# 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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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 replace the consumer welfare standard with a standard that orients antitrust towards breaking up concentrations of political and economic power, at least increasing prohibitions 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!

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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

#### The settler socialism link doesn’t assume the aff – we’re compatible with indigenous self determination

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Seth Davis, “American Colonialism and Constitutional Redemption,” *California Law Review*, vol. 105, 14 June 2017, pp. 1788-1799, https://www.californialawreview.org/wp-content/uploads/2017/12/6-Davis-34.pdf.

Some strains of religious and political theology treat this sort of skepticism as a necessary feature of redemption. In this register, "redemption" is relational. Applied to constitutionalism, relational redemption aims to transform unjust relationships and asks what any particular constitutional faith means not only for those who hold it, but also for those who hold other faiths.

Redemptive rhetoric, George Shulman has argued, can be dangerous politics. "God's messengers presume there is one right way to view and live in the world," he wrote, which can lead them to treat other faiths as "false prophecy dooming the nation." 237 At the same time, redemption can be relational, in which different communities of faith turn towards history and each other. When it comes to racism, for example, "we too want whites to acknowledge and overcome - why not say repent of and redeem? - a history of racial domination." 238 In that sense, "faith is ubiquitous and political theology is inescapable." 239 But perhaps there can be relational stories of redemption, ones in which different communities of faith "can engage rather than demonize the differences on which their identities depend." 240

For Reverend Powell, recognizing the problem of cheap grace was also a call for relational redemption. Cheap grace in the face of injustice does not disturb "the very societal structures responsible for oppression in the first place." 241 Redemption, by contrast, depends upon whether "the quest for justice brings about salvation and liberation for the oppressed and their oppressors." 242 On this view, redemption is relational; it begins with recognition of the injustice of a relationship and requires a transformation of that relationship.

This relational idea of redemption draws inspiration from relational theories of rights within feminist legal theory. Jennifer Nedelsky, for example, argued for an "understanding of rights as relationship and constitutionalism as a dialogue of democratic accountability." 243 Rights, in this relational approach, constitute (and are constituted out of) particular relationships "of power, of responsibility, of trust, of obligation." 244 Designing rights involves choices about basic values and how law structures (and is structured by) relationships, with lawmakers seeking to foster certain kinds of relationships. 245

To say the state is a fiduciary is to tell a story about the relationship between political elites and those subject to the public power they wield. In Socrates' telling, this story seemed beyond belief: "All of you in the city are brothers," his story went, "but the most precious are the ones fit to rule, because when the god formed you at birth he mixed gold into them, silver into the auxiliaries, and iron and bronze into the farmers and the craftsmen." 246 This is a sacred story of guardians bound to the terms of a public trust 247 and a profane tale in which some citizens dominate others. 248

Today's public fiduciary theorists seek to work this sort of myth pure of its profaneness. 249 Mutual trust and the rule of law, not elitism and paternalism, are at the heart of this modern trust conception. For more than four centuries, however, the trust conception of government has been associated with relationships of European and American imperialism and colonial domination. It seems implausible to think that the association is a mere accident, that this history of fiduciary domination tells us nothing important about the fiduciary conception. And it is beside the point to say that imperialism and colonialism would have been worse without the trust conception. Perhaps it would have been. Even so, the trust conception may perpetuate or foster relationships that we should reject. Historically, the discourse of fiduciary government became "saturated" with "images" of racism and domination, particularly in settler colonial states. 250 The persistence of the plenary power doctrine in U.S. law should make clear it is not easy to split the sacred trust from the profane tale.

"Metaphors in law," Justice Benjamin Cardozo once mused, "are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." 251 Some private fiduciary relationships are patently paternalistic. The law entrusts guardians with authority over their wards' affairs based upon the (purported) incapacity of the ward. Other fiduciary relationships, such as the private trust, entail paternalism because the law directs the fiduciary to decide what's in the beneficiary's best interests. There is a strong argument that fiduciary duties "build a measure of paternalism into every fiduciary relation." 252 The fiduciary metaphor may keep us from focusing on the ways in which the people are not (and should not be) passive beneficiaries of public laws made and enforced by political elites. 253

Where the people are defined as beneficiaries and the state as a fiduciary, perhaps we should expect political elites to assert a "paramount power" 254 to define the law, the right, and the just. Instead of asking why Western colonial governments dominated Indigenous Peoples "in spite of" 255 their fiduciary ideals, we might ask why the trust conception lends itself to relationships of domination.

Three features of the trust conception stand out as particularly conducive to relationships of domination. 256 First, consent need not be the source of public authority, as the law itself may entrust the state with fiduciary authority over a people. This idea of authority by operation of law lends itself to the law of the conqueror unilaterally declaring its own supremacy. In Cherokee Nation v. Georgia, Chief Justice Marshall declared it, and it was so: Indian Nations "occupy a territory to which we assert a title independent of their will … . Their relations to the United States resemble that of a ward to his guardian." 257

Second, under the trust conception, the state's authority is explicable less in terms of what the people can do, but more in terms of what they are incapable of doing. Indian Nations "are the wards of the nation," the Supreme Court reasoned in Kagama, and "their very weakness and helplessness" subjects them to the authority of the United States. 258 The problem, in other words, is that the trust conception lends itself to paternalistic justifications of relationships of domination.

Third, we do not expect fiduciaries to leave their beneficiaries alone. To the contrary, fiduciaries are authorized to interfere in their beneficiaries' affairs. Private trustees, for example, manage the trust property for the beneficiaries. Transposed to the colonial context, this idea has supported policies to restrict Tribal self-government.

Nothing in what I have argued thus far "proves" that it is impossible to tell a story of constitutional law based upon trust or the trust conception of government. 259 But what I have argued should cast doubt on trust law (much less the law of guardianship) as a device for thinking about relationships of mutual respect among self-governing peoples. That's not to deny the "unique obligations" of the United States "toward the Indians" 260 or to call into question the government-to-government relationships among Indian Nations and the federal government. These government-to-government relationships are distinct from the relationship between an individual and the government. But, as public fiduciary theorists have shown, the relationship between state authority and anyone subject to it can be described in terms of a trust. Like private fiduciaries, public officials have discretionary power to act on the interests of others. And like the beneficiaries of private fiduciary relationships, the people depend upon public officials to exercise their discretion fairly and with care. Entrusting discretionary authority to public officials makes the people vulnerable to self-dealing, carelessness, and other abuses of power. For this reason, we might view public officials as fiduciaries who owe duties of loyalty and of care to anyone subject to their authority. 261 There is nothing in the formal idea of government authority as a trust that distinguishes Indigenous Peoples from others subject to government power without their consent. 262 Therefore, the unique government-to-government relationship between an Indian Nation and the United States does not arise from the trust form alone. Instead, we have to explain this unique relationship based on something other than trust law itself.

Such stories of relational redemption cannot be told by "We the People" alone. We the People's veneration of the Constitution, their trust in its institutions, their confidence that constitutional government can be washed of the wrongs it has committed - ultimately, their faith in themselves 263 - cannot by itself transform their relationships with other peoples. Within a multinational and multicultural world, a world in which many people are excluded from "We the People" or choose not to join them, redemption should mean something that's more demanding, more radical, and more important. It should mean sharing stories among "We the Peoples."

C. The Consent of We the Peoples

1. Stories of Relational Redemption

Fiduciary theorists have told a story about colonial rule that focuses on how "Western nations framed their authority to govern territory in fiduciary terms." 264 Other stories of the relationship between settler governments and Indigenous Peoples do not depend upon the fiduciary principles that settler governments invoked to legitimate conquest and colonial rule. Whether founded on human rights claims or Indigenous visions of diplomacy, such stories involve recognition of a "mutual … relationship" 265 between peoples based upon good faith and consent.

To revisit consent in this way is not to tell the same story as traditional social contract theory. Social contract theories range from quasi-anthropological descriptions of the origins of society in agreements among persons in a state of nature to the use of contract as a conceptual device for thinking about what we should demand of each other and the state. 266 Traditional social contract theory points to agreement among rational individuals for the foundation and content of legitimate government authority. This theory influenced - and continues to influence - Americans' story of their constitutional government. American judges, for example, have used the idea of a social contract to justify exclusion, discrimination, and domination. 267

Social contract theory, then, is susceptible to the same objection as the public trust conception of government, namely, that whatever legal legitimacy it purchases comes at the price of legitimating social injustice. Perhaps any story of constitutional government based on contract lends itself to ideologies of domination, not relational redemption. 268 Critical social theorists have argued that the contract conception can exclude as much as it secures freedom among individuals. Carole Pateman, for example, has argued that the original contract includes not only the social contract constituting the state, but also the "sexual contract" through which men assert the right to govern women. 269 Following Pateman's account of the sexual contract, Charles Mills has argued that the social contract also includes a "racial contract" through which whites have justified the exclusion and domination of people of color. 270 Thus, the social contract has served as an ideology of domination, not simply a story of agreement among free and equal persons.

When it comes to American colonialism, moreover, the association between contract and domination is not simply conceptual or metaphorical. The United States acted coercively in many treaty negotiations with Indian Nations. Negotiation can lead to domination if one party does not have "the people and institutions [necessary to] hold their own as equals across the table." 271 Many Indigenous Peoples are renewing and developing the necessary institutions. But any number of "principal-agent difficulties" arise when we think about contracting as a tool of self-government. 272 Finally, in many cases colonial states refused to contract with Indigenous Peoples. Within the United States, where treaty making ended in 1871, 273 there are many Indian Nations without treaties.

One advantage of looking to contract rather than to trust as a metaphor for multicultural constitutionalism, however, is that it focuses us on these difficult questions, rather than on how colonial states justify the supreme power they claim over Indigenous Peoples. 274 Charles Mills has argued that the core of the contract metaphor is the recognition that human choices construct the law and the state. 275 As a doctrinal matter, a fiduciary relationship can exist by operation of law. The United States, for example, has assumed the authority of a trustee by operation of federal law even where Indian Nations have not consented to it. By contrast, as Michele Goodwin has argued, "a social compact exists only when a real social relationship exists. In this way, the party subject to the State's compact must be valued, their contributions respected, and their communities honored." 276

Understood in this way, the social contract is a relationship. It is not a thing, like a piece of paper in a consumer contract. 277 The social contract is not a ritual, repeated every four years in a voting booth, nor a foundation that the Framers built centuries ago and left to posterity. Instead, the social contract is an ongoing relationship between equals in which agreement and resolution of differences in good faith is a goal.

This relational understanding of the social contract has analogues in the common law of contract. Relational theories emphasize contracts as relationships based upon "good faith, best efforts, and reasonable adjustments between parties." 278 One way of thinking about contracts treats them as exchanges between parties who aim to maximize value through one-off market transactions rather than as building blocks of relationships. Relational contract theorists, on the other hand, think that the way to understand contractual agreements is by focusing upon the social relationship between the contracting parties. They reject the idea that we can best understand contracts by focusing upon one-shot deals between strangers who reach agreements in impersonal markets, an idea they associate with classical contract theory. Understanding most contracts requires a thick description of relationships in which "parties expect some form of loyalty" as well as "trust and social solidarity." 279 The difference between relational contract theory and its classical counterpart is not simply one of standards versus rules, though it encompasses that distinction. Relational contract theory, rather, focuses upon fostering ongoing relationships among contracting parties. Otherwise, relational theorists warn, "legal mechanisms are imperialistic and do not function effectively in concert" with the norms the parties have established throughout their relationship. 280 Thus, for relational theorists, recognizing the relational realities of most contracts opens up critiques of existing law and invites new norms of contracting.

Indigenous Peoples have asserted their rights to relationships based upon consent while resisting colonial domination. Sometimes this resistance involves demanding that colonial governments keep their treaty promises. 281 More broadly, as Robert Williams has put it, "so long as indigenous peoples can continue to point out the embarrassing fact that they never consented to" the authority of colonial states, "they will continue to be able to frame a compelling case for their fundamental human rights of self-determination." 282 This case need not depend on a traditional Western conception of the social contract, even if it draws upon that conception for rhetorical and normative force. Before there was a U.S. Declaration of Independence, Vine Deloria remarked, "American Indians were the original proprietors of the continent, the quintessential practitioners of the original social contract." 283 And before there was a story of "We the People," there were stories of many different peoples.

When it comes to North America, one such story holds that "the Trust Doctrine was not the exclusive byproduct of the Western legal tradition brought to North America from the Old World." 284 In the early years of Indian and European relations in eastern North America, Indian and European sovereigns treated each other in fact "as rough political, economic, and military equals." 285 As late as the 1820s, Chief Justice Marshall, the author of the foundational judicial opinions in federal Indian law, "feared the possibility that the Indians would push America into the sea." 286 As equals, Indian Nations offered understandings of international diplomacy that did not depend upon the law of trusts.

For the Iroquois, for example, diplomatic relationships were extensions of kinship. 287 Indians might refer to their European treaty partners as fathers or brothers, with the Europeans "naturally assuming that the father figure represented authority and wisdom in dealing with Indian children." 288 Understood in European terms, the diplomatic relationships between Indians and colonial governments looked like a guardian-ward, or perhaps a parent-child, fiduciary relationship. But Indian kinship terms did not have the same connotations for Indians. It was not uncommon for different Indian Nations in eastern North America to treat with one another in kinship terms without surrendering sovereignty as a ward to his guardian. 289

There are many such traditions of Indigenous diplomacy. Among Indian Nations of the eastern woodlands, 290 for example, treaties were sacred pacts affirmed by wampum. Wampum belts, made of clamshells or glass beads, served many functions, including as gifts and records of intergovernmental agreements. 291 The Gus-Wen-Tah, also known as the Two Row Wampum, symbolized the Haudenosaunee understanding of the intergovernmental relationship of "peace and friendship." 292 Along the wampum there "are two rows of purple" that "symbolize two paths or two vessels," one for Indians and another for non-Indians, "travelling down the same river together," with neither "trying to steer the other's vessel." 293 The Gus-Wen-Tah signifies a relationship of mutual protection and trust, not the submission and vulnerability of a ward to a guardian under Euro-American fiduciary law.

Understood as a "mutual, ongoing trust relationship" between sovereigns, 294 this vision signifies legal and moral protections for Indian self-determination and separatism. Robert Williams has argued that Chief Justice Marshall's opinion in Worcester incorporated Indian understandings of the trust relationship into federal law. 295 In Worcester, the Chief Justice wrote that the "relation" between the Cherokee Nation and the United States "was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master." 296 Treaties between the two nations "recognize[] the national character of the Cherokees, and their right of self-government, thus guaranteeing their lands." 297 On that understanding of Worcester, American constitutional law and discourse has a story of mutual consent among peoples.

Recognizing the rights of Indian Nations to steer their own vessels entails respect for political communities whose ideas of good governance may not be rooted in fiduciary norms of Western law. In this way, a story of mutual consent is not a story of U.S. supremacy based upon plenary power and the Indian trust. Nor is it a story that assumes that U.S. norms and institutions are superior to Tribal institutions and norms. Such differences among legal norms and institutions are not unfamiliar from the American constitutional tradition. After all, the American federal system incorporates differences in legal norms through the varied laws of the fifty states. 298 The federal government may assert the supremacy of federal law, but that does not mean that federal law is superior to Tribal law. 299 Viewing relationships between Indigenous Peoples and colonial governments in terms of Indigenous diplomacy and relational contracts focuses us on mutual obligations and good faith, while not assuming Indigenous and colonial governments are partners that must share the same values.

The idea of relational contracts is not simply a metaphor when it comes to Indigenous Peoples. In many cases, there are "actual contracts" 300 that embody ongoing relationships of mutual respect and good faith. American Indian Nations have looked to treaties as tools of self-government. Under Indian traditions of diplomacy, mutual respect, protection, and good faith are inherent to treaties. Many Indian treaties embody an ongoing relationship of mutual respect and a continuing obligation among peoples to resolve disputes through consent, not conquest. An Indian treaty is not merely a document that memorializes an agreement; rather, it invokes a relational understanding of contract and consent among peoples.

Even though the United States has ceased treaty making with Indians, contracts remain an important tool of self-determination. Indian Nations have entered into self-determination contracts with the United States to provide government services, such as education and health care, to their citizens. 301 Long-term contracting with private parties has allowed Indian Nations to develop their economies. 302 And Indian Nations have entered into agreements to resolve disputes with state and local governments over jurisdictional boundaries. 303

Calls for a resumption of treaty making and government-to-government relationships based on consent are common in American Indian social movements. In November 1972, for example, American Indian activists marched the "Trail of Broken Treaties" to present "Twenty Points" to the federal government. Seven of the twenty demands concerned restoring a consensual, treaty-based relationship between Indian Nations and the United States. 304 More recently, international Indigenous rights movements have called for nation-states to comply fully with the duty to obtain free, prior, and informed consent from Indigenous Peoples, which is codified in the U.N. Declaration on the Rights of Indigenous Peoples. 305 Within the United States, the federal government's failure to live up to that obligation has been brought to national attention with the federal executive branch's authorization of construction of the Dakota Access Pipeline across the traditional territory of the Standing Rock Sioux Tribe, 306 a decision that violated the executive's obligations to take a hard look at the impacts of a pipeline spill on Tribal rights. 307

Metaphors of contract and consent thus capture some of the social reality of Indian Nations' autonomy and self-determination. Indian Nations have persisted not as wards of a colonial guardian, but as nations that negotiate agreements to provide government services, to develop their economies, and to resolve disputes with other governments. The operative metaphor here is not the guardian-ward relationship, or even a relationship in which a trustee makes decisions for her beneficiary. Instead, the metaphor is one of contract. There is a significant risk of romanticizing consent and contract as an alternative to the trust conception. But if we are committed to a constitutional democracy that recognizes Indigenous self-determination, then we need a way of sharing stories that begins with mutual respect and autonomy, not with plenary power and domination.

## K

#### Alt makes the mistake of assuming structures are inevitable – that reifies the structures they try to fight and undermines radical changes to the social order

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Manu Vimalassery, Juliana Hu Pegues, and Alyosha Goldstein, “Introduction: On Colonial Unknowing,” *Theory & Event*, vol. 19, no. 4, 2016, https://muse.jhu.edu/article/633283#bio\_wrap.

Structures and Events

The theorization of “settler colonialism” is indicative of these tensions. Activists and academics have increasingly taken up settler colonialism as an analytic to address the particular ways in which colonialism operates and persists in places such as Canada, Australia, New Zealand, and the United States, as well as Israel/Palestine. To a considerable extent, much of the work that has recently become associated with settler colonial studies has already been underway in Native American and Indigenous studies, as well as other fields including ethnic studies and colonial discourse studies. Our contention is that the particular ways in which settler colonialism has assumed predominance as an analytic risks obscuring or eliding as much as it does to distinguish significant features of the present conjuncture.22 Indeed, we suggest that when settler colonialism is deployed as a stand-alone analytic it potentially reproduces precisely the effects and enactments of colonial unknowing that we are theorizing in this introduction. Approaches to the analysis of settler colonialism, as isolated from imperialism and differential modes of racialization, are consequences of the institutionalization of this work as a distinct subfield, which is claimed and consolidated through analytic tendencies that foreclose or bracket out interconnections and relational possibilities. Settler colonial histories, conditions, practices, and logics of dispossession and power must necessarily be understood as relationally constituted to other modes of imperialism, racial capitalism, and historical formations of social difference.

The key insights of settler colonial studies into the particularity of settlement as a manner of colonial power have also led to a tendency to focus on this distinction as constituting a discrete and modular form or ensemble of practices— such as Patrick Wolfe’s often cited contention that “settler colonialism destroys to replace”23—that can be applied across differences of geography or time. As such, settler colonialism appears as a self-contained type rather than a situatedly specific formation that is co-constituted with other forms and histories of colonialism, counter-claims, and relations of power. For instance, in the U.S. context, settler colonialism as a singular manner of colonialism entirely misses the ways in which the abduction and enslavement of Africans and their descendants was a colonial practice that, while changing in its intensities and modes of organization over time, was co-constitutive of colonialism as a project of settlement rather than a supplement that demonstrates the taking of land and labor as distinct endeavors.

Wolfe’s description of settler colonialism as a structure, and not an event, has by now achieved the status of a truism in analyses of settler colonialism.24 Wolfe’s work has been crucial in bringing further attention to the fact that colonialism is an ongoing fact of life for indigenous peoples more than fifty years after the advent of the so-called era of decolonization. His scholarship insightfully underscored historical continuities in the shifting regimes and policies of settler states in relation to indigenous peoples, and challenged a certain produced ignorance about the “post” colonial character of societies like the U.S., Canada, Australia, and New Zealand.25 Yet drawing an absolute distinction between structure and event, and as a result, discarding a focus on the historicity of settler colonialism, neglects some of the ways Wolfe distinguishes between the binary terms structure/event in the service of further analysis. For example, Wolfe emphasizes how settler colonialism is a “complex social formation” with “structural complexity” that emerges through process.26

When taken up as a modular analytic that travels without regard to the specificities of location or social and material relations, a categorical event/structure binary banishes deeply engaged historical knowledge from the landscape, turning away from historical materialism, devolving into a scholastic debate over identities and standpoints that are reduced to structural essences and divorced from politics or contingency. Emphasizing structure over event also limits the analysis of settler colonialism itself into a descriptive typology, orienting our vision narrowly within the technical perspective of colonial power (in the white Commonwealth countries), away from geographies from below, such as a hemispheric perspective of the Americas, with their multiple and distinct modes of colonialism, thus replicating the conditions of unknowing.27 Foregrounding structure against event might also divert attention away from imperialism. This binary perpetuates taking what Lisa Lowe calls the “colonial divisions of humanity” as given. Situating this compartmentalization as a consequence of imperial formations calls attention to how, as Lowe writes, “The operations that pronounce colonial divisions of humanity—settler seizure and native removal, slavery and racial dispossession, and racialized expropriations of many kinds—are imbricated processes, not sequential events; they are ongoing and continuous in our contemporary moment, not temporally distinct now as yet concluded.”28 If the analytic project is reduced to naming and delimiting settler colonialism as a distinct structure of power that exists in specific places, primarily the settler peripheries of Anglo imperium, we lose focus on the Caribbean and the Americas as the grounds of modern imperialism, abdicating the hard-won horizon of anti-imperialism.

An emphasis on structure over event is symptomatic of the stabilization of colonial unknowing through binaries and schematic modes of thought. As Wolfe writes, “Territoriality is settler colonialism’s specific, irreducible element.”29 However, Wolfe’s cartographic model is that of the frontier, in which “the primary social division was encompassed in the relation between natives and invaders.”30 The frontier is a linear model, a binary opposition between civilization and savagery, reflecting both a colonizing subjectivity and its state form. What socio-spatial imaginaries, and concomitant critical models, might become visible if we thought from other spatial forms, such as circles or spirals, spatial forms that are often more relevant to indigenous epistemologies than straight lines? If we remapped the colonial condition through circular or spiraling forms, what new insights might we gain on the decolonial imperative?

For one, we might be able to better grasp colonial, racial, and imperial simultaneities, as well as positions that do not easily fit into a settler/native binary. As Wolfe writes, “Settler-colonists came to stay. In the main, they did not send their children back to British schools or retire ‘home’ before old age could spoil the illusion of their superhumanity. National independence did not entail their departure.”31 Moreover, to inflect these insights through the lens of negritude produces a considerably more complex set of possibilities, where the verbs come and stay do not carry any simple or easily recoverable trace of agency or consent.32 As Iyko Day writes, “the logic of antiblackness complicates a settler colonial binary framed around a central Indigenous/settler opposition.”33

It may be useful to dissolve the implied divide between structure and event. How would our critical perspective open up if we began to understand (settler) colonialism as a structuring event, an ongoing elaboration of a structure, a suspension of time, tense, and timeliness? In order to interrogate settler colonialism as a unique structuring event or events in a structure of power, close attention to process and relationship, to structures of power as they transform in specific places and times, seems to be a useful approach for clarifying the stakes of decolonial possibility. Marx’s insights on the need for capital (and for individual capitalists) to perpetually reproduce the social relations of capitalism (on an expanding scale) and the vulnerable never given-in-advance character of that reproduction, could be relevant for contemplating settler colonialism as it constantly thwarts and undoes its own internal governing logics. To consider settler colonialism as a structure of failure seems a useful starting point for an intellectual project that proceeds from the impulse of decolonization.34 To bring the critique of imperialism back to the foreground in indigenous-centered critiques of colonialism is to bring back basic questions about the definitions of these terms, and their relation to each other. This is not about discarding analysis of settler colonialism for analysis of imperialism, but instead about entangling them in order to specify historically particular processes and structures.35 To the extent that a settler colonial analytic disavows relationships between settler and congruent modes of colonization, imperialism, and race, the field formation of settler colonial studies runs a risk of capture, breathing further life into shifting and mutable colonial sovereignty claims.

#### The aff is the only way out – changing the social order in spite of its overarching structures is the only ethical option

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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 responsioble 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.

#### Creating a new social world is key – colonialism 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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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

#### That understanding is specifically true in the context of settler colonialism – saying the U.S. is settlerist is analytically useless and doesn’t tell us what we should do in response – the aff alone ruptures the settler past

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Aziz Rana, interviewed by Nikhil Pal Singh, “Universalizing Settler Liberty,” *Jacobin*, 4 August 2014, https://www.jacobinmag.com/2014/08/the-legacies-of-settler-empire/.

Thus, to universalize settler liberty — as I argue for in the book — would require a fundamental restructuring of American life. This is something radical critics themselves perceived at various moments in American history. It would mean thinking about how a democratic principle could actually govern all institutional sites and provide all communities with meaningful economic and political power.

Such an effort would transform, root and branch, settler legacies and living practices: from recognizing Indian sovereignty to fundamentally altering the structure of the economy to challenging the border as a closed barrier. The key thing to note is that such freedom, although emerging from a settler past, would no longer perpetuate settlerism.

This speaks to what I see as the dialectical character of freedom, where the conflict between an initial account of liberty and its opposition produces something new. And similarly, I would add that I do not believe that if we ever “universalized” settler freedom this would mean the end of subordination once and for all. Rather, in keeping with the dialectical vision, even successful projects of emancipation generate new legal and political orders that knit together secured liberties with emerging hierarchies.

In other words, the struggle for freedom is ongoing; it requires an aspiration to utopia but is never completely redeemed in history. This is to say that I don’t believe we can overcome the impasse of settler violence simply by rising above it or thinking differently — we are stuck with our particular histories and the modes of freedom and subordination that constitute our discursive frameworks and institutional practices. These histories open up the possibility of transformation — they give us tools to imagine utopias — but they can never be completely overcome.

This also underscores why my argument is not nostalgic, despite its discussion of the emancipatory dimensions of settler freedom. Those emancipatory elements were grounded in extreme violence. Indeed, one reason why I choose to refer to these arguments as “settler” — with all its fraught implications — rather than simply republican, populist, or socialist is to avoid extricating American economic radicalism from its colonial underpinnings.

This history of extreme violence means that there is no past we need to find a way back to; the settler experience offers no golden age before modern American imperialism. This acknowledgment perhaps distinguishes my views from those of critics like Christopher Lasch or even William Appleman Williams. If anything, for me, the two logics of empire — settler colonization and global police power — cannot be thought of as distinct historical periods. They are deeply interlinked and fold into one another rather than marking clear breaks or ruptures in time.

NPS: Why does this discussion of settler freedom as integral to US conceptions of sovereignty and governance matter for something called the Left today?

AR: I think it’s essential for at least two reasons.

First, a remarkable feature of US domestic conversations about capitalism and economic inequality is the extent to which they are often separated from conversations about the application of US power abroad. As just one example, take the issue of immigration and immigrant rights, a focal point of new labor organizing on the one hand and conservative reaction on the other.

The overwhelming tendency is to present immigration as an issue that begins at the national border, with virtually no attention paid to the particular histories, international economic pressures, and specific US foreign policy practices that generate migration patterns in the first place. The movement of men and women from their homes does not occur in a vacuum and is deeply tied to patterns of colonization and empire that stitch together the Global North and the Global South, as well as to the recent security politics of the US and Europe across the post-colonial world.

On the Left, it’s obviously taken as a truism that capitalism is a global system requiring global political action. But without articulating the mutually constitutive relationship between capitalism and the ongoing politics of empire, it’s very hard to perceive the truly global dimension of economic inequality. Moreover, the separation between what’s viewed as “domestic” and what’s viewed as “foreign” means that it’s equally difficult to recognize and develop solidarities between communities in the North and in the South or to appreciate how seemingly US-centered struggles may be only one piece of a broader global reality.

A key effect is the decline of a self-conscious and committed internationalist sensibility among economic reformers in the US. Thinking of inequality in isolation from colonialism or from exercises of American hegemony essentially leaves uncontested the security ends of the US state, ends that feed back in direct and indirect ways precisely into sustaining corporate power and class hierarchies at home.

It should be noted that during the heyday of the labor movement or of black radicalism, activists very clearly articulated an independent foreign policy grounded above all in the interests of oppressed communities — one that emphasized solidarities abroad (between workers or colonized peoples) and that directly challenged the security state itself. Nothing like this exists at present, and I can’t help but think that one reason is the discursive disconnect between questions of economy on the one hand and those of race, empire, and hegemony on the other.

The second reason for bringing the legacies of settler empire back into our discussions of capitalism has to do with specifically American roadblocks to social democracy. Thomas Piketty notes that the United States in the nineteenth century was marked by far greater white economic equality than European counterparts. But he spends less time on the essentially colonial explanation for this fact.

Throughout American history, the tension between capitalism and both democratic self-government and economic independence has largely been resolved through native expropriation and/or racialized economic subordination. And many of the great American struggles to replace capitalism with a more humane political economy have foundered precisely on questions of membership.

For example, radicals during Reconstruction, the Populist movement, the New Deal, and the long black freedom struggle all emphasized the need to pursue policies that made economic justice both universal and effective. Yet all faced powerful counterforces that defined membership narrowly and reverted to colonial dichotomies of insiders and outsiders, in the process breaking class solidarities and preserving racial and economic privileges. To return to immigration, today we can see this dynamic playing out once more in the context of debates around the legal rights and status of undocumented workers.

To make matters worse, a common American narrative has been to blame oppressed communities for the collapse of “universal” economic agendas. The conventional story of the 1960s instructs us that it is black radicals at the close of the decade that were not universalistic enough — despite the fact that they maintained a persistent and thoroughgoing critique of capitalism — and thus scared away potential white allies, fatally compromising left-liberal change. This blame narrative suggests just how pernicious race in particular and colonial legacies more generally have been for fulfilling social democratic goals.

The politics of exclusion has been a persistent means of cleaving class solidarities and undermining direct confrontation with the prevailing economic order. The collapse of these solidarities has then been blamed on the very radicals — particularly within excluded communities — that were at the forefront of pressing for universal and revolutionary reform in the first place.

The only way that these cycles of retrenchment and blame can be broken in the United States is by fully integrating our conversations about class and race, capitalism and colonialism.

#### Perm do both – even if change is impossible, we should still act to create a new order – 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.

#### Thinking that “decolonization” is synonymous with “rejecting the aff” turns their offense – it produces Eurocentric approaches to reconciliation that undermine indigenous worldmaking

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John Borrows and James Tully, “Introduction,” *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, Eds. Michael Asch, John Borrows, and James Tully, University of Toronto Press 2018, Epub (email [arg5180@gmail.com](mailto:arg5180@gmail.com) for relevant text).

At times the difference between “separate resurgence” and resurgence and reconciliation (or “resurgence-reconciliation”) has been polarized. Disagreements among practitioners can be divisive in both theory and practice. This volume identifies diverse paths that attempt to move beyond this polarization and the disempowering divisions it generates. We accept critiques and refusals of so-called reconciliation models that threaten to reconcile Indigenous peoples to the unjust status quo. We also acknowledge and accept critiques and refusals of certain types of “recognition” that place the state or its imperial networks at the centre of social, political, and economic affairs. Recognition can be a Trojan horse–like gift; state action often operates to overpower or deflect Indigenous resurgence. Indeed, the contributors to this volume have co-developed these critiques and refusals with others. In turning from critique to construction, we distinguish between two forms and meanings of reconciliation and resurgence. The first are those that perpetuate unjust relationships of dispossession, domination, exploitation, and patriarchy. These reconcile Indigenous people and settlers to the status quo, and we strongly reject them. The second are those that have the potential to transform these unjust relationships; these are the kinds of ideas we seek to advance in this book. These are relationships of “transformative” reconciliation. To be transformative they must be empowered by robust practices of resurgence. Robust resurgence infuses reciprocal practices of reconciliation in self-determining, self-sustaining, and intergenerational ways. These unique forms of reconciliation and resurgence coexist in a relationship of gift-reciprocity, as many contributors argue. For example, the creation of resurgent Indigenous Studies programs often (though not invariably) grew from reconciliation efforts with settler partners in university settings. These programs, run by Indigenous scholars, have transformed curricula and teaching in their disciplines over the last twenty years – not only for their resurgent units but also for their partners whose reconciliation efforts were vital to their development. Unfortunately, despite the significant growth of resurgence-reconciliation networks and frameworks, all is not well in the field. Polarizing debates have developed through misunderstandings and/or misuses of the different meanings of resurgence and reconciliation. This volume seeks to clarify this entangled semantic field. Contributors in this book seek to move beyond the polarizing dichotomy of rejectionist resurgence and non-transformative reconciliation to renew the collaborative search for practices of robust resurgence and transformative reconciliation in their work.

From a resurgence-reconciliation perspective, a major cause of recent divisions arose through the adoption of a dialectic drawn from another colonial context. The binary of Third World decolonization and master-slave dialectics of the 1950s and 1960s was pulled into some Indigenous studies circles in ways that reject reconciliation in broad terms. While great value was derived from much of this decolonization literature, in our view, some of the claims made in its name were over-broad and thus were applied in inappropriate ways. Dichotomies and binaries were advanced in a manner that did not always distinguish between contemporary North America, and those of colonial Africa, Asia, and Latin America in the 1960s. Differences in temporal, spatial, and socioeconomic circumstances were flattened and universalized. Ideas were essentialized, and deficiencies in Third World decolonization were often overlooked. Thus, positions rejecting all forms of reconciliation entered the field. This flowed from a binary framing that insisted the decolonizing resurgence of the colonized had to take place in separation from the colonizer. Some followers of this field argued that no good relationship or dialogue with the colonizer was possible, because such encounters were simply thinly disguised struggles over power between hegemons and subalterns. Those who thought otherwise were dismissed as being misguided, even colonized, by “the system.” This criticism spread to critiquing the majority of Indigenous people as being co-opted. Some held that even the participation in workshops of Indigenous and settler participants, such as ours, was to be colonized.4 Entanglement was rejected, and interdependence was discarded by those who took this position. The colonizer/colonized binary grew in different places and was cloaked in many different guises. It was used to justify the “rejection and separatist resurgence” strategy. This generated divisions among Indigenous people (between those accused of being colonized and those who claim to see through the co-optation), among settlers (between those who accept and reject separationist resurgence), and between Indigenous people and settlers, at almost every site of potentially coordinate action in which it is invoked.

The defenders of this colonization/decolonization and friend-enemy vision argue that it provides a deeper critique of the global and local system than the language of resurgence and reconciliation can provide. Thus, they say it has to be embraced by Indigenous people to effect revolutionary resurgence. However, in our view these claims lack nuance. Simple binaries such as these can fatally conceal and obscure a complex intersectional field. Approaches to “reconciliation and resurgence” advanced by the authors in this book largely avoid the essentializing, a priori, absolutist, universalizing terms of separatist resurgence. They recognize that separation may sometimes be needed but that this is only one option among many in the practice of resurgent, transformative reconciliation. Separation, while powerful and sometimes necessary, must be applied with care to the context in which it is inserted. While measured separation may be very appropriate in some settings, it cannot be regarded as a comprehensive strategy that is healthy in all circumstances.

The idea we are advancing of “reconciliation and resurgence” acknowledges our situatedness in overlapping regimes of knowledge, power, and subjectification. It is attentive to situated freedom. This approach claims that we are all differently situated and governed, in both constraining and enabling ways, in relationships of division, patriarchy, imperialism, racism, capitalism, ecological devastation, and poverty. In our view, the failure to illuminate broader and more complex intersectional fields of power was one reason why the colonization/ decolonization binary did not lead the way to Third World liberation. It might even be said that such dichotomies led to deeper forms of neocolonialism, dependency, inequality, and patriarchy in Third World settings. Global neoliberalism has thrived in such settings.5 It is for these and other reasons, which will be explained throughout this book, that there has been a turn to new and renewed ways of conceiving and enacting resurgence and reconciliation in the twenty-first-century world.6

As will be developed in these pages, Indigenous people do not generally accede to the binary world view that spawns separation resurgence.7 This approach does not coincide with many traditional ways of knowing and being. For example, Indigenous contributors to this volume cautiously argue that reconciliation and resurgence are more appropriate English terms for the unique, place-based, kin-centric, and relational ways Indigenous people conceive and enact transformative change, at least in comparison to Western theories of colonization/ decolonization. Their view of transformative resurgence and reconciliation is grounded in Indigenous traditions of regenerating healthy and sustainable, gift-reciprocity relationships. These cycles of interdependent thought and action acknowledge that our connections are both fragile and resilient. They require careful attention to cultivate the positive and root out the negative in the totality of our relationships, with each other, Mother Earth, and our settler neighbours. From within these world views the problem with the simplifying and separating framework of rejection insurgency is that it constrains its adherents. It obscures the interdependent relationships in which they are already situated and from which they derive support. Again, we must stress that not all relationships should be sustained and that there is significant room in our approach for refusing, rejecting, challenging, breaking, or transforming particular connections. We strongly support action that rejects oppressive state and imperial ideas, practices, and frameworks. Yet, seen through the eyes of this book’s authors, it is clear that many of our relationships can be enhanced through robust resurgence and transformative reconciliation frameworks.

The authors in this book envision the combination of robust resurgence and transformative reconciliation as a continuation and renewal of what many of their ancestors have pursued for centuries. The Two Row Wampum Treaty relationship (Kaswentha) combines both self-rule and shared rule; the Royal Proclamation of 1763 (when understood in light of the Treaty of Niagara in 1764) further recognizes independence and interdependence in Indigenous–settler relationships. Many Indigenous understandings of self-determination are often internally related to declarations of interdependence, in contrast to Third World declarations of self-determination as disconnection and independence.8 As we see throughout this volume, this complementary vision of independence and interdependence also includes the interdependence of human partners on the ecological, gift-reciprocity relationships of the living earth that sustain all life.9 With this long and continuous history in mind, we argue that “separate resurgents” must be careful not to misrepresent recent and current protests as exclusive examples of their project. Resurgence has often been combined with demands for transformative reconciliation in contemporary political life through nation-to-nation negotiations, Idle No More activities, anti-pipeline protests, environmental activism, alliances such as Standing with Standing Rock, and so on.

In practice, independence and interdependence have characterized Indigenous–settler relationships for centuries, for good and ill.10 The attempt to improve these relationships by pursuing “resurgence and reconciliation” is not a linear process. Mistakes are often made, and setbacks are legion. Trial and error accompanies any process that recognizes the messiness of political life. When universal answers and approaches are taken off the table, we are left to muddle our way through with less than perfect information and frameworks. In these circumstances we must variously rely upon and resist one another since God, philosopher kings, and grand theories cannot be counted on to deliver us from ourselves. Contestation, agreement, rejection, and reformulation are constantly before us. These are best deployed when they draw upon robust resurgence and transformative reconciliatory practices.

Since we cannot depend upon a fusion of horizons, we are left to engage in endless forms of talking, non-violent contention, and working with good and bad neighbours en passant, as difficult and challenging as this has always been. Since this volume is assembled on the northwest coast, it is worth noting that this is precisely what a formidable coalition of First Nations and allied settlers, assembled in Kam-loops on 25 August 1910, recommended in their submission to Prime Minister Laurier in what is now known as “The Laurier Memorial.”11 This advice has been followed and forgotten through the years, yet we argue that it must once again be resurrected to help guide practices of resurgent reconciliation outlined in this book.12 The questions that follow from this analysis are: What are genuinely self-determining practices of resurgence and transformative forms of reconciliation today, and how are they distinguished from non-robust and non-transformative practices and relationships? This is not only a theoretical question, but a practical one that can be answered only through intergenerational trial-and-error and apprenticeship: that is, through practice and examples. The contributors to this volume respond to this general question through various examples and from various perspectives.

As we mentioned above, the first task is to clarify the various meanings of resurgence and reconciliation in the contexts in which they are being used. As should be clear, we do not pose simple solutions. This is a complex field, and we do not identify a single way of robust resurgence and transformative reconciliation. Nor do we identify a single definition of these terms. Rather, we see an intricate field of overlapping practices and corresponding meanings of reconciliation and resurgence; some are good, and some are harmful. Others are recent, and some are ancient, woven together in complex ways in language, thought, and practice.

Accordingly, the skill required to understand our way around this field is akin to the complex intricacies of cedar basket-weaving and braiding sweetgrass. It requires attentiveness and attunement and must move beyond the simplistic models and metaphors standardly used to misdescribe and dominate the field from one perspective or another (even the metaphors of weaving and braiding have their limits). Yet the kinship we are describing should not be surprising or discouraging. Weaving and braiding are always more than physical activities. Good apprenticeships must focus on both art and craft. Good teachers and wise students see their engagements as moving beyond the materials that lie before them. Relationships are horizontal, vertical, twisted, and three-dimensional. Layers of meaning and ambiguity reside in any system of instruction and practice, and they embrace the social as well as the physical activity of construction. For ancient braiders and weavers, this predominately female apprenticeship relationship took practitioners deep into the entanglements of community life. It engaged the various meanings, organizations, and structures at play in the material and social world. Working with roots, branches, fibres, and filaments was always a creative enterprise, requiring improvisation and a deep knowledge of patterns, impressions, prototypes, and conventions – in the human and natural world. Applying these skills to baskets and to life was a constant work in progress. Knowing how to best construct vessels to effectively transport water, seeds, soil, or life is ultimately a human activity. This requires that we acknowledge both the conservatism and innovativeness that mark our species.13

How, then, do we, as participants within this complex field, come to understand the practical meanings of reconciliation and resurgence as they are used in various practices, relationships, ways, and contexts? The answer of the contributors to this volume involves abandoning the illusion that it is possible to stand above the field and, from this transcendental view from nowhere, define the essence of these terms – the necessary and sufficient conditions of their application in every case. Rather, like learning any complex vocabulary, it is a matter of finding one’s way in the dense forest of uses and the activities into which they are woven. This consists in listening carefully, asking questions, using the terms oneself, always listening and speaking truthfully, making mistakes, and learning from them. Then, through practice, gradually learning to use the terms as others use them, but also to enter into contests over different uses with others in a self-critical way, and to advance proposals for their refinement, revision, or transformation that are understandable and responsive to others.

In this way of learning one’s way around life’s labyrinth, participants listen carefully to what others are saying. They then ask questions such as, Who is speaking, and from what standpoint and perspective in the field of power and knowledge? For whom do they claim to speak, and on what grounds? What aspects of the field does their use of these terms reveal, and what aspects of the field does it conceal? What is the context in which this speaker’s usage makes sense, and what are its strength and weakness? What do others say in response? Are these responses respected by the speaker, and does she or he take them into account in revising their own usage? The talking stick is then passed to another participant and others tell their story of reconciliation and resurgence in their way and from their standpoint and world view. Questions are raised and responded to. The talking stick is passed to the next participant, and so on and on.14

By listening carefully and asking and answering questions truthfully in turn, participants learn or are reminded that it is illusory to presume that their views are the comprehensive view of the field. They are moved around to see the complex field they inhabit from the diverse perspectives of fellow inhabitants. Then, by means of exchanges of comparisons and contrasts, they begin to see the strengths and limits of the different meanings, as well as the extent to which various meanings share features. Engagement in these exchanges also exposes the limits of one’s own view and makes possible the self-critical task of accepting the epistemically humbling insight that we need each other’s perspectives in order to understand the complex world we co-inhabit. This difficult reciprocal transformation of how we understand ourselves and others enables participants to understand the meanings of reconciliation and resurgence. And this dawning reciprocal, mutual understanding of the forest of overlapping meanings enables participants to begin to propose, discuss, and negotiate what reconciliation and resurgence might mean in working and living together in peace and friendship.

When concrete situations are critically examined in this dialogical way within the complex field of unequal power and scales, the best strategy in specific circumstances often can be refusal. However, the question then arises as to the most appropriate ways and means of refusing, for the ways always deeply influence the end. Is it to refuse with anger, hatred, and violence, or with the courage of the peaceful warrior and her way of non-violent contention, embodying goodwill and oriented to peace and friendship? 15 So this whole way of being resurgent and reconciliatory in thought and action is carried on as the participants move forward and pass it on to the next generation.

Learning how to use the words reconciliation and resurgence in this intersubjective and interdependent dialogical way is akin to Indigenous storytelling. It is also said to be the way good treaty negotiations were begun in the early contact period. It was acknowledged in the Royal Proclamation of 1763 and exemplified in the Treaty of Niagara in 1764. Through lengthy exchanges of stories of where each other was coming from, how each partner saw the difference at issue, and how each saw the way of reconciliation, they came to be of one mind. “One mind” did not seem to refer to complete agreement, but to understanding each other, holding all views in tension. Then reconciliation negotiations began. So this form of dialogue can be seen as a pathway of and to reconciliation. As Asch characterizes it from a settler perspective in chapter 1, it consists in coming to enough of an understanding to take small steps forward in building relationships with those already here.

#### Their ethical claims are circular and prescribe endless violence – claiming entitlement to land due to “original occupancy” reinscribes the colonial logic they criticize

Waldron 07

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All this has been understood and argued through by theorists of First Occupancy since John Locke's time. We know that Locke felt it necessary to qualify his version of the Principle of First Occupancy with the condition that there be 'enough and as good left for others' after the occupation.3s And the formulation and reformulation of this 'Lockean proviso' have seemed essential in the modern discussion of theories of this sort. No one now that I know of in the theory of property is willing to argue for a First Occupancy principle that is not qualified in this way, re and very few are willing to deny that this proviso may also call one's holding into question at a later time, when circumstances change. In brief it is well understood in the literature on property that First Occupancy cannot stand on its own to legitimate disproportionate possession of land by one people to the exclusion of others who have no place else to go, simply because the former people came on the scene first. And I guess that is my point. This has all been thought through, in a complex and important literature, but it is the bare Principle of First Occupancy that gets seized on opportunistically by defenders of indigenous rights in a way that is completely impervious to these details and qualifications.

What I am saying is that people need to be a little more careful about the type of property theory they implicitly buy into when they privilege indigeneity. Simple slogans like 'First come, first served' and 'We were here first' have never been particularly attractive sentiments in the history of property theory, and they become no more attractive by being associated with revulsion from historic injustice.ar They have often been associated with righteous indifference to others' interests, indifference even to others' needs, as people seek to retain possession of resources purely on the basis of historic priority. Since 1974, we have had the benefit-if that is the right word-of having a fully worked theory in front of us, based on exactly these intuitions, in the forms of Robert Nozick's theory of historical entitlement,a2 and for more than ten years after the publication of Nozick's book, the advantages and disadvantages of theories of his kind were comprehensively discussed by social and political philosophers. True the theory presented in Anarchy, State and Utopia was radically individualist in flavor, organized around the idea of absolute individual rights, whereas in the present context we are talking about the rights of communities or whole peoples. But as Nozick recognized, the logic is basically the same, and so are the difficulties.a3 In both cases, people who may have an interest in resources, for example people who may need to make use of them, are being excluded simply because they were not in the right place at the right time. I guess in the end any theory of property is going to have this sort of consequence: property is almost always exclusive in some regard, and the right to exclude is generated along with other property rights by contingent events. But just for that reason, great care needs to be taken in specifying what the contingent events are that give rise to these exclusive rights, and in specifying how they may be conditioned by circumstances. The most plausible theories of historical entitlement do this with some sort of Lockean proviso; but as we have seen that is exactly the sort of device that is likely to cast most doubt on simplistic claims of entitlement based on pure indigeneity.

Once we recognize that First Occupancy does raise serious problems of exclusion and that it does have this potential for a curious imperviousness to latter-day circumstances, then we can begin to appreciate the dangers of any simple-minded application of it or of a concept of indigeneity founded on it. Quite apart from the inherent creepiness of its underlying legitimism, there are considerable dangers in exposing modern distributions of power and property to the arcane details of recondite historical and prehistorical inquiry. For example:

recognition of special rights and entitlements for having been the earliest or original occupants might spur and legitimate chauvinist claims all over India. ... Claims to historical priority already feature in some 'communal' conflicts and incipient chauvinist movements abound, as with the pro-Marathis, Hindu-nationalist shiv Sena party in Maharashtra. In effect, if some people are 'indigenous' to a place, others are vulnerable to being targeted as nonindigenous, and groups deemed to be migrants or otherwise subject to social stigma may bear the brunt of a nativist 'indigenist' policy. aa

These dangers are not aberrations. They are part and parcel of what First Occupancy inquiries, for that principle itself purports to license some people, on grounds of historical priority, to repudiate and marginalize the claims of others. First occupancy looks all very well when one considers only that the very first occupants did not have to dispossess anyone else. But if having established their occupancy, they hold the resources exclusively against everyone else in a way that is impervious of the needs of newcomers, then there is a very grave moral danger.

1.7. IS THAT ALL THERE IS?

Some will say that the account I have given is excessively analytic-picking apart the notion of indigeneity, and confronting it with this crude dilemma: either an Established order claim, which precludes any radical reversionary remedy, or a First Occupancy claim, which is both inherently objectionable and anyway historically precarious. What could be better proof, my critics will say, of the proposition that the analytic techniques of Western political philosophy are out of place in this area and that 'liberal arguments are ... unable to comprehend what is distinctive about indigenous claims to land and self-government'. 45

Maybe they are right. Or maybe I should turn the point around and say that, if the discourse of indigeneity really is incompatible with the conceptual structure of Western political philosophy, then what are the aficionados of indigeneity doing appropriating principles like First Occupancy and Established Order from John Locke and Hugo Grotius? We cannot have it both ways. If we want to make indigeneity respectable with these venerable principles of natural law, then we have to also be prepared to buy into all their difficulties, and face up to them responsibly.

If, on the other hand, indigeneity is a sui generis notion, as the Canadian theorist James Tully has argued, generating a set of claims that, in Tullv's words:

do not derive from any universal principles, such as the freedom or equality of peoples, the sovereignty of long-standing, self-governing nations, or [even] the jurisdiction of a people over land they have occupied to the exclusion and recognition of others peoples since time immemoriala6 then it is difficult to know what to say. It cannot be that discussion is over as soon as someone mentions the word indigenous and associates a set of claims with it. Such claims are not self-justifying. They are supposed to be heard and understood, and subject to reason and criticism and examination, on both sides of the divide.

I am aware that my discussion here is far from exhausting the debatable content of indigeneity; I said that at the beginning. I am aware, too, that the concept does have an ineffable, almost mystical element, which is difficult to fathom. Is it fair to say, as Bill Oliver says, that'[t]he notion of indigenousness often leads. . . to the ascription of a timeless and sacred quality to what was simply prior occupation', a merely 'rhetorical heightening of the unexceptional fact of having been here first'?47 It may be an unexceptional fact; but what I have been doing in this chapter is trying to explore some of the principles in our tradition that might make it significant. And the conclusion I rest with is not the mundaneness of the question 'Who was here first?' but some sense of its difficulty and danger. There are places in the world-India is one, perhaps Bosnia is another, Israel/Palestine is a third, as various places in Africa provide a further and distressing set of examples-places where making that the crucial question is a deadly and vicious ingredient in social and political pathology. These frightful situations are too distant for those to worry about who talk most confidently of the rights of indigenous peoples. For me, however, there are places closer to home-Fiji, for example-where insistence on the question Who was here first? has already done great harm. The difficulties, the harm and the dangers may be less apparent in Australia, New Zealand, Canada, and the United States; but if we are seeking to buy into the general discourse of indigeneity then we had better be aware of the volatile substance we are playing with.

#### Remedying dispossession with property reinforces colonial logic

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(David and Julian, “‘Being in Being’: Contesting the Ontopolitics of Indigeneity,” The European Legacy, January)

Dispossession and Indigenous Agency

The appropriation and occupation of indigenous lands, the dispossession of indigenous peoples, including notably, but not exclusively, the Palestinians, has led not simply to arguments for the return of those lands to their original owners but also to the articulation of the experience and condition of dispossession itself as a basis on which to theorize political subjectivity. In terms of the will to combat liberalism and liberal theories and practices of subjectivity this focus on the problem of dispossession is understandable. As is well documented, liberal arguments dating back to the seventeenth century concerning the nature and right to property, especially the conditions for the exercise of the right to claim ownership of land, were fundamental to the colonial project and “gigantic process of expropriation” to which indigenous peoples were subjected.10 Colonizers, in other words, would not have been able to justify their projects without the underlying theories of property that served to legitimate the acts of dispossession of indigenous peoples.

Of all the theories of property it was John Locke’s theory that has proved the most influential in legitimating the colonial dispossession of indigenous peoples. Locke’s central claim was that only those who till the soil of the land on which they live, and improve, cultivate and develop it, can claim the right to own it. The distinction between those who cultivate the land and those who merely live off it thus provided the rationale for dispossessing indigenous peoples of the right to their land.11 This distinction concerns not simply the relationship of a people to a particular land but its relationship to nature as such. Is the people in question one that has transcended nature and through its development of the soil become its master? Or is it a people that lives simply in subordination to nature, as other animals do, living off the land without improving it? These are the questions that underlie the Lockean theory of property that provided the basis not just for the dispossession of indigenous peoples of the lands on which they lived, thus denying their right to those lands, but also the racist reasoning that in turn legitimated the long history of violence against them. No wonder then that the supposedly postliberal theories of political subjectivity today involve serious reflection on the nature of dispossession itself.

This postliberal approach is explicitly and forcefully critiqued in Judith Butler and Athena Athanasiou’s 2013 Dispossession: The Performative in the Political. They conceive dispossession both as an act, “as one way that subjects are radically de-instituted,” and as an attribute of the subject that offers a counter-movement to the forces of dispossession. Butler and Athanasiou contest the histories and continuing realities of dispossession by addressing the deeper terrains of its subject-formations. The problem they identify lies both in the right to dispossess and in its assumption at the heart of the liberal subject. This assumption, which is crucial to the distinction between colonizing and colonized subjects, was the notion that the colonizers had transcended nature. Butler and Athanasiou seek to avoid any avowal of a subject that “possesses itself and its object world, and whose relations with others are defined by possession and its instrumentalities” in the struggle against regimes that dispossess indigenous peoples. “Prizing the forms of responsibility and resistance that emerge from a ‘dispossessed’ subject,” they underline their awareness that “dispossession constitutes a form of suffering for those displaced and colonized.” Their gesture of solidarity with the peoples who have been historically dispossessed is accompanied by a normative gesture that signals the need for constraint on the part of the indigenous lest they seek recourse to the forms of possessive individualism that the authors otherwise identify with colonizers: “How to become dispossessed of the sovereign self and enter into forms of collectivity that oppose forms of dispossession that systematically jettison populations from modes of collective belonging and justice” is thus the question they raise.12

Likewise, it is the question of how to oppose forms of dispossession in ways that function

doubly to produce dispossessed forms of subjectivity.13 Too many social and political struggles against dispossession are thought to recuperate the same logic of possession that accounted for the original dispossession from which the struggles in question emerged. As Libby Porter argues, “the social field of rights-based struggle becomes stuck in a mode that seeks parity only within the frame of liberal ‘possessive individualism’. Rights under this conception are a bundle of things that can be possessed, held, alienated and exchanged, and express the positionality of a possessing unitary subject.”14 The project of liberalism—not just dispossessing peoples of their lands for liberal development, but reconstituting those peoples as liberal—requires that they too partake in the logic of possession, becoming themselves possessive subjects, claiming rights to property and procedures consistent with their liberalization. This invitation, to become possessive, to partake in the logic of possession, and to emerge as fully-fledged liberal subjects, is one that has to be refused.

This invitation, however, as we have known at least since Frantz Fanon’s The Wretched of the Earth (1961), is not what it seems to be. One cannot transition from colonized subject to liberal subject without conceding to one’s subjugation to the colonial schema itself. The sustainability of colonial power depends on the capacity to transform the colonized population into subjects of imperial rule.15 Thus the liberation from colonial subjugation requires the colonial subject to wage war on that schema itself.16 Embracing the logic of possession cannot work, therefore, as a mode of resistance to liberal colonialism. It does not work to produce justice even in the most naive sense. In situations where people have been dispossessed of the lands on which they lived, or as is often the case nowadays, have been displaced from one place to another, the ability to come into possession of another plot of land or place simply cannot compensate for their loss: “There is no genuine space in compensation payment calculus to attend to the loss and grief of a neighbourhood abandoned, the bulldozing of a home, the erasing of memories or the shattering of lives,” as Porter argues.17

#### Futurity is an effective frame for indigenous struggles --- their critique ignores the history of resistance.

Kuwaada 15

Bryan Kamaoli Kuwada, PhD Candidate in English, University of Hawaiʻi at Mānoa. “We live in the future. Come join us.” Ke Kuapu Hehiale (a group of indigenous Pacific and allied scholar/poet/activists). April 3. https://hehiale.wordpress.com/2015/04/03/we-live-in-the-future-come-join-us/.

It could not have been clearer from the words and the actions of the people up on the mauna and those standing in solidarity with them that they are concerned with nothing more than the very future of our world, our islands, and our people. Yet in boardrooms and newspapers, social media and overheard conversations, they have already been accused of “living in the past” or even of “wanting to keep Hawaiʻi in the Stone Age.” In fact, in an article on an earlier blockade to stop the Thirty Meter Telescope this past October, a science writer for the New York Times connected the action on the mauna with the repatriation of Native American burials from museums, and lumped them all together as an anti-science “turn back toward the dark ages.” Now, as much as I am devastated and inspired by what is going on up on the mountain one hundred and eighty-five miles away, this is not a post about Mauna a Wākea, because I am a malihini to that place and that issue, and can only say that I stand in support of our steadfast koa in those rocky heights.

What this post is about is how any time Hawaiians—or any other native people, for that matter—come out in force to push for more respect for our culture and language or to protect our places from this kind of destruction, we are dismissed as relics of the past, unable to hack it in the modern world with our antiquated traditions and practices. Though the very things that people say they love most about Hawaiʻi are actually what Hawaiians and their allies have been trying to protect for decades, we are still considered nothing more than speedbumps slowing everyone down on the road to progress. We are even smugly condemned as hypocrites for daring to use smartphones and social media and cars or any kind of technology in our activism, because somehow asserting ourselves as modern, innovative, future-looking native peoples does not jibe with the image of living fossils that the rest of society seems to have of us.

Yet remembering the past does not mean that we are wallowing in it. Paying attention to our history does not mean we are ostriching our heads in the sand, refusing to believe that the modern world is all around us. We native peoples carry our histories, memories, and stories in our skin, in our bones, in our health, in our children, in the movement of our hands, in our interactions with modernity, in the way we hold ourselves on the land and sea. Sometimes people see themselves implicated in the injustices and abuses we wear so clearly on our selves, and it makes them uncomfortable. They see a queen deposed and held prisoner in her own palace. They see children taken away from their tribes to abusive boarding schools, shorn of their hair, and made to refuse their native language. They see people and animals used as guinea pigs for nuclear experiments, the only outcry coming from those concerned about the animals. It makes them want to look away and ignore us. It makes them tell us to stop showing it to them. They are the ones who want us to only be living in the past, so that their pain can end.

But we don’t carry only pain, we carry connection. Whenever we resist or insist in the face of the depredations of developers, corporate predators, government officials, university administrators, or even the general public, we are trying to protect our relationships to our ancestors, our language, our culture, and our ʻāina. But at the same time, we are trying to reawaken and protect their connections as well.

That short-sighted model of “progress”—that we seem to be standing in the way of—hinges upon all of us, all of Hawaiʻi’s people, all of the Pacific’s people, all of the world’s people losing connection to land, to sea, to other human beings. The less you feel these connections, the easier it is for you to be convinced that unrestricted development is the highest and best use of land. That kind of progress means the University of Hawaiʻi and its international partners justify building on Mauna a Wākea by pointing to permits and documents that they have secured rather than any real sense of kuleana. That progress means farms exploit migrant labor and then label their products as organic and sustainable. That progress means Freeport McMoRan and Rio Tinto brag about the amazing knowledge it took to build the largest copper mine in the world in the mountains of West Papua but insist that they don’t know how to keep it from polluting the entire Aghawagon River ecosystem. That progress means our state tries to legislate homeless people out of existence because they are an eyesore for tourists but do nothing about the structural inequalities that force them to live on the sidewalks of Kakaʻako and in the bushes of Waiʻanae Boat Harbor. All of these things done in the name of rootless progress show (un)surprisingly little care for trying to truly progress and create a future that we all want for the coming generations.

And when you see the possibility of “progress” in this more connected way, you see that we are actually the ones looking to the future. We are trying to get people back to the right timescale, so that they can understand how they are connected to what is to come. One of the urgencies for the construction company trying to break ground for the telescope on the mauna is that they have a limited time in which to execute the contract. But we are operating on geological and genealogical time. Protecting the ʻāina, carrying on our traditions, speaking our language, and acting as kahu for our sacred places are not things measured in days, or weeks, or even years. This work spans generations and eras and epochs.

Our genealogies are a backbone stretching to the very inception of these islands, and when we understand our genealogy, we know our origins, where we have been. We always have our ancestors at our back. That certainty gives us a wider possibility of movement, a more supple way to navigate through the world. Standing on our mountain of connections, our foundation of history and stories and love, we can see both where the path behind us has come from and where the path ahead leads. This connection assures us that when we move forward, we can never be lost because we always know how to get back home. The future is a realm we have inhabited for thousands of years. You cannot do otherwise when you rely on the land and sea to survive. All of our gathering practices and agricultural techniques, the patterned mat of loʻi kalo, the breath passing in and out of the loko iʻa, the Kū and Hina of picking plants are predicated on looking ahead. This ensures that the land is productive into the future, that the sea will still be abundant into the future, and that our people will still thrive into the future.

This is the future we are leading the way to, the future we are going to live in, the future our ancestors fought for, the future we still fight for.

Come join us.

#### And, irrespective of the truth value of their theory, their frame is bad – undermines indigenous agency

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Sheryl, “The Pessimism Traps of Indigenous Resurgence,” Chapter 10 in *Pessimism in International Relations*, Eds. Stevens, T., & Michelsen, N., Palgrave)

Despite all of these activities designed to re-write the relationship between states and Indigenous peoples, some high-profle critical Indigenous political theorists reject all state overtures towards reconciliation and take extremely pessimistic approaches towards future Indigenous-state relations. They advocate that Indigenous resurgence through a return to Indigenous land-based forms of governance is the only path to decolonisation. I argue that while resurgence school theorists are strong advocates for Indigenous nations and bring focus and clarity to a set of issues about power structures and dynamics, they are all caught in the same set of three ‘pessimism traps’ that unnecessarily limit their capacity to contribute to improved Indigenous-state relationships. These pessimism traps emanate from a reliance on Fanonian revolutionary thought and a problematic application of Fanonian theory from French-colonised North Africa to an entirely different context in the English-speaking settler states. Finally, I argue, these pessimism traps are diametrically opposed to the work and vision of Indigenous organisations who have been working on the ground for decades to assert Indigenous nationhood both domestically and internationally, in ways that often assertively and creatively challenge and shift the existing system of sovereign states. In sum, because the resurgence school remains trapped in a pessimism box of its own making, it remains signifcantly out of step with Indigenous movements and actually risks harming their efforts to advance Indigenous self-determination in creative and innovative ways.

Pessimism Trap 1: A Clear Demarcation of Indigenous Individuals into Only Two Categories, ‘Authentic’ and ‘Co-Opted’

For Indigenous resurgence theorists, these two categories are the only possibilities, and there is no grey area in-between. In their view, Indigenous peoples are co-opted if they hold elected offce, make land claims or economic development agreements with governments or industry, or even sign treaties. Furthermore, co-opted Indigenous peoples are so co-opted, that they do not even recognise how they are being used and colonised by the state and its private-sector partners. On the other hand, authentic Indigenous peoples live on their traditional lands, speak their Native languages, practice their culture and govern themselves in traditional fashion. They are the only ones that have successfully resisted the overwhelming forces of colonisation and its powers of cooptation, and the only ones with the power to do so into the future.

In his 2005 book, Wasáse: Indigenous Pathways of Action and Freedom, Taiaiake Alfred calls on the original people, what he calls Onkwehonwe in the Mohawk language, to unify in resisting the colonial structures that continue to oppress them.5 Relying on warrior imagery in the Mohawk tradition, Alfred confronts Indigenous people to recognise Western domination in our communities and resist it. He argues forcefully that Indigenous peoples have become overly complacent on, and even dependent upon, Western social, economic and political structures. He calls for a resurgence in Indigenous spirituality and political structures in Indigenous communities. As he sees it, a strong Indigenous warrior is not one that necessarily engages in war and violent resistance but, rather, is one that shows real courage by living a daily life grounded in the spiritual teachings and practices of our ancestors. The decolonising revolution he calls for is rooted within the peaceful resurgence of traditional spirituality and governance. As he writes, ‘There are people in all communities who understand that a true decolonization movement can emerge only when we shift our politics from articulating grievances to pursuing an organized and political battle for the cause of our freedom. These new warriors understand the need to refuse any further disconnection from their heritage and the need to reconnect with the spiritual bases of their existences’.6 While at frst glance, this book represents a powerful and compelling call to action by Indigenous communities and leaders, a closer examination reveals all three pessimism traps in play throughout the text .

Alfred draws a sharp line between authentic Indigenous approaches and co-opted ones. As he puts it, ‘Not all of us have been conquered. There are still strong Onkwehonwe who persevere in their struggle for an authentic existence and who are capable of redefning, regenerating, and reimagining our collective existences’.7 Yet, he warns, ‘The colonizers stand on guard for their ill-gotten privileges using highly advanced techniques, mainly co-optation, division and when required, physical repression’ and ‘with its massive resources, the state can co-opt leadership and movement successes’.8

Furthermore, Alfred notes, the authentic Indigenous peoples and leaders are no longer the majority, as the co-opted ones seem to occupy most of the leadership roles in organisations and communities. Lamenting the constant temptations for co-optation on offer, from land claims agreements, to casino capitalism, to chief and council salaries, Alfred writes, ‘Working for a cause that has indigenous integrity means sacrifce. …This is the reality of an authentic indigenous existence in political terms. And, evidently, in our communities today, there are only a few people who are convinced that taking on the psychological and fnancial burden of being really indigenous is worth the fght’.9

Similar patterns appear in Alfred’s follow-up 2009 book, Peace, Power, Righteousness: An Indigenous Manifesto. 10 In this work, Alfred walks the reader through Indigenous values, weaving a thesis that a new kind of Indigenous leadership, characterised by the resurgence of Indigenous forms of self-determination, is the only way to resist colonialism and preserve what still exists of Indigenous culture and lifeways today. In a Fanonian spirit, he challenges Indigenous peoples, and particularly leaders, professionals and academics, to be aware of how colonialism has impacted them and their communities on every level, including and especially, psychologically. He challenges Indigenous leadership and communities to recognise these multiple layers of colonialism in current contemporary practice, and to resist them.

As in his earlier work, Alfred divides Indigenous peoples, communities and leadership into two stark categories: authentic and co-opted. Indigenous leaders, he says, either actively resist, or they co-operate with the state. When they co-operate with the state, they ‘rationalize and participate actively in their own subordination and the maintenance of the Other’s superiority’ and therefore become co-opted.11

Further, he sees that as states have moved away from overt violent control of Indigenous communities, co-option has become the preferred method of control and subordination:

The fact is that neither the state-sponsored modifcations to the colonial-municipal model …nor the corporate or public-government systems recently negotiated in the North constitute indigenous governments at all. Potentially representing the final solution to the white society’s ‘Indian Problem,’ they use the co-operation of Native leaders in the design and implementation of such systems to legitimize the state’s longstanding assimilationist goals for indigenous nations and lands.12

One of the deepest problems, according to Alfred, is that co-opted communities, leaders and professionals do not often even realise that they are, in fact, co-opted. Co-option, he says, ‘is a subtle, insidious, undeniable fact, and it has resulted in a collective loss of ability to confront the daily injustices, both petty and profound, of Native life’.13 As a case in point, Alfred engages in a substantial discussion of how the concept of sovereignty itself is Western in focus and therefore, when Indigenous leaders advocate for it, on behalf of their nations and communities, they are unwittingly engaging in a politics of co-optation. ‘Shallow-minded politicians’, Alfred writes, ‘are unable to grasp that asserting a right to sovereignty has signifcant implications’. When they assert a claim to sovereignty but not to resist the state itself, ‘they are making a choice to accept the state as their model and to allow indigenous political goals to be framed and evaluated according to a “statist” pattern’.14 Another prominent member of the Indigenous resurgence school, Glen Coulthard (Yellowknives Dene), was mentored by Taiaiake Alfred and their common philosophy is immediately apparent. As Alfred writes in his foreword to Coulthard’s 2014 book, Red Skin, White Masks: Rejecting the Colonial Politics of Recognition, ‘Coulthard is talking about rising up, …about resurgence and the politics of self-affrmation. This is a call to combat contemporary colonialism’s objectifcation and alienation and manipulation of our true selves’.15

Coulthard critiques the current Canadian policy atmosphere of reconciliation as contemporary colonialism, ultimately the same as the old colonialism, but with a new mask. He argues the structure of the settler colonial invasion continues to dispossess and oppress Indigenous peoples, as it always has, but it now has a new face: the disingenuous liberal politics of recognition—which includes such current policy initiatives as the delegation of self-determination, economic development and the settlement of land claims. He begins by noting that over the past forty years or so, there has been an ‘unprecedented degree of recognition for Aboriginal “cultural” rights within the legal and political framework of the Canadian state’.16 Coulthard acknowledges that the increase in recognition demands coming from Indigenous intellectual and community leaders are largely responsible for these changes to the structure of the Indigenous-state relationship in Canada. Yet, Coulthard’s goal in this work is to challenge the notion that ‘the colonial relationship between Indigenous peoples and the Canadian state can be adequately transformed via such a politics of recognition’.17 Rather than ushering in a new relationship, he argues, the ‘politics of recognition in its contemporary liberal form promises to reproduce the very confgurations of colonialist, racist, patriarchal state power that Indigenous peoples’ demands for recognition have historically sought to transcend’.18

In other words, all of the work and struggle by Indigenous leaders and advocates in the past four decades to advance self-government, recognition of Aboriginal rights and title and economic development for their communities has not only been futile, but damaging to what would or should have been an ‘authentic’ struggle for Indigenous self-determination. Further, all of these advocates and leaders do not even realise how co-opted they have become in the ongoing structures of colonialism. Citing Alfred, and echoing Fanon, Coulthard notes that the dominance of the recognition approach over an extended period of time has produced a class of ‘Aboriginal “citizens”’ who have come to defne themselves in terms of the colonial state and its institutions rather than the culture and political traditions of their own Indigenous nations. He identifes a similar process with capitalist economic development initiatives that have created an ‘emergent Aboriginal bourgeoisie whose thirst for proft has come to outweigh their ancestral obligations to the land and to others’.19 Unfortunately, Coulthard pessimistically views Indigenous rights advancement as ‘bleak’, since ‘so much of what Indigenous peoples have sought over the last forty years to secure their freedom has in practice cunningly assured its opposite’.20

In a 2007 article, Cherokee political scientist Jeff Corntassel takes the co-option argument to the international level.21 Corntassel acknowledges that UN fora do provide opportunities for strategising and diplomacy among Indigenous actors from diverse parts of the world, especially important in storytelling, information sharing and building solidarity. Corntassel also acknowledges that there were a handful of instances in the First UN Indigenous Decade (1995–2004) where Indigenous peoples were able to successfully challenge UN protocols and procedures and insert themselves into the UN ‘on their own terms’. However, despite these acknowledgements, Corntassel concludes that the UN system, being made up of states, aims to co-opt Indigenous peoples into the norms and mores of the state, thereby distracting them from their proper focus on advancing their own nationhood. Like Alfred and Coulthard, Corntassel falls into the first pessimism trap which demarcates Indigenous political leadership into ‘authentic’ and ‘co-opted’ categories.

Pessimism Trap 2: The State is Unified, Deliberate and Unchanging in Its Desire to Dispossess Indigenous Peoples and Gain Unfettered Access to Indigenous Lands and Resources

In other words, colonialism by settler states is a constant, not a variable, in both outcome and intent. Further, the state is not only intentionally colonial, but it is also unifed in its desire to co-opt Indigenous peoples as a method and means of control.

In 2005’s Wasase, Alfred presents the state as unitary, intentional and unchanging in its desire to colonise and oppress Indigenous peoples noting, ‘I think that the only thing that has changed since our ancestors frst declared war on the invaders is that some of us have lost heart’.22 Referring to current state policies as a ‘self-termination movement’, Alfred states, ‘It is senseless to advocate for an accord with imperialism while there is a steady and intense ongoing attack by the Settler society on everything meaningful to us: our cultures, our communities, and our deep attachments to land’.23

Alfred’s Peace, Power, Righteousness (2009) also argues that the state is deliberate and unchanging, stating quite plainly that ‘it is still the objective of the Canadian and US governments to remove Indians, or, failing that, to prevent them from beneftting, from their ancestral territories’.24 Contemporary states do this, he argues, not through outright violent control but ‘by insidiously promoting a form of neo-colonial self-government in our communities and forcing our integration into the legal mainstream’.25 According to Alfred, the state ‘relegates indigenous peoples’ rights to the past, and constrains the development of their societies by allowing only those activities that support its own necessary illusion: that indigenous peoples today do not present a serious challenge to its legitimacy’.26

Linking back to the aim of co-option, Alfred argues that while the state’s desire to control Indigenous peoples and lands has never changed, the techniques for doing so have become subtler over time. ‘Recognizing the power of the indigenous challenge and unable to deny it a voice’, due to successful Indigenous resistance over the years, ‘the state has (now) attempted to pull indigenous people closer to it’.27 According to Alfred, the state has outwitted Indigenous leaders and ‘encouraged them to reframe and moderate their nationhood demands to accept the fait accompli of colonization, (and) to collaborate in the development of a “solution” that does not challenge the fundamental imperial lie’.28

In a similar vein, Coulthard’s central argument is centred on his understanding of the dual structure of colonialism. Drawing directly from Fanon, Coulthard fnds that colonialism relies on both objective and subjective elements. The objective components involve domination through the political, economic and legal structures of the colonial state. The subjective elements of colonialism involve the creation of ‘colonized subjects’, including a process of internalisation by which colonised subjects come to not only accept the limited forms of ‘misrecognition’ granted through the state but can even come to identify with it.29 Through this dual structure, colonial power now works through the inclusion of Indigenous peoples, actively shaping their perspectives in line with state discourses, rather than merely excluding them, as in years past. Therefore, any attempt to seek ‘the reconciliation of Indigenous nationhood with state sovereignty is still colonial insofar as it remains structurally committed to the dispossession of Indigenous peoples of our lands and self-determining authority’.30

Concerning the state in relation to Indigenous peoples on the international level, Corntassel argues that states and global organisations, for years, have been consistently framing Indigenous peoples’ self-determination claims in ways that ‘jeopardize the futures of indigenous communities’.31 He claims that states frst compartmentalise Indigenous self-determination by separating lands and resources from political and legal recognition of a limited autonomy. Second, he notes, states sometimes deny the existence of Indigenous peoples living within their borders. Thirdly, a political and legal entitlement framing by states deemphasises other responsibilities. Finally, he claims that states, through the rights discourse, limit the frameworks through which Indigenous peoples can seek self-determination. Like Alfred and Coulthard, Corntassel has concluded that states are deliberate and never changing in their behaviour. With this move, Corntassel limits and actually demeans Indigenous agency, overlooking the reality that Indigenous organisations themselves chose the human rights framework and rights discourse as a target sphere of action precisely because, as was evident in earlier struggles like slavery, civil rights or women’s rights, these were tools available to them that had a proven track record of opening up new possibilities and shifting previous state positions and behaviour. Indigenous advocates also cleverly realised, by the 1970s, that the anti-discrimination and decolonisation frames could be used together against states. States did, in no way, nefariously impose a rights framework on Indigenous peoples. Rather, Indigenous organisations and savvy Indigenous political actors deliberately chose to frame their self-determination struggles within the human rights framework in order to bring states into a double bind where they could not credibly claim to adhere to human rights and claim that they uphold equality while simultaneously denying Indigenous peoples’ human rights and leaving them with a diminished and unequal right of self-determination. But, because he is caught in the pessimism trap of seeing the state only as unifed, deliberate and unchanging, Corntassel overlooks and diminishes the clear story of Indigenous agency and the potential for positive change in advancing self-determination in a multitude of ways.

Pessimism Trap 3: Engagement with the Settler State is Futile, if Not Counter-Productive

Since the state always intends to maintain, if not expand, colonial control, and is seeking to co-opt as many Indigenous peoples as possible in order to maintain or expand its dispossession and control, it is therefore futile, at best, and actually dangerous to Indigenous existence to engage with the state. Furthermore, all patterns of engagement will lead to co-optation as the state is cunning and unrelenting in its desire to co-opt Indigenous leaders, academics and professionals in order to gain or maintain control of Indigenous peoples.

Alfred argues, in both his 2005 and 2009 books, that any Indigenous engagement with the state, including agreements and negotiations, is not only futile but fundamentally dangerous, as such pathways do not directly challenge the existing colonial structure and ‘to argue on behalf of indigenous nationhood within the dominant Western paradigm is self-defeating’.32 Alfred states that a ‘notion of nationhood or self-government rooted in state institutions and framed within the context of state sovereignty can never satisfy the imperatives of Native American political traditions’33 because the possibility for a true expression of Indigenous self-determination is ‘precluded by the state’s insistence on dominion and its exclusionary notion of sovereignty’.34 Worst of all, according to Alfred, when Indigenous communities frame their struggles in terms of asserting Aboriginal rights and title, but do so within a state framework, rather than resisting the state itself, it ‘represents the culmination of white society’s efforts to assimilate indigenous peoples’.35

Because it is impossible to advance Indigenous self-determination through any sort of engagement with the state, Coulthard also advocates for an Indigenous resurgence paradigm that follows both his mentor Taiaiake Alfred but also Anishinaabe feminist theorist Leanne Simpson.36 As Coulthard writes, ‘both Alfred and Simpson start from a position that calls on Indigenous peoples and communities to “turn away” from the assimilative reformism of the liberal recognition approach and to instead build our national liberation efforts on the revitalization of “traditional” political values and practices’.37 Drawing upon the prescriptive approach of these theorists, Coulthard proposes, in his concluding chapter, fve theses from his analysis that are intended to build and solidify Indigenous resurgence into the future:

1. On the necessity of direct action, meaning that physical forms of Indigenous resistance, like protest and blockades, are very important not only as a reaction to the state but also as a means of protecting the lands that are central to Indigenous peoples’ existence;

2. Capitalism, No More!, meaning the rejection of capitalist forms of economic development in Indigenous communities in favour of land-based Indigenous political-economic alternative approaches;

3. Dispossession and Indigenous Sovereignty in the City, meaning the need for Indigenous resurgence movements ‘to address the interrelated systems of dispossession that shape Indigenous peoples’ experiences in both urban and land-based settings’38;

4. Gender Justice and Decolonisation, meaning that decolonisation must also include a shift away from patriarchy and an embrace of gender relations that are non-violent and refective of the centrality of women in traditional forms of Indigenous governance and society; and

5. Beyond the Nation-State. While Coulthard denies that he advocates complete rejection of engagement with the state’s political and legal system, he does assert that ‘our efforts to engage these discursive and institutional spaces to secure recognition of our rights have not only failed, but have instead served to subtly reproduce the forms of racist, sexist, economic, and political confgurations of power that we initially sought…to challenge’.39 He therefore advocates expressly for ‘critical self-refection, skepticism, and caution’ in a ‘resurgent politics of recognition that seeks to practice decolonial, gender-emancipatory, and economically nonexploitative alternative structures of law and sovereign authority grounded on a critical refashioning of the best of Indigenous legal and political traditions’.40

Corntassel also demonstrates the third pessimism trap, that all engagement with the state is ultimately futile. For the most part, however, Corntassel’s observation is that the UN system operates like a reverse Keck and Sikkink ‘boomerang model’ and ‘channels the energies of transnational Indigenous networks into the institutional fefdoms of member countries’, by which an ‘illusion of inclusion’ is created.41 He argues that, in order to be included or their views listened to, Indigenous delegates at the UN must mimic the strategies, language, norms and modes of behaviour of member states and international institutions. Corntassel fnds that ‘what results is a cadre of professionalized Indigenous delegates who demonstrate more allegiance to the UN system than to their own communities’.42 In his fnal analysis, he charges that the co-optation of international Indigenous political actors is highly ‘effective in challenging the unity of the global Indigenous rights movement and hindering genuine dialogue regarding Indigenous self-determination and justice’.43

Finding that states deliberately co-opt and provide ‘illusions of inclusion’ to Indigenous political actors in UN settings, Corntassel comes to the same conclusion as Alfred concerning the futility of engagement, arguing that because transnational Indigenous networks are ‘channeled’ and ‘blunted’ by colonial state actors, ‘it is a critical time for Indigenous peoples to rethink their approaches to bringing Indigenous rights concerns to global forums’.44

Imagining a Post-Colonial Future: Pessimistic ‘Resurgence’ Versus the Optimism and Tenacity of Indigenous Movements on the Ground

All of these writers advocate Indigenous resurgence, through a combination of rejecting the current reconciliation politics of settler colonial states, coupled with a return to land-based Indigenous expressions of governance as the only viable, ‘authentic’ and legitimate path to a better future for Indigenous peoples, which they refer to as decolonisation. While inherently critical in their orientation, these three approaches do make some positive and productive contributions to Indigenous movements. They help shed light on the various and subtle ways that Indigenous leaders and communities can become co-opted into a colonial system. They help us to hold leadership accountable. They also help us keep a strong focus on our traditional, cultural and spiritual values as well as our traditional forms of governance which then also helps us imagine future possibilities.

As I have pointed out here, however, all three theorists are also caught in the same three pessimism traps: authenticity versus co-option; a vision of the state as unified, deliberate and never changing in its desire to colonise and control; and a view of engagement with the state as futile, if not dangerous, to Indigenous sovereignty and existence. When combined, these three pessimism traps aim to inhibit Indigenous peoples’ engagement with the state in any process that could potentially re-imagine and re-formulate their current relationship into one that could be transformative and post-colonial, as envisioned by the UN Declaration on the Rights of Indigenous Peoples. The pessimism traps together work to foreclose any possibility that there could be credible openings of opportunity to negotiate a fairer and just relationship of co-existence with even the most progressive state government.

This pessimistic approach is not innocuous. By overemphasising structure and granting the state an enormous degree of agency as a unitary actor, this pessimistic approach does a remarkable disservice to Indigenous resistance movements by proscribing, from academia, an extremely narrow view of what Indigenous self-determination can and should mean in practice. By overlooking and/or discounting Indigenous agency and not even considering the possibility that Indigenous peoples could themselves be calculating, strategic political actors in their own right, and vis-à-vis states, the pessimistic lens of the resurgence school unnecessarily, unproductively and unjustly limits the feld of possibility for Indigenous peoples’ decision-making, thus actually countering and inhibiting expressions of Indigenous self-determination. By condemning—writ large—all Indigenous peoples and organisations that wish to seek peaceful co-existence with the state, negotiate mutually benefcial agreements with the state, and/or who have advocated on the international level for a set of standards that can provide a positive guiding framework for Indigenous-state relations, the pessimistic lens of resurgence forecloses much potential for new and improved relations, in any form, and is very likely to lead to deeper conficts between states and Indigenous peoples, and potentially, even violent action, which Fanon indicated was the necessary outcome. The pessimism traps of the resurgence school are therefore, likely self-defeating for all but the most remote and isolated Indigenous communities. Further, this approach is quite out of step with the actions and vision of many Indigenous resistance movements on the ground who have been working for decades to advance Indigenous self-determination, both domestically and globally, in ways that transform the colonial state into something more just and may eventually present creative alternatives to the Westphalian state form in ways that could respect and accommodate Indigenous nations. Rather, it aims to shame and blame those who wish to explore creative and innovative post-colonial resolutions to the colonial condition.

The UN Declaration on the Rights of Indigenous Peoples (the Declaration or UN Declaration) was adopted by the General Assembly in 2007 after 25 years of development. The Declaration is ground-breaking, given the key leadership roles Indigenous peoples played in negotiating and achieving this agreement.45 Additionally, for the frst time in UN history, the rights holders, Indigenous peoples, worked with states to develop an instrument that would serve to promote, protect and affirm Indigenous rights, both globally and in individual domestic contexts.46

Many Indigenous organisations and movements, from dozens of countries around the world, were involved in drafting and negotiating the UN Declaration and are now advocating for its full implementation, both internationally and in domestic and regional contexts. In Canada, some of the key organisational players—the Grand Council of the Crees (Eeyou Istchee), the Assembly of First Nations, and the Union of British Columbia Indian Chiefs, or their predecessor organisations—were involved in the drafting and lengthy negotiations of the UN Declaration during the 1980s, 1990s and 2000s. In the United States, organisations like the American Indian Law Alliance and the Native American Rights Fund have been involved as well as the Navajo Nation and the Haudenosaunee Confederacy, who represent themselves as Indigenous peoples’ governing institutions. From Scandinavia, the Saami Council and the Sami Parliaments all play a key role in advancing Indigenous rights. In Latin America, organisations like the Confederación de Nationalidades Indígenas del Ecuador (CONAIE) and the Consejo Indio de Sud America (CISA) advocate for implementation of the UN Declaration. The three, major transnational Indigenous organisations— the World Council of Indigenous Peoples, the International Indian Treaty Council and the Inuit Circumpolar Council—were all key members of the drafting and negotiating team for the UN Declaration, and the latter two, which are still in existence, continue their strong advocacy for its full implementation.

Implementation of the UN Declaration on the Rights of Indigenous Peoples requires fundamental and significant change, on both the international and domestic levels. Because implementation of Indigenous rights essentially calls for a complete and fundamental restructuring of Indigenous-state relationships, it expects states to enact and implement a significant body of legal, constitutional, legislative and policy changes that can accommodate such things as Indigenous land rights, free, prior and informed consent, redress and a variety of self-government, autonomy and other such arrangements. States are not going to implement this multifaceted and complex set of changes on their own, however. They will require significant political and moral pressure to hold them accountable to the rhetorical commitments they have made to support this level of change. They will also require ongoing conversation and negotiation with Indigenous peoples along the way, lest the process becomes problematically one-sided. Such processes ultimately require sustained political will, commitment and engagement over the long term, to reach the end result of radical systemic change and Indigenous state relationships grounded in mutual respect, co-existence and reciprocity. This type of fundamental change requires creative thinking, careful diplomacy, tenacity, and above all, optimistic vision, on the part of Indigenous peoples. The pessimistic approaches of the resurgence school are ultimately of little use in these efforts, other than as a cautionary tale against state power, of which the organisational players are already keenly aware. Further, by dismissing and discouraging all efforts at engagement with states, and especially with the blanket accusations that all who engage in such efforts are ‘co-opted’ and not ‘authentically’ Indigenous, the resurgence school actually creates unnecessary negative feelings and divisions amongst Indigenous movements who should be pooling limited resources and working together towards better futures.

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