the lives upon those whom they were imposed. This was one of Steve Bantu Biko’s insights on the South African apartheid state. To maintain itself, it waged a war not only against non-white peoples but also against politics because to maintain itself, it had to prioritize rule at the expense of political life. Blocking politics required barring political life from certain groups of people. This involved making them invisible. This invisibility took at least four forms.23

One is racial, which focuses on quantity. There are always “too many” members of a racially degraded group around, which makes them what the French call de trop (roughly, unnecessary, unwanted, or unsuitable). The significance of this for critical discourses of diversity should be evident. It is one of the reasons why diversity could be celebrated in some institutions in which only one member of a despised group has limited access.

Another is temporal. Where settler colonialism claims victory, Indigenous people “belong” to the past. This makes their continued presence a ghostly one. The settler’s longing for a future devoid of the Indigenous peoples occasions anxiety over their continued presence.

A third goes directly to the heart of politics: speech. Such people are ignored when they speak. Not heard, they, in effect, have no voice. This is historically a heavily gendered experience in European and many Asian countries in which to speak was a properly male phenomenon. (Oddly enough, I typed the previous sentence right before a session at a conference in which a group of male participants simply started speaking to each other while a female participant was responding to one of the gentlemen’s papers!) Elaborating the details of the history of voice and why it was different in many pre-Euromodern colonial societies of the Global South would take us far afield. The main thing is that this invisibility is predominantly female in Euromodern societies and those affected by them, which are the foci of this chapter.

A fourth is epistemological. It is the presumed illegitimacy of non-Euromodern knowledge. Elsewhere, I refer to this phenomenon as epistemic closure. 24 It is a form of presumed knowing in which there is, where a particular group is identified, nothing more to know or learn.

The imposition of these forms of oppressive invisibility entails liberation from them. Liberation for a society without those dynamics entails a world of no people who are always de trop by virtue of their race, barred from the future by virtue of being indigenous, voiceless because blocked from embodying political agency or citizenship by virtue of their gender or race, and excluded from the production and appearance of and contributing to knowledge. There are, of course, other forms of invisibility, but I have chosen these four because of their familiarity in both colonial countries and postcolonies of Euromodernity. The fourth, which focuses on knowledge, also raises radical questions of the conditions of thought and norms of thinking and living. Radicalized, it raises the question of justifications. After all, the decolonial challenge is whether even modes of knowing and even being normatively moved in such societies are also disempowering.25 It demands, then, questioning even liberation, which is why the Wits University Centre for Diversity Studies’ formulation of “liberations” was also a demand for radical self-critique.

#### Abandoning the terrain of the human lapses into useless nihilism – even if their theory is right, the conclusion shouldn’t be resignation

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Lewis Gordon, “5: Thoughts on Afropessimism,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 81-82.

That power is a facilitating or enabling phenomenon, a functional element of the human world, a viable response must be the establishment of relations that reach beyond the singularity of the body. I bring this up because proponents of Afropessimism might object to this analysis because of its appeal to a human world. If that world is abrogated, the site of struggle becomes that which is patently not human. It is not accidental that popular race discourse refers today to “black bodies” instead of “black people,” for instance. As the human world is discursive, social, and relational, this abandonment amounts to an appeal to the nonrelational, the incommunicability of radicalized singularity, and appeals to the body and its very limited reach, if not isolation. At that point, it is perhaps the psychologist, psychiatrist, or psychoanalyst who would be helpful, as turning radically inward offers the promise of despair, narcissistic delusions of divine power, and, as Fanon also observed, madness.22 Even if that slippery slope were rejected, the performative contradiction of attempting to communicate such singularity or absence thereof requires, at least for consistency, the appropriate course of action: silence.

The remaining question for Afropessimism, especially those who are primarily academics, becomes this: Why write?

It is a question for which, in both existential and political terms, I do not see how an answer could be given from an Afropessimistic perspective without the unfortunate revelation of cynicism. The marketability of Afropessimists in predominantly white institutions—perhaps as an exotic phenomenon that affirms white standpoints as ontological sites of legitimacy—is no doubt in the immediate and paradoxical satisfaction in dissatisfaction it offers. Indeed, if Afropessimists were correct, their only solace would be in black institutions, but that, too, would pose a problem since the argument is that such institutions lack agency because, as black, they are absent. This is not to say that critical black and Black thinkers should not do their work in predominantly white spaces. It is simply that the argument of the impossibility of their doing so makes their location in such places patently contradictory. We are at this point on familiar terrain. As with ancient logical paradoxes denying the viability of time and motion, the best option, after a moment of immobilized reflection, is, eventually, to move on, even where the pause is itself significant as an encomium of thought.

## New Affs Bad

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#### Net benefit is our frame of antidomination – that’s better for “survival”

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Aziz Rana, “Freedom Struggles and the Limits of Constitutional Continuity,” *Maryland Law Review*, vol. 71, no. 4, 2012, pp. 1026-1045, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2493&context=facpub.

The South African experience raises a basic question for Americans committed to constitutional continuity: whether Du Bois and others may have been correct. Would there have been an earlier and to date more complete elimination of colonial and racial subordination if a similarly explicit constitutional rupture occurred in the United States? In the following Parts, I will return to the Civil War and Reconstruction period to argue that faith in our constitutional tradition has historically embodied one important roadblock to a more thoroughgoing redemptive politics. This argument, and indeed the invocation of Du Bois and James, is about more than antiquarian curiosity. It suggests that if the commitment to constitutional continuity has at key moments undermined progressive political principles, we today should be wary of seeing constitutionalism as the privileged path to redemption. Indeed, the lesson for progressives might be to deemphasize constitutional faith and to develop more politically instrumental approaches to the value of constitutionalism.

III. The Emancipation Proclamation and the Prize Cases

In thinking historically about the practical consequences of constitutional continuity, it is worthwhile to assess those points in American life when colonial practices of subordination faced profound internal pressure. Perhaps the greatest such moment in the early republic occurred during the Civil War and concerned Abraham Lincoln's Emancipation Proclamation, which on January 1, 1863, unilaterally freed all slaves in secessionist territory still in rebellion. As Sandy Levinson reminds us, "the Proclamation is a most peculiar document," leaving the institution untouched in Union slave states and "parts of the ostensibly secessionist states that had been brought under Union control." 58 Despite its limitations, the Proclamation nonetheless spoke to the collapsing nature of the institution of slavery. Moreover, the Proclamation occurred alongside growing efforts to recruit black soldiers, including newly freed slaves in the South. If the 1776 Declaration of Independence listed as one of its grievances the decision by Virginia Governor Dunmore to emancipate slaves willing to join British forces, 59 then Lincoln now was engaged in precisely the same practice - one long perceived as a threat to the safety and internal identity of the republic. Taken together, the freeing and arming of the black population directly challenged the settler basis of American society. These wartime practices also implicitly raised questions concerning the future status of freed blacks, namely the extent to which individuals who fought on the Union side would be incorporated as social members regardless of race. 60

Among the most compelling features of the decision to pursue emancipation was the issue of its constitutionality. As Levinson has discussed, the legality of the Proclamation was deeply questioned at the time, with none other than Benjamin Curtis - the former Supreme Court Justice who dissented in Dred Scott - issuing a pamphlet condemning it as an overreach of executive power. 61 According to Curtis, whose stand against Roger Taney garnered him the esteem of many in Republican circles, the Proclamation not only failed to adequately distinguish loyal from disloyal citizens in the seceding states, but also entailed a theory of presidential war power so capacious as to suggest no meaningful limits: "If the President … may by an executive decree, exercise this power to abolish slavery in the States, because he is of the opinion that he may thus "best subdue the enemy,' what other power … may not be exercised by the President." 62 In fact, for Curtis, since Lincoln himself rejected the idea that the rebellion was legal, the domestic laws of those states remained valid and its citizens still enjoyed their constitutional rights. These laws and rights could not be made "null and void" merely through presidential fiat. 63

Given the constitutional uncertainty, Lincoln very well could have responded to these critics by embracing the extra-legality of his decision, which he explicitly did on occasion during the Civil War. 64 Certainly, in Levinson's view, the legitimacy of the Proclamation today ultimately rests not on constitutional fidelity but on its substantive justice - the manner in which the Proclamation signalled an institutional rupture from existing modes of racial bondage. 65 In fact, in the mid-nineteenth century, there existed a longstanding political tradition of what John Locke had called "prerogative power," in which the executive in extraordinary times contravened the law in the name of necessity or justice and then accepted the political consequences of such illegality. 66 Locke saw the use of prerogative as a decidedly political rather than a constitutional act; its legitimacy came from a public judgment after the fact that such pure discretion was warranted. In discussing the Louisiana Purchase, Thomas Jefferson similarly invoked this vision of extra-legal and discretionary political action, one that could only be authorized by post-fact popular acceptance. In his words, "The Executive … [has] done an act beyond the Constitution. The Legislature in … risking themselves like faithful servants, must … throw themselves on their country for doing for them unauthorized what we know [the people] would have done for themselves had they been in a situation to do it." 67

Lincoln, however, made a conscious choice to avoid justifying the Proclamation as a discretionary act of extra-legal justice, whose legitimacy was not bound to constitutionalism per se. He sought instead to read the Proclamation as consistent with a project of constitutional continuity. This meant arguing that the President's commander-in-chief authority (as well as powers implied by the executive oath) sanctioned emancipation as an expedient of military emergency. 68 In a letter to Albert Hodges, a Kentucky journalist who opposed both the Proclamation and the arming of freed blacks, Lincoln emphasized that he was not motivated by antislavery ideology and acted in accordance with constitutional fidelity:

I aver that, to this day, I have done no official act in mere deference to my abstract judgment and feeling on slavery. I did understand however, that my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government - that nation - of which that Constitution was the organic law. 69

In response to other potential skeptics, Lincoln reiterated how both emancipation and the arming of freed slaves were matters of military judgment, constitutionally justified by the executive's commander-in-chief powers. In a letter to be read on his behalf at a public rally in Lincoln's hometown of Springfield, Illinois, he wrote of these policies:

I know … that some of the commanders of our armies in the field who have given us our most important successes, believe the emancipation policy and the use of the colored troops constitute the heaviest blow yet dealt to the Rebellion, and that at least one of these important successes could not have been achieved when it was, but for the aid of black soldiers. Among the commanders holding these views are some who have never had any affinity with what is called Abolitionism or with the Republican party politics but who held them purely as military opinions. 70

In many ways, Lincoln's arguments on behalf of the constitutionality of the Proclamation were among the best that could be marshaled from within the constitutional tradition. In Balkin's language, they spoke to an effort (however halting) to make a redemptive political enterprise consistent with faith in the Constitution, especially faith in its discursive capacity to serve as a language for emancipation. 71 Yet, with the benefit of hindsight, one might well argue that the decision to tie the Proclamation to a commitment to constitutional continuity came at its own real cost. First, by focusing on military necessity, it deemphasized the radical significance of Lincoln's policies and the extent to which the Proclamation - as well as the arming of freed blacks - embodied a fundamental transformation from preexisting structures. 72 And second, by framing the legitimacy of emancipation in terms of presidential emergency power, the practical legal precedent of Lincoln's approach was to embed within the constitutional system justifications for unchecked executive authority. 73

Both consequences are exemplified by the Prize Cases, 74 the Supreme Court decision that - while not directly addressing the Proclamation - profoundly impacted its perceived constitutionality for the remainder of the conflict. 75 In the Prize Cases, the Court assessed the legality of Lincoln's decision, in the days following the attack on Fort Sumter, to pursue a naval blockade of the South even though Congress remained in recess. As a textual matter, Lincoln's unilateral action appeared to violate the express language of the Constitution, which gave to Congress alone the power both to "declare war" and to "make rules concerning captures on land and water" during wartime. 76 Yet, not only did a sharply divided five-to-four Court uphold the blockade, it went further and presented a sweeping theory of presidential authority. 77

According to Justice Robert Grier's majority opinion, the executive enjoyed a unilateral emergency power "to resist force by force." 78 This meant that even if Congress had not provided legislative sanction to presidential action, in times of invasion or attack inherent authority existed within the presidency "to meet the [emergency] in the shape it presented itself, without waiting for Congress to baptize it with a name." 79 Furthermore, whether to use force in the face of "armed hostile resistance" and how much force to employ were executive judgments solely. Such questions were questions "to be decided by him [the President], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands.'" 80

What also made the Prize Cases significant for Lincoln's broader wartime policies was a connected argument about the very nature of the Civil War. Justice Grier asserted that while Congress "alone has the power to declare a national or foreign war," no clause in the Constitution gave it the authority to "declare war against a State, or any number of States." 81 This was critical because ordinarily the President's war powers (such as under the commander-in-chief clause) were only triggered once Congress had sanctioned the use of force, legally initiating the start of armed hostilities. But in this context, following the attack on Fort Sumter, the Union clearly found itself facing a massive insurrection and thus a de facto state of war. Moreover, Congress did not have the constitutional authority to declare war against rebelling states and thereby give the conflict its de jure legislative approval. Justice Grier concluded that although this Civil War could not be "declared" through traditional means, as a matter of common sense a war still existed and still triggered the full panoply of the President's Article II powers:

The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States … . He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. 82

In effect, the President enjoyed independent constitutional authority to employ military action to defeat the rebellion, even if Congress could not declare war in the normal manner. This focus on the unusual legal status of the Civil War was quite suggestive, especially for how to view presidential power after Congress finally met in session on July 4, 1861. Although Grier never addressed the issue, his reasoning raised the possibility that the President may still have had a legitimate constitutional basis - grounded in defensive emergency powers - to pursue unilateral action throughout the conflict, given its insurrectionary and undeclared character.

One should note that these arguments, with their focus on inherent and broad presidential authority, were hardly necessary for reaching a conclusion that the blockade alone was legal. The Court had many potential theories at its disposal. For example, the Court could have conceded that Congress's power to declare war operated even in a conflict with seceding states and that the President could not act in the absence of explicit legislative authorization. 83 Nonetheless, Justice Grier might have contended that the blockade was justified due to the truly unprecedented nature of the particular factual circumstances. As Congress had been in recess during the attack on Fort Sumter, it was unable to provide ex ante legislative sanction and the executive had no choice but to act unilaterally in order to put down a surprise rebellion. 84 Additionally, the Court could have centered its ruling on the argument that because Congress eventually ratified the blockade, this post hoc ratification legally validated the executive decision. 85

Yet the majority did not appear interested in a narrow holding, one that while justifying the blockade presented the likelihood of future piece by piece struggles over the legality of Lincoln's wartime policies. 86 Three of the five Justices (Samuel Miller, David Davis, and Noah Swayne) were recent Lincoln appointees and Republican Party stalwarts. 87 And, in effect, the Grier majority produced an opinion expansive enough to provide discursive cover to the broad range of Lincoln's practices, perhaps none more symbolically prominent than the recent Emancipation Proclamation. 88 Indeed, the status of the proclamation had hung heavy over the case, with oral arguments occurring only six weeks after Lincoln had issued the emancipation order. Given the fact that both the blockade and emancipation were unilateral acts that denied southerners their property rights, as legal scholars Thomas Lee and Michael Ramsay note, "even a narrow ruling against the President … might [have] called into question the constitutional basis of emancipation." 89

As a purely legal matter, a competent lawyer could still distinguish between the facts surrounding the Prize Cases and those of the Proclamation. The issue posed by the former was whether seizures taken before Congress sat in special session and asserted its legislative war power were valid prizes. 90 The problem of how far the President's unilateral authority extended, and thus whether Lincoln could on his own initiative pursue a blockade or emancipate slaves even after Congress passed relevant legislation, was not directly at stake. In fact, in oral arguments before the Court, U.S. Attorney Richard Henry Dana, Jr., consciously sought to limit the scope of the government's position, maintaining that the only subject concerned "the power of the President before Congress shall have acted, in case of a war actually existing." 91 Nonetheless, the decision's language - with its vision of an assertive commander-in-chief, its rejection of Congress's ability to declare war on states, and its interpretative space for a broader reading of unilateral executive action throughout the entirety of the Civil War - made clear to observers the likely fate of any future challenge to Lincoln's emancipation. 92 For the New York Times, Justice Grier's claim that the President had the right under the laws of war "not only to coerce the [enemy belligerent] by direct force, but also to cripple his resources by the seizure or destruction of his property" 93 settled the question - if not as a legally dispositive matter certainly for all practical purposes. In its editorial on the ruling, the pro-war Times declared:

It is very difficult to see why the very broad language of the Court in respect to the proclamation of the blockade does not involve the constitutional validity of the proclamation against slave property… . It is our firm conviction that the Supreme Court would indorse … every important act of the Executive or of Congress thus far in the rebellion. 94

Although the constitutionality of unilateral executive emancipation may have provided a central backdrop for the decision, it is not surprising that the Court never referenced the Proclamation. Due to the legal posture of the Prize Cases, as Dana remarked in oral arguments, all that needed to be discussed directly was the legality of presidential actions during the congressional recess. Still, this silence underscores a key dimension of constitutional discourse - its capacity at times to obscure real political stakes. In a sense, the dominant framing of the Proclamation as a question of constitutional war powers allowed the practical legality of black freedom to be answered, albeit implicitly, in a case about the seizure of foreign vessels. 95 Here, the language of constitutionalism, rather than making explicit questions of racial subordination, operated to conceal from view the very politics of race. Indeed, today, this contested backdrop for the ruling is almost never raised by legal scholars or practitioners when discussing the decision. If anything, by cloaking the racial implications of the Prize Cases, constitutional narratives have had the paradoxical (even perverse) effect of casting slavery's defenders as model civil libertarians. While Justice Grier's majority opinion has been employed by government lawyers in the post-9/11 context to defend a notion of the Constitution as legitimizing nearly any act of presidential judgment, it is the dissent that appears respectful of constitutional principles and rule of law values. 96

To appreciate this last point, it is useful to explore Justice Samuel Nelson's dissent as well as the members of the dissenting faction more closely. If the majority opinion embraced expansive executive authority, Justice Nelson's opinion spoke instead about the separation of powers and the liberty of citizens. 97 For those in the dissent, allowing the President the unilateral power to initiate a blockade prior to a congressional declaration of war fundamentally imperiled the rights of free citizens and inverted the Framers' original constitutional vision for governing warfare and emergency. The majority's holding opened the door to future Presidents invoking claims of crisis or threat in order to gain wartime authorities and thus subject political opponents to abuse and infringements of their rights. 98

However prescient the sentiment, one should still note precisely which Justices signed onto Nelson's dissent. All four men were Democrats, three of whom (Roger Taney, John Catron, and Nelson) had been part of the Dred Scott majority 99 and the fourth (Nathan Clifford) was a proslavery politician who had previously served as James Polk's attorney general. Each was also widely believed to be suspicious of Lincoln's emancipation, and indeed some worried, as hinted above, that if Chief Justice Taney could gain a fifth vote against the legality of the blockade it may well signal judicial defeat in the future for the Proclamation. As Taney biographer Carl Brent Swisher writes, the Chief Justice certainly rejected the Proclamation's constitutionality and many suspected that if he could muster the votes he would press "the Supreme Court [to] declare the proclamation unconstitutional at the first opportunity." 100

For abolitionists, the stirring arguments about checks and balances by the Taney faction on the Court served the very real purpose of protecting the property rights and colonial status of thousands of slaveholders. According to one Washington newspaper, in a column published a few months after the decision in the Prize Cases, it was absolutely unacceptable for "the proclamation of 1863 … to be filtered through the secession heart of a man whose body was in Baltimore and whose soul was in Richmond… . God help the negro who depended on Roger B. Taney for his liberty." 101 According to such abolitionists, Nelson's and Taney's calls for presidential constraint during wartime functioned in practice to undermine federal efforts to challenge the institution of slavery and to alter the racial structure of American life. They sought to remove from the Union's toolkit a key mechanism for ending black servitude - a strong and unitary executive.

The foregoing discussion clearly affirms Levinson's view that the moral power of the Proclamation rests on its substantive justice rather than the arguments for legality suggested by Lincoln or Grier - particularly given the post-9/11 purposes to which these arguments have been employed. 102 But beyond this, it also highlights how the redemptive political meaning of the Proclamation persists not because of - but truly in spite of - its attachment during the Civil War to a language of constitutional continuity. The discourse of constitutionalism in practice operated to occlude the anti-colonial power of emancipation and to promote arguments about executive power that in our own time have justified profoundly coercive measures. 103 None of this is to suggest that Lincoln or his Republican supporters on the Court did not firmly believe in the moral rightness of presidentially directed emancipation or in its compatibility with constitutional values and fidelity. Yet it does underline the real tensions between a self-consciously redemptive political agenda and the desire to speak in constitutionally respectful terms. During perhaps the first great American period of fundamental colonial rupture, the constitutional tradition did not act to heighten the transformative potential of the political moment. Its primary effect was to rearticulate questions of racial bondage as those of presidential power and to re-present the proponents of slavery as civil libertarian defenders of limited government. And as the next Part explores, at a decisive time of potential re-founding - early Reconstruction - the invocation of a shared constitutional tradition did more than merely occlude redemptive possibilities, it actually directly impeded change.

IV. Milligan: Redemption or Constitutional Faith?

Today, the Supreme Court's 1866 decision in Ex parte Milligan 104 is embraced as a powerful vindication by the judicial branch of civil libertarian values and constitutional constraints on wartime excess. As famed Court historian Charles Warren once wrote, the case "has been long recognized as one of the bulwarks of American liberty." 105 According to current civil libertarians, where the Prize Cases suggested a Court far too deferential to executive say-so, Milligan indicates the heroic capacity of the judiciary to serve as a check on the political branches and as a voice for the protection of individual rights.

The case itself concerned Lambdin Milligan, a prominent Indiana Democratic critic of the war effort. 106 In late 1864, Milligan was arrested by military officials and brought before a military tribunal in Indianapolis where he was tried on charges of planning to lead an armed uprising in Indiana to seize weapons, liberate Confederate soldiers, and kidnap the state's governor. 107 The tribunal found him guilty and sentenced Milligan to hang. 108 But on appeal to the Supreme Court, the Court unanimously ruled in favor of Milligan, declaring that the military tribunal did not have the jurisdiction to prosecute him. 109

The Justices, however, differed internally and dramatically over the actual rationale for the ruling. Both the five-person majority opinion, authored by Justice David Davis, and the four-person concurrence, written by Chief Justice Salmon Chase, agreed that Milligan's military tribunal had exceeded the bounds of what Congress authorized. 110 As Justice Davis maintained, Congress indeed passed a statute in March 1863 partially suspending habeas corpus. This partial suspension allowed the President to arrest a "suspected person" and to detain that person militarily for "a certain fixed period." 111 This period, however, lasted only until an actual grand jury indicted the individual on criminal charges in civil court or terminated its session without an indictment. At that point, the President enjoyed no further statutory authorization to hold the detainee in military custody, let alone to try him or her by a military tribunal. 112

For Chief Justice Chase, in concurrence, the lack of authorization in this case did not mean that Congress had no power to provide for the military trial of American civilians. 113 Congress, depending on the circumstances, could well issue a more comprehensive suspension of the writ. As he declared, "it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety." 114 At its root, as Samuel Issacharoff and Richard Pildes have highlighted, the constitutional problem for Chief Justice Chase was the fact that the executive was operating unilaterally, rather than on the basis of clear congressional support. 115

Yet Justice Davis's majority opinion fundamentally rejected this focus in the concurrence on inter-branch cooperation. The majority went much further, arguing that even Congress was constrained in its ability to curtail the due process rights of civilians. 116 According to the decision, regardless of congressional authorization, it was unconstitutional for civilians to be tried by a military court unless the locale was a "theatre of active military operations" and the civil courts were "actually closed." 117 For Justice Davis, efforts to depart from the due process guarantees of the Constitution transformed a republic of limited government into nothing less than military despotism: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." 118 In sweeping civil libertarian language that is often quoted to this day, Justice Davis concluded that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." 119

Issacharoff and Pildes correctly read the disagreement between Justice Davis and Chief Justice Chase as one concerning whether the Court should emphasize a rights-based or "institutional-process oriented view" of the Constitution during an emergency. 120 But they never fully locate this debate in Reconstruction politics 121 and so miss the heat that made the disagreement (and especially Justice Davis's internal victory on the Court) so critical. Just as the colonial backdrop to the Prize Cases is today largely unacknowledged, so too have we lost sight of Milligan's significance for the very real post-Civil War possibility of comprehensive anti-colonial rupture. 122 Even more directly than with the Prize Cases, the Milligan decision embodies a moment in which the language of a shared constitutional tradition and the commitment to legal continuity were employed to stymie a redemptive agenda.

In order to appreciate this point, it is necessary to see the decision through the eyes of the most intensely egalitarian among the Radical Republicans, Pennsylvania Congressman Thaddeus Stevens. For Stevens, the end of the Civil War was only the beginning of what he hoped would be a comprehensive social transformation, one that re-founded the republic on principles that uprooted wholesale all the settler exclusivities of American life. 123 In his view, such a redemptive aspiration entailed more than simply the abolition of slavery, it also required a long-term project of federal supervision to eliminate those existing modes of socio-economic subordination that sustained racial domination in the South (and indeed across the country). 124 Stevens envisioned a new collective order that extended beyond providing formal legal protections and voting rights to former slaves. 125 His plan went so far as to redistribute slave plantation land among freed blacks and poor whites, providing historically marginalized communities with the economic independence and material power to enjoy meaningful self-rule. 126 According to Du Bois, writing decades later in Black Reconstruction in America, figures like Stevens and Senator Charles Sumner of Massachusetts understood that creating a truly democratic system required "land and education for black and white labor." 127 Stevens himself remarked of newly freed slaves in December 1865, "This Congress is bound to provide for them until they can take care of themselves. If we do not furnish them with homesteads, and hedge them around with protective laws; if we leave them to the legislation of their late masters, we had better have left them in bondage." 128

For Stevens, the commitment to universal equality and the goal of complete anti-colonial rupture were not simply desirable, they were matters of essential justice dictated by God. 129 Indeed, Stevens took these beliefs so seriously that he chose to be buried in a black cemetery in Lancaster as a statement of principle given the segregated character of all the white cemeteries. 130 For him, Reconstruction offered a revolutionary opportunity in which, through concerted political action, the sins of American life could be extirpated and the country redeemed. 131 Moreover, such redemption entailed not only a total anti-colonial break, but a break from both the existing legal framework and, if need be, the very values of constitutionalism. In Stevens's view, in moments of tension, faith in the American constitutional tradition had to give way to a deeper political one. Stevens expressed this sentiment by calling for the long-term application of martial law in the South and by defending the employment of the federal military even in non-secessionist land. According to him, Reconstruction, precisely as an epochal moment of re-founding on egalitarian economic and political grounds, required the congressional use of discretionary power - enforced coercively by the strong arm of the military - in the service of political justice. 132 Once more capturing the essence of Stevens's approach, Du Bois wrote of this need to privilege racial transformation over constitutional continuity: "Rule-following, legal precedence and political consistency are not more important than right, justice and plain commonsense. Through the cobwebs of such political subtlety, Stevens crashed and said that military rule must continue in the South until order was restored, democracy established, and the political power built on slavery smashed." 133

In many ways, Milligan highlighted the fractured nature of the Republican Party, which as early as 1866 was increasingly hesitant to pursue fundamental social change as comprehensively as Stevens desired. 134 Justice Davis and Chief Justice Chase were both close allies of Lincoln (the former his 1860 presidential campaign manager, the latter his Treasury Secretary). 135 Justice Davis's sweeping civil libertarian language and curtailment of congressional authority were understood by Radical Republicans as a direct assault, by a member of their own party no less, on the federal government's capacity to pursue racially emancipatory ends. 136 Stevens excoriated the Milligan majority, declaring:

That decision, although in terms perhaps not as infamous as the Dred Scott decision, is yet far more dangerous in its operation upon the lives and liberties of the loyal men of this country. That decision has taken away every protection in every one of these rebel States from every loyal man, black or white, who resides there. 137

Shortly after Stevens's speech, the Republican magazine Harper's Weekly further underscored the perceived connection between Milligan and Taney's infamous ruling, headlining its piece on Milligan, The New Dred Scott. 138 Elaborating the parallel, the article declared, "The Dred Scott decision was meant to deprive slaves taken into a Territory of the chances of liberty under the United States Constitution. The Indiana decision operates to deprive the freedmen, in the late rebel States whose laws grievously outrage them, of the protection of the freedmen's Courts … ." 139 These "freedmen's Courts," referred to in the article, embodied a separate court system established by the Freedmen's Bureau during the early days of Reconstruction to address white crimes against blacks. Such courts were seen by Radical Republicans as necessary due to the overwhelming prevalence of racial animus in ordinary civil proceedings in the South. 140 The article's author worried that since the regular courts were open and functioning, Milligan would operate to undermine the legality of the Bureau's courts and to condemn former slaves to the vagaries of a legal system controlled by their ex-masters.

Indeed, for Stevens and others, the embrace of martial law was not simply a defense of political discretion over rule-of-law principles for its own sake. According to Radical Republicans, the problem in the South was that an entire colonial infrastructure still existed, one that sustained racial subordination and related economic hierarchies. 141 This infrastructure was epitomized by the traditional legal system, whose purpose - in Stevens's mind - was to preserve a framework of white supremacy. 142 Moreover, ex-masters were now innovating new non-slave methods for maintaining a coerced labor supply, through laws like the Black Codes, and for rehabilitating the structure of colonial domination shaken by the Civil War. Part of this process of innovation was the use of extreme violence by white supremacists as a tool of black intimidation and control - violence that the regular courts, for obvious reasons, were uninterested in addressing. In such circumstances, extra-legal discretion and federal military imposition, in the name of political justice, were essential for the fulfillment of equal freedom for all. In effect, political necessity suggested that, at this moment of historical upheaval, substantive commitments to egalitarian redemption on the one hand, and commitments to a discourse of constitutionalism on the other, were conflicting ends in which one could be achieved, but not both simultaneously.

Today's historians often argue that Justice Davis's majority opinion in Milligan ultimately had minimal long-term impact on Reconstruction. 143 Congress moved quickly to pass legislation that both reaffirmed the legality of military tribunals and that curtailed "the Court's jurisdiction to hear cases involving military law." 144 Moreover, rather than heighten the confrontation with Congress, the Supreme Court in Ex parte McCardle, an opinion this time authored by Chief Justice Chase, retreated from Justice Davis's judicial assertiveness and validated Congress's act of jurisdiction stripping. 145 As a result, military tribunals remained commonplace during Reconstruction with upwards of 1,400 such trials between 1865 and 1870. 146

Still, the immediate consequences of the Milligan decision should not be ignored. In fact, they were not far off from Radical Republican fears or, for that matter, the hopes of status quo Democrats. Referring to Stevens and others as possessed by "fanaticism," the Baltimore Sun crowed that such individuals were "feeling the sting of death in the decision." 147 Employing the Milligan ruling as precedent, President Andrew Johnson declared a complete halt to any trial in either military or Freedmen's Bureau courts of civilians. 148 In the process, Milligan and Johnson's use of the case ushered in the initial stages of legal impunity for white violence against blacks in the South, and thus the reformation of white supremacy under new institutional conditions. November 1866 saw the admitted murder by a white Virginia doctor of a local African American man for accidentally causing fifty cents-worth of damage to the doctor's carriage. 149 After the doctor was acquitted by the local civil court, the general in charge of the area used pre-existing congressional authorization for "military jurisdiction over a variety of cases involving freedmen" 150 to order a military trial. Although this trial produced a murder conviction, Johnson, again citing Milligan, stepped in to dissolve the commission and to release the prisoner - taking the local court acquittal as the final word. 151 For Radical Republicans, in the face of such impunity and the rebirth of white supremacy in the South, the only response to Milligan was the swift passage of legislation that reaffirmed military rule and, to the greatest extent possible, repudiated the Davis opinion. 152

In a sense, the Milligan saga reminds us how the American commitment to constitutional faith actually functioned at a time of real potential redemption. Justice Davis was not a pro-slavery fire breather. He had been a member of the majority in the Prize Cases, the very decision that for practical purposes secured the constitutional status of the Emancipation Proclamation. 153 In fact, Justice Davis, like other Republicans, sought a meaningful alteration in American society along tracks more racially egalitarian than that of the antebellum order. 154 What he argued was that any politics of change should maintain faith in the Constitution and in its discursive capacities to fulfill even radical aspirations. In his view, congressional Republicans had to reject the drift toward discretionary action and to abide by "principles of the Constitution." 155 Explaining his opposition to the use of military tribunals, Justice Davis wrote in Milligan, "Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded … the dangers to human liberty are frightful to contemplate." 156

For all the wisdom such words denoted, their political effect, not unlike Taney's arguments during the Civil War, was to provide a straitjacket for social transformation. Stevens's ultimately revolutionary embrace of discretion did not embody a "hatred of liberty" or a desire for ambition, but instead articulated a pragmatic calculation that the best - and perhaps only - means to redemption was through discretionary and, if need be, extra-legal political action. For him, at least in this context, the commitment to transformation required pursuing actual constitutional rupture in ways that no doubt challenged the very legitimacy of the Constitution and its narrative framings. 157 In the end, one might well ask whether the victory of continuity over an explicit discourse of political justice and constitutional break helped discursively to suppress more wide-ranging social change. As Reconstruction receded and political "fanaticism" declined, frameworks of constitutional construction provided a critical means for suggesting egalitarian progress while substantively cloaking the reality of persistent and systematic subordination.

#### Creating a new social world is key – antiblackness is mediated through contingent and concrete power relations that can be changed through radical transformation of the social world – the alt lapses into nihilism, which is profoundly individualistic and disempowering

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Lewis Gordon, “5: Thoughts on Afropessimism,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 79-81.

In existential terms, then, many ancestors of the African diaspora embodied what Kierkegaard calls an existential paradox. All the evidence around them suggested failure and the futility of hope. They first had to make a movement of infinite resignation—that is, resigning themselves to their situation. Yet they must simultaneously act against that resignation. Kierkegaard, as we have seen, called this seemingly contradictory phenomenon “faith,” but that concept relates more to a relationship with a transcendent, absolute being, which could only be established by a “leap,” as there are no mediations or bridge to the Absolute whose distant is, as Kierkegaard put it, absolutely absolute. Ironically, if Afropessimism appeals to transcendent intervention, it would collapse into faith. If the Afropessimist’s argument rejects transcendent intervention and focuses on committed political action, of taking responsibility for a future that offers no guarantees, then the movement from infinite resignation becomes existential political action.

At this point, the crucial meditation would be on politics and political action. An attitude of infinite resignation to the world without the leap of committed action would simply be pessimistic or nihilistic. Similarly, an attitude of hope or optimism about the future would lack infinite resignation. We see here the underlying failure of the two approaches. Yet ironically, there is a form of failure at failing in the pessimistic turn versus the optimistic one, since if focused exclusively on resignation as the goal, then the “act” of resignation would have been achieved, which, paradoxically, would be a success; it would be a successful failing of failure. For politics to emerge, there are two missing elements in inward pessimistic resignation to consider.

The first is that politics is a social phenomenon, which means it requires the expanding options of a social world. It must transcend the self. Turning away from the social world, though a statement about politics, is not in and of itself political. As we have seen, the ancients from whom much Western political theory or philosophy claimed affinity had a disparaging term for an individual resigned from political life—namely, idiōtēs, a private person, one not concerned with public affairs, in English: an idiot. I mention “Western political theory” because that is the hegemonic intellectual context of Afropessimism; I have not come across Afropessimistic writings on thought outside of that framework. We do not have to end our etymological journey in ancient Greek. Recall that extending our linguistic archaeology back a few thousand years we could examine the Middle Kingdom (2000 BCE–1700 BCE) of Kmt’s Mdw Ntr word idi (deaf). The presumption, later taken on by the ancient Athenians and other Greek-speaking peoples, was that a lack of hearing entailed isolation, at least in terms of audio speech. The contemporary inward resignation of seeking a form of purity from the loathsome historical reality of racial oppression, in this reading, retreats ultimately into a form of moralism (private, normative satisfaction) instead of public responsibility born of and borne by action. The nonbeing to which Afropessimists refer is also a form of inaudibility.

The second is the importance of power. Politics makes no sense without it. As we have seen throughout our earlier reflections on power, Eurocentric etymology points to the Latin word potis as its source, from which came the word “potent” as in an omnipotent god. If we again look back farther, we will notice the Middle Kingdom Mdw Ntr word pHty, which refers to godlike strength. Yet for those ancient Northeast Africans, even the gods’ abilities came from a source. In the Coffin Texts, HqAw or heka activates the ka (sometimes, as we have seen, translated as soul, spirit, womb, or “magic”), which makes reality.20 All this amounts to a straightforward thesis on power as the ability with the means to make things happen.

There is an alchemical quality of power. The human world, premised on symbolic communication, brings many forms of meaning into being, and those new meanings afford relationships that build institutions through a world of culture, a phenomenon that Freud, we should recall, rightly described as “a prosthetic god.” It is godlike because it addresses what humanity historically sought from the gods—protection from the elements, physical maledictions, and social forms of misery. Such power clearly can be abused. It is where those enabling capacities (empowerment) are pushed to the wayside in the hording of social resources into propping up some people as gods that the legitimating practices of cultural cum political institutions decline and stimulate pessimism and nihilism. The institutions in Abya Yala and in Northern countries, such as the United States and Canada, very rarely attempt to establish positive relations to blacks, and Blacks the subtext of Afropessimism and this entire meditation.

The discussion points to a demand for political commitment. Politics is manifested under different names throughout the history of our species, but the one occasioning the word “politics” is, as we have seen, from the Greek pólis, which refers to ancient Hellenic city-states. It identifies specific kinds of activities conducted inside the city-state, where order necessitated the resolution of conflicts through rules of discourse the violation of which could lead to (civil) war, a breaking down of relations into those appropriate for “outsiders.” Returning to the Fanonian observation of selves and others, it is clear that imposed limitations on certain groups amount to impeding or blocking the option and activities of politics. Yet, as a problem occurring within the polity, the problem short of war becomes a political one.

Returning to Afropessimistic challenges, the question becomes this. If the problem of antiblack racism is conceded as political—where antiblack institutions of power have, as their project, the impeding of Black power, which in effect requires barring Black access to political institutions—then antiblack societies are ultimately threats also to politics defined as the human negotiation of the expansion of human capabilities or, more to the point, appearance, speech, and freedom.

Antipolitics is one of the reasons why societies in which antiblack racism is hegemonic are also those in which racial moralizing dominates; moralizing stops at individuals at the expense of addressing institutions the transformation of which would make immoral individuals irrelevant. As a political problem, it demands a political solution. It is not accidental that blacks continue to be the continued exemplars of unrealized freedom and against whom violence is waged against appearance and speech. As so many from Ida B. Wells-Barnett to Angela Y. Davis, Michelle Alexander, Angela J. Davis, Noël Cazenave have shown the expansion of privatization and incarceration is squarely placed in a structure of states and civil societies premised on the limitations of freedom (Blacks)—ironically, as seen in countries such as South Africa and the United States, in the name of freedom. 21

#### Aff is a uniquely valuable form of futurity – it transforms unjust power structures and is oriented towards the expression of popular democratic agency

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Amna A. Akbar, “Demands for a Democratic Political Economy,” *Harvard Law Review Forum*, vol. 134, 2020, pp. 98-106, https://harvardlawreview.org/wp-content/uploads/2020/12/134-Harv.-L.-Rev.-F.-90.pdf.

I. NON-REFORMIST REFORMS

As a matter of rhetoric, the left often fashions itself as against reform and outside of formal politics -- characterizations that liberals and scholars echo. 51But today's left social movements are turning to demands, reforms, and policy platforms. 52This is not a rejection of electoral and legislative politics: it is a cautious embrace, marking a shift for the emergent left. The demands are amplified by an increasingly organized strategy to elect left and socialist candidates to office, to challenge the Democratic Party's ties to corporate money and the billionaire class, and to redefine the realm of the possible. 53Congressional Representatives Alexandria Ocasio-Cortez, Ilhan Omar, and the growing Squad are supported by a developing constellation of organizations focused on electoral strategy -- and these elected officials have become important amplifiers for radical demands. 54The turn to reform undoubtedly reflects the defeat of the revolutionary politics of the New Left and Black Power era -- itself an index of frustration with what the civil rights movement achieved 55-- as well as a recognition of the immensity of U.S. military and police power that rose up to crush movements here and around the world. 56But it also reflects a sober assessment of the limited scale of left, working-class, and poor people power amid decades of state repression and the rise of the neoliberal agenda Klarman documents. 57It is a bid for power that recognizes that mass disenfranchisement is central to the elite's hold on the state and the economy. A growing number of organizers now understand the need to organize poor, working-class, Black, brown, and immigrant people to effectuate transformational change. 58

Reform has long been a central question in debates about left and socialist strategy, 59with a range of terms to capture the aspiration for a reform program aimed at a larger project of transformation. 60Organizers are increasingly invoking non-reformist reforms, the term coined in the 1960s by French economist-philosopher and socialist André Gorz. 61In Strategy for Labor, Gorz defined a non-reformist reform as one that does not comport with "capitalist needs, criteria, and rationales." 62Instead it advances a logic of "what should be" and requires "implementation of fundamental political and economic changes." 63Whether the change is "sudden" or "gradual" is immaterial: non-reformist reforms require a "modification of the relations of power," in particular "the creation of new centers of democratic power." 64

The non-reformist reform framework is prevalent in abolitionist organizing against the prison industrial complex 65and deployed by those who embrace racial justice, anticapitalism, and socialism more broadly. 66In Golden Gulag, Professor Ruth Wilson Gilmore calls for non-reformist reforms, which she defines as "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization." 67Through decades of campaigns against carceral infrastructure, abolitionist campaigns have produced rubrics demarcating an approach to reform focused on reducing the scale, power, tools, and legitimacy of the carceral state. 68The focus on the ideological scaffolding of carceral control -- the equation of policing with safety, for example -- signals a keen understanding of the interlocking ideological and material infrastructure of our lives. 69In turn, it suggests, like Gorz did, that a revolutionary program of reform must continually deepen consciousness around the violence and exploitation of the status quo as it advances the possibility of alternatives.

While Gorz is remembered as a champion for non-reformist reforms, his work is decidedly ambivalent: a "very clear dividing line" will not always exist between "reformist" and "non-reformist reforms." 70Assessing a demand for "the construction of 500,000 new housing units a year," for example, would require an assessment of whether the proposal involved "the expropriation of those who own the required land, and whether the construction would be a socialized public service, thus destroying an important center of the accumulation of private capital; or if, on the contrary, this would mean subsidizing private enterprise with taxpayers' money to guarantee its profits." 71The non-reformist reform does not aim to create policy solutions to discrete problems; rather it aims to unleash people power against the prevailing political, economic, and social arrangements and toward new possibilities.

But whether something is non-reformist or reformist is about more than the nature of the demand and its particulars: it is also a question of how the campaign is waged. Consider another example: abolition of the death penalty. The conventional liberal approach emphasizes that death is too great a power for the state, and reassures the public that life sentences will continue to ensure safety of local communities. In this guise, the campaign aims to shrink the state's carceral power in one particular way but does not question mass human caging. As the campaign attempts to undermine the death penalty, its logic shores up the legitimacy, righteousness, and necessity of life sentences. 72A non-reformist approach would frame the problem of the death penalty as stemming from the larger violence of prisons and policing and its historical continuities with lynching and enslavement. Life without parole then is not the solution, it is illegitimate carceral violence: what abolitionist organizers in Pennsylvania have dubbed "death by incarceration." 73

If the same demand can be framed or implemented in reformist or non-reformist ways, the line is undoubtedly murky in practice. But this does not make the attempt to distinguish futile. Instead it clarifies that reform projects are contradictory gambits if the aim is transformation: they always have the possibility of reifying the status quo. Nonetheless, there are essential distinctions for developing transformative programs of reform that aim to undermine the prevailing order in service of building a new one.

The hallmarks of non-reformist reforms are three. First, non-reformist reforms advance a radical critique and radical imagination. 74Reform is not the end goal; transformation is. 75Non-reformist reforms are "conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands." 76In advancing an agenda to meet human need, non-reformist reforms advance a critique about how capitalism and the carceral state structure society for the benefit of the few, rather than the many. They also posit a radical imagination for a state or society oriented toward meeting those needs.

By contrast, reformist reforms draw on and advance critiques of our system -- whether that be capitalism or the carceral state -- that do not question underlying premises or advance alternative futures. In fact, reformist reforms "reject[] those objectives and demands -- however deep the need for them -- which are incompatible with the preservation of the system." 77Here, one can think of the quick rejections by so many of defund the police or the Green New Deal -- despite the mounting evidence that liberal reforms have done little to limit police violence or to slow the speed at which we are hurtling toward increasingly frequent environmental disasters. 78Liberal reformism effectively shields the status quo from deep critique. 79The end goal of liberal reformism is just that: reform.

The non-reformist reform then provides a framework for demands that will undermine the prevailing political, economic, social system from reproducing itself and make more possible a radically different political, economic, social system. For abolitionists, the underlying system to undermine is the prison industrial complex and the horizon to build toward is abolition democracy. For socialists, the underlying system is capitalism and the horizon socialism. In theory and practice, these are intertwined, variegated, and debated political projects. 80

I am suggesting neither a false neatness within nor artificial distinctions between rich left traditions. But I mention it to make a point so obscured in legal discourse: that approaches to reform reflect ideological commitments, critiques of or acquiescence to underlying systems, aspirations for the future, and theories of change. Reforms communicate analyses of our conditions, tell stories about possibilities, and contribute to dynamic relations of power. So the target and object of the non-reformist framework will depend on one's political project and analysis, as will whether one accepts a reformist or non-reformist orientation.

Whereas reformist reforms aim to improve, ameliorate, legitimate, and even advance the underlying system, 81non-reformist reforms aim for political, economic, social transformation: for example, socialism or abolition democracy. They seek to delegitimate the underlying system in service of building new forms of social organization. Rather than relegitimate, they seek to sustain ideological crisis as a way to provoke action and develop public consciousness about the possibilities of alternatives and our collective capacity to build them together.

Second, non-reformist reforms must draw from and create pathways for building ever-growing organized popular power. 82They aim to shift power away from elites and toward the masses of people. This is a matter of substance and process, from where the demand comes, the vision it advances, and the space it creates. Whether through demands on the state or the workplace, non-reformist reform " always requires the creation of new centers of democratic power[,] . . . a restriction on the powers of State or Capital, an extension of popular power, that is to say, a victory of democracy over the dictatorship of profit." 83In their focus on power, non-reformist reforms challenge liberal legal frameworks that tend to obscure power relations. 84Non-reformist reforms are about building the power of people to wage a long-term struggle of transformation.

In contrast to reforms formulated by expert elites, non-reformist reforms come from social movements, labor, and organized collectives of poor, working-class, and directly impacted people making demands for power over the conditions of their lives and the shape of their institutions. 85People living under perilous conditions must generate analysis of those conditions, and advance solutions, in collective formations. 86 Collective processes -- whether in organizations, unions, or assemblies -- become schools of democratic governance in action: processes of enfranchisement and exercises in self-determination that build power and motivate further action. 87

Third, non-reformist reforms are about the dialectic between radical ideation and power building. Non-reformist reforms come from contestatory exercises of popular power. 88They attempt to expand organized collective power to build pathways for transformation. As such, they are not in themselves about finding an answer to a policy problem: They are centrally about an exercise of power by people over the conditions of their own lives. They aim to create "a vast extension of democratic participation in all areas of civic life -- amounting to a very considerable transformation of the character of the state and of existing bourgeois democratic forms." 89

Because the end goal is building power rather than identifying a policy fix, non-reformist reforms can only be effective when pursued in relation to a broader array of strategies and tactics for political, economic, social transformation. That includes protests and strikes as well as political education, mutual aid, organizing, and the building of alternative institutions.

Along with other strategies and tactics, reforms are in dialectical relationship with transformation: deepening consciousness, building independent power and membership, and expanding demands. 90As Gorz put it, reforms have to be imagined as part of a longer-term "strategy of progressive conquest of power by the workers." 91

#### Examining the contingent and interlocking nature of systems of domination is critical – sole focus on either race or class as explanatory variables fails

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Olúfẹ́mi O. Táíwò, “A Unified Story for a Divided World,” *Dissent Magazine*, Summer 2021, https://www.dissentmagazine.org/article/a-unified-story-for-a-divided-world.

Wars of position rage between “race reductionists” who insist on the political primacy of race and their “class reductionist” counterparts. But some of us, especially those of us who make use of racial capitalism as a set of frameworks, insist that such debate is tired.

In Golden Gulag, Ruth Wilson Gilmore offers an intricate definition of racism: “the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.” It follows that races are divisions of populations into hierarchies of vulnerability to premature death (the likely fate of the materially insecure).

What’s the difference between “race” and “class,” then? They are two, compatible ways of explaining how society is split into strata of material security. Class zooms in on how global production was and is organized: capitalists own the means of production, the proletariat owns its labor, enslaved people own neither, and Indigenous and colonized peoples are targeted for elimination or assimilation into one of the other categories. Alongside this hierarchy in function is a hierarchy of material security; to be a capitalist, after all, one must have secure access to the “means of subsistence,” and a proletariat becomes possible when this same security is unavailable for masses of people.

Race asks more generally: how is society organized? Slavery and indigeneity were legal and social statuses that approached rightlessness. The racial categorizations fashioned out of these colonial designations marked certain groups of people as available for plunder, domination, and subjugation in social life, well beyond the workplace. Indigenous and enslaved people have always faced systematically higher levels of social violence and predation of all kinds, and thus death. And this stratified distribution of security remains necessary to sustain exploitative social arrangements: as the South African activist Steve Biko once put it, “that we are oppressed to varying degrees is a deliberate design to stratify us not only socially but also in terms of the enemy’s aspirations.”

The history of racial capitalism helps explain how the broader racial organization of the whole of global society emerged from regional economic and political distinctions. Starting in 1492, European empires and descendant states atop the Atlantic system created racial governance systems to divide and rule their colonies, ranging from the straightforward to the dizzyingly complex. Justifications were varied—based on religion or pseudoscience—and were often helped along by a thick layer of convenient obfuscations (“racecraft,” as Barbara J. and Karen E. Fields famously put it) and longstanding habits of political thought.

The political stakes of racial divisions, however, were less variable than the myths that justified them. In the colonies, as a social stratum’s ancestral proximity to the European elite increased, so did its presumed share of social rights and protections. As a stratum’s ancestral proximity to the Atlantic system’s most exploited and plundered populations increased—those dispossessed of their land or labor—its presumed share of rights and protections dropped precipitously. This organization, and consequent differences in social and geographic distribution of rights and resources, proliferated and hardened over time as colonial conquests and economic links expanded. The system built across the Atlantic and Indian Oceans took over almost the entire world.

Today, many of the institutions and laws permitting explicitly racial stratifications of exploitation and predation have been effectively challenged. But stratifications remain, as do the organizational logics that inform them and the group social identities built out of them. Globally, racially marginalized communities are still the most polluted, policed, and preyed upon; progress on racial justice has been far less sweeping than advertised.

This history is a unified story about both kinds of division. Asking whether we should talk about class or race, it reveals, is like asking whether we should talk about guitars or musical instruments: confused. We could do both by doing either.

Some criticisms confuse the phrase “racial capitalism” with its analysis, such as the accusation that it focuses excessively on racial divisions (as opposed to gender, nationality, ability, and others). But the “what” of racial capitalism is less important than the “why”: the historical processes that explain why society is racially organized point us to the events that are formative of the same world order that is also unjust with respect to gender, nationality, ability, and countless other aspects of social life. By paying attention to this broad global and historical context, rather than focusing all of our attention on production, the racial capitalism approach can “open up, as opposed to foreclose, more complex analyses,” as Charisse Burden-Stelly recently argued.

This also helps answer another common criticism: how could race even be real, much less fundamental, if it means one thing in France and another in Brazil? One could just as easily notice that what counts as “middle class” differs even more wildly across different contexts, though people are curiously more reluctant to infer from this fact that class does not exist.

But the deeper answer is that racial capitalism is a way of thinking about the world’s history, not just any particular country’s. If we were focused on the networks that actually produce commodities and circulate capital rather than the ones that dominate political discussions—seems like the more materialist thing to do, right?—we might lose our appetite for the pretense that we live in separate social systems. Multinational institutions and investment patterns of shareholders half the world away govern the lives of people on this planet just as surely as their local and national governments—and in many cases, more so.

As the philosopher Vanessa Wills reminds us, it is production as a social process that is properly at the center of materialist thought, not class as an identity. Our economic systems are and have long been global: individual states (capitalist or not) are themselves components of a planetary economic system. Racial capitalism encourages us to think globally, which is essential in an era of global climate crisis.

If there’s reason to use “racial capitalism” over just “capitalism,” one would be to acknowledge the various African scholars and intellectuals who helped shape the term, from the South African revolutionaries like Neville Alexander who brought it into use to the Dar es Salaam school of intellectuals like Samir Amin, Marjorie Mbilinyi, and Issa G. Shivji, which further developed the world-systems approach that informed later theorizing on racial capitalism. But acknowledgement of these figures and their intellectual contributions doesn’t depend on the name we use for analyses of history or for the system we live in. Call it whatever you want. What matters are the substantive commitments we decide to take up, and what we do with them.

#### The aff confronts the neoliberal fiction that colorblind market forces can equitably distribute outcomes – attention to the role of contingent economic and legal forces in producing antiblackness is key to racial justice

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James W. Fox Jr, “Black Progressivism and the Progressive Court,” *The Yale Law Journal Forum*, 6 January 2021, pp. 414-420, https://www.yalelawjournal.org/pdf/FoxEssay\_81a8zrrr.pdf.

IV. BLACK PROGRESSIVISM AND THE PROGRESSIVE COURT

There are two important themes evident in each of these writings from early Black progressives: the systemic nature of racism and the essential connection between racial and economic justice. For each of these authors, racism was far too complex and pervasive for it to be addressed by any single front. Indeed, to limit antiracism in that way would in fact support racism by allowing it to accumulate and solidify power across other spheres. This was one of the things Wells and Du Bois found so problematic with Booker T. Washington's accommodationism and its hyperfocus on industrial education. 77And while Washington and the progressives may have agreed on the importance of economic development generally, Washington's cultivation of millionaires like Andrew Carnegie made the anticapitalist strand of Black progressivism unpalatable for conservative Bookerites.

Comparing the Black progressive thought sketched here with the Court's "pro-rights" cases of the middle period of the Lochner era, it becomes clear that the isolated and status-quo enhancing nature of the opinions meant they would, in the minds of Black progressives, have little chance of success. 78For instance, when the Court struck down the Alabama peonage law in Bailey it explicitly abjured race as a basis for its decision. 79Rather, the Court focused on how the law criminalized a breach of contract and thus converted a personal-service contract into a type of servitude. 80Certainly the outcome of the case was welcome to Black progressives, who had been highlighting the injustice of peonage laws for almost thirty years. For Black progressives, however, the issue was not that the law criminalized contract relations, but that peonage re-established racial slavery. By divorcing its reasoning from the problem of race, the Court avoided confronting how this peonage law was part of a system of racial oppression that also violated the Reconstruction Amendments. Doing so would have required looking behind cases like Giles, Plessy, and the Civil Rights Cases and the related doctrines supporting states' rights and limited federal powers. Instead, the Court could rely on a contract-enhancing analysis arguably consistent with Lochner to provide some enforcement heft to the Thirteenth Amendment while not displacing established Jim Crow jurisprudence.

Similarly, the Court in Buchanan overturned a Louisville ordinance prohibiting Black people from moving into a majority-white neighborhood. A full-throated Black progressive analysis of such a law might well have argued for the unconstitutionality of legal segregation and separation of the races. This was a perfect case to embrace Du Bois's idea that social rights were fundamental rights, or to declare that laws implicitly targeting race were invalid class legislation much as the Court had looked at the implied purposes of the labor regulations in Lochner. But this would have required overturning the underlying justification for Plessy and Pace; indeed, the Louisville ordinance was drafted to fit neatly within those cases because it also barred white purchasers from moving into majority-black neighborhoods. Overturning the ordinance seemed to require a confrontation with the Pace-Plessy doctrine. The Court again sidestepped this conflict. The Court emphasized the need to protect the property rights of the white owner. While the Black progressives working with the interracial NAACP, which brought the case, were clearly pleased with the result, the fact that the Court dodged the racial equality issues meant that, under the doctrine of Buchanan, residential segregation would remain divorced from systemic racism. And since the Court's opinion ended up supporting the rights of white property owners, it meant that Black people could only benefit if they could find a sympathetic white owner to sell to them. Whereas Black progressivism focused on the broadly unequal distribution of property caused by centuries of slavery, the Court's focus on protection of de facto property distributions not only avoided this problem but arguably upheld it, for if white people had the constitutional right to sell to Black people they also had the right not to. Residential segregation by custom--which Du Bois, Fortune, and Wells all viewed as on par with legal segregation--was legally secured under the rule of Buchanan.

The Court's penchant to avoid systemic issues was also apparent in the voting-rights case of Guinn v. United States. Oklahoma, soon after obtaining statehood, rewrote its election laws to exclude Black people from suffrage. It did so by implementing a literacy test and excepting white Americans through a grandfather clause timed to coincide with a date prior to the Fifteenth Amendment. The Court overturned the grandfather clause, but expressly upheld the literacy test as being race-neutral, clinging to (although not citing) its 1898 holding in Williams. From the perspective of Black progressivism this type of surgical constitutionalism served only to support the vast swath of racially discriminatory election laws. While enforcement of the Fifteenth Amendment was clearly cheered (the NAACP had argued as an amicus in the case), the failure to address the system of suffrage discrimination itself served to support that discrimination in its effects, a problem the NAACP and other would spend decades combatting. This fact--that in each case the Court managed to address a narrow issue and that the cases had relatively little systemic impact--highlights another aspect of the Black progressive critique. As Michael Klarman has observed, victories in cases such as Guinn were essentially meaningless precisely because litigation strategies required extensive financial resources and extended civil-society networks. 81But absent significant economic development in Black communities, resources for long-term test litigation strategies were thin indeed. The economic and wealth critique advanced early on by Thomas Fortune still rang true: So long as wealth remained primarily in the hands of white corporations and property owners and wages remained low and discriminatory, sporadic cases like Buchanan, Bailey, and Guinn provided no de facto equality, even on the very topics they addressed. Without the federal government's willingness to fund basic citizenship programs, such as broad-based educational reforms, labor protections, or equal-suffrage enforcement, little progress could be made. As Ida Wells had observed and predicted, mass disenfranchisement in the South produced political paralysis on race issues nationally, and the Lochner-era Court's concurrent doctrines that greatly constrained federal powers only layered on more obstacles to racial justice. 82

So, did the Court's post- Lochner race jurisprudence matter? To the extent it reflected and revealed tensions, fissures, and cracks in the Court's constitutional doctrines, they may have helped some. And given the limited range of options, they were some of the few tools available for the NAACP to build its long-term strategies. It also may have helped that there was some movement on other progressive fronts, including a spate of constitutional amendments and some state and local advances outside the South. But as Black progressives understood better than either white progressives or procapitalist libertarians, no ideological or jurisprudential approach--not liberty of contract, not prolabor progressivism, not property rights--could lead to broad-based racial quality. So long as racial equality was not a central doctrinal and political goal, so long as equal protection and equal citizenship were seen as occasional byproducts rather than animating ideals, and so long as the challenges to the historical intertwining of racial and labor oppression and punishment remained politically and economically fragmented, law was unlikely to be much help in realizing the hopes of Black Abolition and Reconstruction.

This brief inquiry into the jurisprudence of the Progressive Court and the critique of Black Progressives also speaks to our contemporary conflicts about the nature of constitutional equality and freedom both in the Court and on the ground. Much like the Progressive Era, the modern Court has embraced a procapitalist, antilabor approach to constitutional powers and individual rights. 83And much like the early Progressive Era Court, the modern Court has curtailed a prior generation's civil-rights and racial-justice advances. 84But rather than simply identifying this historical parallel on the Court, the above focus on Black Progressivism asks us to also consider the parallels between Black Progressivism and modern Black and antiracist writers and activists. And some of the parallels are striking. Ida Wells and the Niagara Movement both identified how the southern criminal-justice systems replicated slavery relations, blocked efforts to advance racial equality, and entrenched white supremacy's national political power. That critique continues today with the movement for prison abolition and other fundamental criminal-justice reforms, including efforts to decouple criminalization from voting eligibility. 85Thomas Fortune, Ida Wells, and W.E.B. Du Bois all identified the relationship of racial oppression and race-based capital and wealth accumulation as deeply unjust and dangerous for democracy. Living now during the second Gilded Age, with wealth inequality just as stark as that which motivated the Progressive Movement, we too must ask how and why the stubborn persistence of racial injustice maps onto the ever widening wealth and income chasm. 86As Ta-Nehisi Coates, Richard Rothstein, Thomas Mitchell, and others keep telling us, modern racial oppression is fundamentally inseparable from governmental, legal, and economic structures of wealth and class distribution, a point that would have not surprised Black Progressives of the 1890s and 1900s. 87And just as Fortune, Wells, and Du Bois each challenged judicial doctrines and categories such as the tripartite civil-political-social rights rubric or the condemnation of class legislation, so today do we need to critique facially neutral doctrines like colorblindness in equal-protection law and the irrelevance of racial-bias fourth amendment law. 88

Of course none of these parallels should be asked to bear too much of the load of our current efforts to create racial justice in law. Current conflicts, doctrines, and structures have a multivariate history, some of which trace back to the Progressive era and before, and some of which have newer manifestations. Still, the critiques presented by Black Progressives should help us remain vigilant about how racial oppression and economic and class dynamics have a long history of reinforcing and reconstructing each other. White wealth was built in large part by enslaved and segregated Black labor. The contemporary Black Lives Matter civil-rights movement is not just an extension of the resistance to organized and governmental violence that Wells and others presented over 100 years ago. It is also an argument about how economic exclusion and oppression--the lack of employment and educational opportunities, unsafe and unaffordable housing, lack of access to medical care--interlock to maintain racial injustice, of how the injustice itself is simultaneously denied by and essential to the dominant political and legal ideologies. Absent full attention to racial justice as a primary goal, other ideologies, whether libertarian or communitarian, liberal or conservative, leftist or reactionary, are going to leave undone the equality mission embedded in the Reconstruction Amendments, like the prolabor, probusiness, or Progressive ideologies of the early 1900s. But just as importantly we can also see how current doctrines can be rhetorically turned in the direction of justice, as Wells did by identifying segregation as itself the worst type of class legislation and as the NAACP did in using Lochner Court's libertarianism as one of its tools to challenge Jim Crow. Resistance to the Court's current doctrines must involve both the development of alternative doctrinal paths and the reconfiguration of those paths the Court has already taken, and they must, like Wells, Fortune, and Du Bois, always keep one eye on the lived experiences of inequality that show us why the work is important.

#### We should both recognize the impossibility of redemptive struggle and also strive towards emancipation – reject the alt’s attempts to determine the endpoint of political struggle in advance

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Aziz Rana, “Freedom Struggles and the Limits of Constitutional Continuity,” *Maryland Law Review*, vol. 71, no. 4, 2012, pp. 1046-1051, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2493&context=facpub.

V. Conclusion: Democratic Discretion and Narratives of Tragedy

The preceding sections have sought to highlight two claims about the ties between freedom struggles and constitutional discourses in America. First, they attempted to remind readers that a long black political tradition, consciously linked to global independence movements, questioned the very compatibility between redemptive anti-colonial aspirations and either constitutional faith or continuity. And second, such discussions emphasized that at two decisive moments of potential anti-colonial rupture in the U.S. the resort to frameworks of constitutional construction hindered as much as they assisted meaningful change. These two claims suggest a lesson and a caution for contemporary progressives committed to actualizing goals of equal and effective freedom. The lesson is that progressives should be less afraid of political discretion and more instrumental in their endorsement of constitutional principles and languages. The caution is that the repeated historic inadequacies of redemptive enterprises – whether here at home or as part of global anti-colonial projects abroad – raise doubts about the continuing utility as such of narratives of redemption (be they political or constitutional).

Let me begin by developing what I take to be the lesson of the historical examples. In many ways, Stevens and the most egalitarian among the Radical Republicans were generating in the first months of Reconstruction a vision of Congress as an instrument for exercising what Emmanuel Sieyès famously described as “constituent power.” 73 By this, Sieyès had in mind the sovereign authority that creates and thus precedes any instituted government. Such power was both democratic and legitimate because it expressed the national will, the people as a whole. In his view, government and its constituted powers were justified only to extent that they remained “faithful to the laws imposed upon [them]. The national will, on the other hand, simply needs the reality of its existence to be legal. It is the origin of all legality.”74 At a moment of collective refounding, Stevens sought to employ congressional discretion and military authority as constituent tools for transforming the basic character of American life – to act outside the bounds of ordinary legality in order to regenerate legal norms.

Today, among many progressives (inside and outside of the legal community) the exercise of such discretion is almost always associated with concerns about a usurpatory and “imperial”75 presidency. Not unlike those Egyptian activists who called for fidelity to the existing 1971 Constitution – regardless of its limitations – the thought is that constitutionalism protects the rights of the weak and that discretion enhances the power of despots. Given the legal specter of Schmittian dictatorship and the historical experience of totalitarianism, these fears are not to be taken lightly. In the words of one such progressive scholar, the “arbitrary character . . . of constituent power” must be avoided because it “is where the law ends, and pure politics (or war) begins.”76 At the same time, however, the Egyptian example also indicates that the progressive embrace of constitutional fidelity, as well as related discourses of shared tradition, may have their own pathologies. As the Mubarak regime exposed, instituted processes can themselves be deeply oppressive and, by contrast, the popular and extra-legal discretion of mass constituents can serve anti-authoritarian ends. In other words, depending on the political conditions, constituent power may well be generative and democratic rather than despotic; at the same time constitutionalism and frameworks of constitutional construction can simply promote a coercive rule-by-law.

More relevantly for the American case, the story of Thaddeus Stevens and David Davis indicates that progressive orientations to constitutional faith should be assessed pragmatically. Not only has the constitution-in-practice been riddled with injustice, as Balkin eloquently illuminates, the Constitution’s discursive structures have not been an unalloyed blessing for the freedom struggles of the past. Indeed, there is no reason to believe that although the radical potential of previous movements may have been hindered – at the most crucial moments – by the focus on constitutional narrative, similar fates will not befall future efforts. If the goal of progressives is a transformative and ultimately political one, faith should reside in the ideal of effective and equal freedom alone; this preeminent commitment may require both a politics of constitutional construction as well as one of constitutional rupture (the latter through democratic discretion). In a sense, progressive political faith should view its relationship to traditions, including constitutional ones, strategically – to be asserted when it serves emancipatory purposes and questioned or even rejected when it does not.

Such a call for progressives to be less tradition-bound and more willing to embrace constituent power (not to mention its very real political dangers) comes with a final note of caution. Twentieth century projects of redemption, both revolutionary anti-colonial ones and those grounded in constitutional faith, have all participated in a particular type of emancipatory history. As theorist David Scott writes, these redemptive accounts embrace a narrative structure of “romance.”77 They have presented “narratives of overcoming, often narratives of vindication; they have tended to enact a distinctive rhythm and pacing, a distinctive direction, and to tell stories of salvation.”78 Above all they have posited a future in which individuals can transcend oppression and unshackle freedom from existing modes of subordination – once and for all. Yet, the contemporary moment, both in the U.S. and in the postcolonial world writ large, has been marked by far greater historical complication. Post-apartheid South Africa offers just one telling illustration. The South African struggle embodied a classic story of anti-colonial redemption, complete with a revolutionary re-founding and a fundamental constitutional rupture. Yet, the postcolonial present in South Africa is much more equivocal than straightforwardly redemptive. Although constitutionally premised on racial equality, the country remains riddled with extreme economic hierarchies that are the persistent legacy of apartheid. In a sense, even total revolution and explicit constitutional rejection has not assured a future of salvation. Similarly, here in the U.S., the twentieth century’s great redemptive social movements – on behalf of organized labor, civil rights, and women’s equality – have transformed the political terrain but have also either receded in social power or left us with complex presents, marked by the overlap between formal equalities and substantive injustices. As Scott suggests, the twentieth century romance of redemption and untainted emancipation is now in many ways “a superseded future, one of our futures past.”79

The response among progressive should not be to give up generally on a utopian imagination. But it does suggest the value of binding this imagination to historical narratives of tragedy rather than to those of redemption or romance. By tragedy, I do not mean the notion that “due to some flaw or defect” our political and constitutional frameworks will necessarily commit us to “a disastrous course of action,” one that produces “great suffering and severe punishment.”80 Instead, I mean the idea, certainly embedded in the concept of a tragic flaw, that historical moments are marked by linked and mutually constitutive relationships of freedom and subordination. In describing the tragic in the postcolonial predicament, Scott writes:

[T]ragedy sets before us the image of a man or woman obliged to act in a world in which values are unstable and ambiguous. . . . [F]or tragedy the relation between past, present, and future is . . . a broken series of paradoxes and reversals in which human action is ever open to unaccountable contingencies – and luck.81

Thus, every political period, be it the Civil War, Reconstruction, or the current-day, presents its own hierarchies and dependencies. The goal of progressive action is to uncover those forms of dependence and to strive for liberation from them. But even successful projects of emancipation will produce their own “unaccountable contingencies” and generate new legal and political orders that knit together secured freedoms with emerging hierarchies, as post-apartheid South Africa and contemporary America suggest. This is the paradox of tragedy. It offers a narrative in which the struggle for emancipation is a ceaseless one, requiring an aspiration to utopia but never capable of being completely redeemed in history – as total emancipation is always and permanently beyond reach.

Besides speaking to the complexity of our postcolonial and post-civil rights times, such a narrative of tragedy better addresses the current moment in two ways. First, unlike stories of redemption, it provides a greater bulwark against the inclination to rationalize the injustices of the present, especially by acceding to a Whiggish faith in progress. Redemption stories, as Balkin himself recognizes and critiques,82 have the tendency to read history as a long-term trend toward justice, albeit halting and uneven. At a time when old forms of subordination persist in the U.S. and yet we see sustained backsliding from the very achievements of previous eras, a tragic narrative frontally challenges the complacent willingness to believe that conditions are ‘good enough.’ It does so by reminding us to be on continuous guard against the hidden and unwitting forms of domination embedded in our social practices, even in those practices – like constitutional construction and veneration – that we collectively esteem.

Second, and finally, an adequately tragic sensibility helps progressives to reclaim a space in their political imagination for democratic discretion. The grave problem of past revolutionary agendas (anti-colonial or otherwise) was a failure to appreciate fully the destructive violence generated by radical change. But if constitutional rupture must still be part of the progressive toolkit, an awareness of the tragic has the potential to cabin the worst consequences of discretion. Tragic discourse, by emphasizing the ambiguous nature of any transformative project, suggests its own ethic of political responsibility. Such a narrative makes ever-present the potential costs wrought by legal rupture and compels progressive actors to appreciate the political stakes when breaking from constitutional fidelity. A tragic sensibility demands of progressives both that they aggressively assert emancipatory commitments and that they embrace a judicious political ethics. Ultimately, it imagines an orientation to collective life animated by justice but tempered by the recognition of indissoluble paradox.

#### Political commitments are an ethical imperative – it is impossible to tell in advance whether we will succeed or fail, but refusing to act at all is disastrous

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Lewis Gordon, “2: Re-Imagining Liberations,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 29.

Concluding Considerations

A crucial feature of political commitment is that it is an existential paradox. Unlike moral commitment, which involves doing the “right thing,” political commitment affords no advanced notice or assured principle of verification. Her actions could have produced an arrogant child who is shortly thereafter killed, or a fighting, committed spirit who suffers the same fate. Political commitment requires acting without knowing the outcome and acting for those whom one ultimately will never know. A six-months’ glimpse into the life of the child is not the same as knowing the man he was to become. This insight is similar with regard to political action. No political act offers guarantees save one: it will affect others whom one would ultimately never know. What, then, could one hope for with such action?

The first thing to consider hits the heart of critical diversity. Those who benefit from our actions may be so radically different from us that we may even recoil at the discovery of whom they turn out to be.

Second, those who suffer from our actions may be those beyond our expectations.

Third, the first and second considerations lead to the realization that the epistemic act of trying to imagine the recipients of our actions collapses into the first desire of love, which would be an affirmation of the self. Put differently, it would involve simply positing versions of ourselves into a future whose condition of possibility requires the emergence of people who are both not us and also, possibly, not like us.

Fourth, this means acknowledging, through political commitment, the production of freedom that transcends us. This act of political commitment is simultaneously a manifestation of the second form of love. It offers the paradox of loving, by virtue of action, anonymous generations to come.29

The fourth kind raises the question of building a future, even in the face of circumstances that do not guarantee our having one. In effect, the message, politically understood, is this: learn we hope, but try we must.

#### The alt falls into the same trap as optimism – their presumption of a uniform arc of history is just an excuse to avoid taking responsibility for changing the world we inhabit

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Lewis Gordon, “5: Thoughts on Afropessimism,” *Freedom, Justice, and Decolonization*, Routledge 2021, pp. 77-78.

An ironic dimension of pessimism is that it is the other side of optimism. Oddly enough, both are connected to nihilism, which is, as Nietzsche showed, a decline of values during periods of social decay.17 It emerges when people no longer want to be responsible for their actions. The same problem surfaces in movements. When one such as the Black Liberation movement is suffering from decay, nihilism is symptomatic. Familiar tropes follow. Optimists expect intervention from beyond. Pessimists declare that relief is not forthcoming. Neither takes responsibility for what is valued. The valuing is what leads to the second, epistemic point. The presumption that what is at stake is what can be known to determine what can be done is the problem. If such knowledge were possible, the debate would be about who is reading the evidence correctly. Such judgment would be a priori—that is, prior to events actually occurring. The future, unlike transcendental conditions such as language, signs, and reality, is ex post facto; it is yet to come. Facing the future, the question is not what will be or how do we know what will be but instead the realization that whatever is done will be that on which the future will depend. Rejecting optimism and pessimism, there is a supervening alternative, as we have seen throughout the reflections offered throughout this book—namely, political commitment.

The appeal to political commitment is not only in stream with what French existentialists call l’intellectuel engagé (the committed intellectual) but also in what reaches back through the history and existential situation of enslaved, racialized ancestors. Many were, in truth, an existential paradox of commitment to action without guarantees. The slave revolts, micro and macro acts of resistance, escapes, and returns to help others do the same, the cultivated instability of plantations and other forms of enslavement, and countless other actions, were waged against a gauntlet of forces designed to eliminate any hope of success. The claim of colonialists and enslavers was that the future belonged to them, not to the enslaved and the indigenous. Such people were, in colonial eyes, incapable of ontological resistance. A result of more than 500 years of “conquest” and 300 years of enslavement was also a (white) rewriting of history in which African and First Nations’ agency was, at least at the level of scholarship, practically erased. Yet there was resistance even in that realm, as Africana and First Nation intellectual history and scholarship attest; what, after all, are Africana, Black, and Indigenous Studies? What, after all, are those many sites of intellectual production and activism outside of hegemonic academies? Such actions set the course for different kinds of struggle today.

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