# Texas Round 1 Wiki

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#### 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.

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#### The alt alone shuts down the only power we have to solve issues like climate change – individual orientation fails and trades off with broader solutions

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This short advisory paper collates a set of recommendations about how best to shape mass public communications aimed at increasing concern about climate change and motivating commensurate behavioural changes.¶ Its focus is not upon motivating small private-sphere behavioural changes on a piece-meal basis. Rather, it marshals evidence about how best to motivate the ambitious and systemic behavioural change that is necessary – including, crucially, greater public engagement with the policy process (through, for example, lobbying decision-makers and elected representatives, or participating in demonstrations), as well as major lifestyle changes. ¶ Political leaders themselves have drawn attention to the imperative for more vocal public pressure to create the ‘political space’ for them to enact more ambitious policy interventions. 1 While this paper does not dismiss the value of individuals making small private-sphere behavioural changes (for example, adopting simple domestic energy efficiency measures) it is clear that such behaviours do not, in themselves, represent a proportional response to the challenge of climate change. As David MacKay, Chief Scientific Advisor to the UK Department of Energy and Climate change writes: “Don’t be distracted by the myth that ‘every little helps’. If everyone does a little, we’ll achieve only a little” (MacKay, 2008).¶ The task of campaigners and communicators from government, business and non-governmental organisations must therefore be to motivate both (i) widespread adoption of ambitious private-sphere behavioural changes; and (ii) widespread acceptance of – and indeed active demand for – ambitious new policy interventions.¶ Current public communication campaigns, as orchestrated by government, business and non-governmental organisations, are not achieving these changes. This paper asks: how should such communications be designed if they are to have optimal impact in motivating these changes? The response to this question will require fundamental changes in the ways that many climate change communication campaigns are currently devised and implemented. ¶ This advisory paper offers a list of principles that could be used to enhance the quality of communication around climate change communications. The authors are each engaged in continuously sifting the evidence from a range of sub-disciplines within psychology, and reflecting on the implications of this for improving climate change communications. Some of the organisations that we represent have themselves at times adopted approaches which we have both learnt from and critique in this paper – so some of us have first hand experience of the need for on-going improvement in the strategies that we deploy. ¶ The changes we advocate will be challenging to enact – and will require vision and leadership on the part of the organisations adopting them. But without such vision and leadership, we do not believe that public communication campaigns on climate change will create the necessary behavioural changes – indeed, there is a profound risk that many of today’s campaigns will actually prove counter-productive. ¶ Seven Principles¶ 1. Move Beyond Social Marketing¶ We believe that too little attention is paid to the understanding that psychologists bring to strategies for motivating change, whilst undue faith is often placed in the application of marketing strategies to ‘sell’ behavioural changes. Unfortunately, in the context of ambitious pro-environmental behaviour, such strategies seem unlikely to motivate systemic behavioural change.¶ Social marketing is an effective way of achieving a particular behavioural goal – dozens of practical examples in the field of health behaviour attest to this. Social marketing is really more of a framework for designing behaviour change programmes than a behaviour change programme - it offers a method of maximising the success of a specific behavioural goal. Darnton (2008) has described social marketing as ‘explicitly transtheoretical’, while Hastings (2007), in a recent overview of social marketing, claimed that there is no theory of social marketing. Rather, it is a ‘what works’ philosophy, based on previous experience of similar campaigns and programmes. Social marketing is flexible enough to be applied to a range of different social domains, and this is undoubtedly a fundamental part of its appeal.¶ However, social marketing’s 'what works' status also means that it is agnostic about the longer term, theoretical merits of different behaviour change strategies, or the cultural values that specific campaigns serve to strengthen. Social marketing dictates that the most effective strategy should be chosen, where effective means ‘most likely to achieve an immediate behavioural goal’. ¶ This means that elements of a behaviour change strategy designed according to the principles of social marketing may conflict with other, broader goals. What if the most effective way of promoting pro-environmental behaviour ‘A’ was to pursue a strategy that was detrimental to the achievement of long term pro-environmental strategy ‘Z’? The principles of social marketing have no capacity to resolve this conflict – they are limited to maximising the success of the immediate behavioural programme. This is not a flaw of social marketing – it was designed to provide tools to address specific behavioural problems on a piecemeal basis. But it is an important limitation, and one that has significant implications if social marketing techniques are used to promote systemic behavioural change and public engagement on an issue like climate change. ¶ 2. Be honest and forthright about the probable impacts of climate change, and the scale of the challenge we confront in avoiding these. But avoid deliberate attempts to provoke fear or guilt. ¶ There is no merit in ‘dumbing down’ the scientific evidence that the impacts of climate change are likely to be severe, and that some of these impacts are now almost certainly unavoidable. Accepting the impacts of climate change will be an important stage in motivating behavioural responses aimed at mitigating the problem. However, deliberate attempts to instil fear or guilt carry considerable risk. ¶ Studies on fear appeals confirm the potential for fear to change attitudes or verbal expressions of concern, but often not actions or behaviour (Ruiter et al., 2001). The impact of fear appeals is context - and audience - specific; for example, for those who do not yet realise the potentially ‘scary’ aspects of climate change, people need to first experience themselves as vulnerable to the risks in some way in order to feel moved or affected (Das et al, 2003; Hoog et al, 2005). As people move towards contemplating action, fear appeals can help form a behavioural intent, providing an impetus or spark to ‘move’ from; however such appeals must be coupled with constructive information and support to reduce the sense of danger (Moser, 2007). The danger is that fear can also be disempowering – producing feelings of helplessness, remoteness and lack of control (O’Neill and Nicholson-Cole, 2009). Fear is likely to trigger ‘barriers to engagement’, such as denial2 (Stoll-Kleemann et al., 2001; Weber, 2006; Moser and Dilling, 2007; Lorenzoni, Nicholson-Cole & Whitmarsh, 2007). The location of fear in a message is also relevant; it works better when placed first for those who are inclined to follow the advice, but better second for those who aren't (Bier, 2001).¶ Similarly, studies have shown that guilt can play a role in motivating people to take action but can also function to stimulate defensive mechanisms against the perceived threat or challenge to one’s sense of identity (as a good, moral person). In the latter case, behaviours may be left untouched (whether driving a SUV or taking a flight) as one defends against any feelings of guilt or complicity through deployment of a range of justifications for the behaviour (Ferguson & Branscombe, 2010). ¶ Overall, there is a need for emotionally balanced representations of the issues at hand. This will involve acknowledging the ‘affective reality’ of the situation, e.g. “We know this is scary and overwhelming, but many of us feel this way and we are doing something about it”.¶ 3. Be honest and forthright about the impacts of mitigating and adapting to climate change for current lifestyles, and the ‘loss’ - as well as the benefits - that these will entail. Narratives that focus exclusively on the ‘up-side’ of climate solutions are likely to be unconvincing. While narratives about the future impacts of climate change may highlight the loss of much that we currently hold to be dear, narratives about climate solutions frequently ignore the question of loss. If the two are not addressed concurrently, fear of loss may be ‘split off’ and projected into the future, where it is all too easily denied. This can be dangerous, because accepting loss is an important step towards working through the associated emotions, and emerging with the energy and creativity to respond positively to the new situation (Randall, 2009). However, there are plenty of benefits (besides the financial ones) of a low-carbon lifestyle e.g., health, community/social interaction - including the ‘intrinsic' goals mentioned below. It is important to be honest about both the losses and the benefits that may be associated with lifestyle change, and not to seek to separate out one from the other.¶ 3a. Avoid emphasis upon painless, easy steps. ¶ Be honest about the limitations of voluntary private-sphere behavioural change, and the need for ambitious new policy interventions that incentivise such changes, or that regulate for them. People know that the scope they have, as individuals, to help meet the challenge of climate change is extremely limited. For many people, it is perfectly sensible to continue to adopt high-carbon lifestyle choices whilst simultaneously being supportive of government interventions that would make these choices more difficult for everyone. ¶ The adoption of small-scale private sphere behavioural changes is sometimes assumed to lead people to adopt ever more difficult (and potentially significant) behavioural changes. The empirical evidence for this ‘foot-in-thedoor’ effect is highly equivocal. Some studies detect such an effect; others studies have found the reverse effect (whereby people tend to ‘rest on their laurels’ having adopted a few simple behavioural changes - Thogersen and Crompton, 2009). Where attention is drawn to simple and painless privatesphere behavioural changes, these should be urged in pursuit of a set of intrinsic goals (that is, as a response to people’s understanding about the contribution that such behavioural change may make to benefiting their friends and family, their community, the wider world, or in contributing to their growth and development as individuals) rather than as a means to achieve social status or greater financial success. Adopting behaviour in pursuit of intrinsic goals is more likely to lead to ‘spillover’ into other sustainable behaviours (De Young, 2000; Thogersen and Crompton, 2009).¶ People aren’t stupid: they know that if there are wholesale changes in the global climate underway, these will not be reversed merely through checking their tyre pressures or switching their TV off standby. An emphasis upon simple and painless steps suppresses debate about those necessary responses that are less palatable – that will cost people money, or that will infringe on cherished freedoms (such as to fly). Recognising this will be a key step in accepting the reality of loss of aspects of our current lifestyles, and in beginning to work through the powerful emotions that this will engender (Randall, 2009). ¶ 3b. Avoid over-emphasis on the economic opportunities that mitigating, and adapting to, climate change may provide. ¶ There will, undoubtedly, be economic benefits to be accrued through investment in new technologies, but there will also be instances where the economic imperative and the climate change adaptation or mitigation imperative diverge, and periods of economic uncertainty for many people as some sectors contract. It seems inevitable that some interventions will have negative economic impacts (Stern, 2007).¶ Undue emphasis upon economic imperatives serves to reinforce the dominance, in society, of a set of extrinsic goals (focussed, for example, on financial benefit). A large body of empirical research demonstrates that these extrinsic goals are antagonistic to the emergence of pro-social and proenvironmental concern (Crompton and Kasser, 2009).¶ 3c. Avoid emphasis upon the opportunities of ‘green consumerism’ as a response to climate change.¶ As mentioned above (3b), a large body of research points to the antagonism between goals directed towards the acquisition of material objects and the emergence of pro-environmental and pro-social concern (Crompton and Kasser, 2009). Campaigns to ‘buy green’ may be effective in driving up sales of particular products, but in conveying the impression that climate change can be addressed by ‘buying the right things’, they risk undermining more difficult and systemic changes. A recent study found that people in an experiment who purchased ‘green’ products acted less altruistically on subsequent tasks (Mazar & Zhong, 2010) – suggesting that small ethical acts may act as a ‘moral offset’ and licence undesirable behaviours in other domains. This does not mean that private-sphere behaviour changes will always lead to a reduction in subsequent pro-environmental behaviour, but it does suggest that the reasons used to motivate these changes are critically important. Better is to emphasise that ‘every little helps a little’ – but that these changes are only the beginning of a process that must also incorporate more ambitious private-sphere change and significant collective action at a political level.¶ 4. Empathise with the emotional responses that will be engendered by a forthright presentation of the probable impacts of climate change. ¶ Belief in climate change and support for low-carbon policies will remain fragile unless people are emotionally engaged. We should expect people to be sad or angry, to feel guilt or shame, to yearn for that which is lost or to search for more comforting answers (Randall, 2009). Providing support and empathy in working through the painful emotions of 'grief' for a society that must undergo changes is a prerequisite for subsequent adaptation to new circumstances.¶ Without such support and empathy, it is more likely that people will begin to deploy a range of maladaptive ‘coping strategies’, such as denial of personal responsibility, blaming others, or becoming apathetic (Lertzman, 2008). An audience should not be admonished for deploying such strategies – this would in itself be threatening, and could therefore harden resistance to positive behaviour change (Miller and Rolnick, 2002). The key is not to dismiss people who exhibit maladaptive coping strategies, but to understand how they can be made more adaptive. People who feel socially supported will be more likely to adopt adaptive emotional responses - so facilitating social support for proenvironmental behaviour is crucial.¶ 5. Promote pro-environmental social norms and harness the power of social networks¶ One way of bridging the gap between private-sphere behaviour changes and collective action is the promotion of pro-environmental social norms. Pictures and videos of ordinary people (‘like me’) engaging in significant proenvironmental actions are a simple and effective way of generating a sense of social normality around pro-environmental behaviour (Schultz, Nolan, Cialdini, Goldstein and Griskevicius, 2007). There are different reasons that people adopt social norms, and encouraging people to adopt a positive norm simply to ‘conform’, to avoid a feeling of guilt, or for fear of not ‘fitting in’ is likely to produce a relatively shallow level of motivation for behaviour change. Where social norms can be combined with ‘intrinsic’ motivations (e.g. a sense of social belonging), they are likely to be more effective and persistent.¶ Too often, environmental communications are directed to the individual as a single unit in the larger social system of consumption and political engagement. This can make the problems feel too overwhelming, and evoke unmanageable levels of anxiety. Through the enhanced awareness of what other people are doing, a strong sense of collective purpose can be engendered. One factor that is likely to influence whether adaptive or maladaptive coping strategies are selected in response to fear about climate change is whether people feel supported by a social network – that is, whether a sense of ‘sustainable citizenship’ is fostered. The efficacy of groupbased programmes at promoting pro-environmental behaviour change has been demonstrated on numerous occasions – and participants in these projects consistently point to a sense of mutual learning and support as a key reason for making and maintaining changes in behaviour (Nye and Burgess, 2008). There are few influences more powerful than an individual’s social network. Networks are instrumental not just in terms of providing social support, but also by creating specific content of social identity – defining what it means to be “us”. If environmental norms are incorporated at this level (become defining for the group) they can result in significant behavioural change (also reinforced through peer pressure).¶ Of course, for the majority of people, this is unlikely to be a network that has climate change at its core. But social networks – Trade Unions, Rugby Clubs, Mother & Toddler groups – still perform a critical role in spreading change through society. Encouraging and supporting pre-existing social networks to take ownership of climate change (rather than approach it as a problem for ‘green groups’) is a critical task. As well as representing a crucial bridge between individuals and broader society, peer-to-peer learning circumnavigates many of the problems associated with more ‘top down’ models of communication – not least that government representatives are perceived as untrustworthy (Poortinga & Pidgeon, 2003). Peer-to-peer learning is more easily achieved in group-based dialogue than in designing public information films: But public information films can nonetheless help to establish social norms around community-based responses to the challenges of climate change, through clear visual portrayals of people engaging collectively in the pro-environmental behaviour.¶ The discourse should be shifted increasingly from ‘you’ to ‘we’ and from ‘I’ to ‘us’. This is starting to take place in emerging forms of community-based activism, such as the Transition Movement and Cambridge Carbon Footprint’s ‘Carbon Conversations’ model – both of which recognize the power of groups to help support and maintain lifestyle and identity changes. A nationwide climate change engagement project using a group-based behaviour change model with members of Trade Union networks is currently underway, led by the Climate Outreach and Information Network. These projects represent a method of climate change communication and engagement radically different to that typically pursued by the government – and may offer a set of approaches that can go beyond the limited reach of social marketing techniques.¶ One potential risk with appeals based on social norms is that they often contain a hidden message. So, for example, a campaign that focuses on the fact that too many people take internal flights actually contains two messages – that taking internal flights is bad for the environment, and that lots of people are taking internal flights. This second message can give those who do not currently engage in that behaviour a perverse incentive to do so, and campaigns to promote behaviour change should be very careful to avoid this. The key is to ensure that information about what is happening (termed descriptive norms), does not overshadow information about what should be happening (termed injunctive norms). ¶ 6. Think about the language you use, but don’t rely on language alone¶ A number of recent publications have highlighted the results of focus group research and talk-back tests in order to ‘get the language right’ (Topos Partnership, 2009; Western Strategies & Lake Research Partners, 2009), culminating in a series of suggestions for framing climate-change communications. For example, these two studies led to the suggestions that communicators should use the term ‘global warming’ or ‘our deteriorating atmosphere’, respectively, rather than ‘climate change’. Other research has identified systematic differences in the way that people interpret the terms ‘climate change’ and ‘global warming’, with ‘global warming’ perceived as more emotionally engaging than ‘climate change’ (Whitmarsh, 2009).¶ Whilst ‘getting the language right’ is important, it can only play a small part in a communication strategy. More important than the language deployed (i.e. ‘conceptual frames') are what have been referred to by some cognitive linguists as 'deep frames'. Conceptual framing refers to catchy slogans and clever spin (which may or may not be honest). At a deeper level, framing refers to forging the connections between a debate or public policy and a set of deeper values or principles. Conceptual framing (crafting particular messages focussing on particular issues) cannot work unless these messages resonate with a set of long-term deep frames.¶ Policy proposals which may at the surface level seem similar (perhaps they both set out to achieve a reduction in environmental pollution) may differ importantly in terms of their deep framing. For example, putting a financial value on an endangered species, and building an economic case for their conservation ‘commodifies’ them, and makes them equivalent (at the level of deep frames) to other assets of the same value (a hotel chain, perhaps). This is a very different frame to one that attempts to achieve the same conservation goals through the ascription of intrinsic value to such species – as something that should be protected in its own right. Embedding particular deep frames requires concerted effort (Lakoff, 2009), but is the beginning of a process that can build a broad, coherent cross-departmental response to climate change from government.¶ 7. Encourage public demonstrations of frustration at the limited pace of government action¶ Private-sphere behavioural change is not enough, and may even at times become a diversion from the more important process of bringing political pressure to bear on policy-makers. The importance of public demonstrations of frustration at both the lack of political progress on climate change and the barriers presented by vested interests is widely recognised – including by government itself. Climate change communications, including government communication campaigns, should work to normalise public displays of frustration with the slow pace of political change. Ockwell et al (2009) argued that communications can play a role in fostering demand for - as well as acceptance of - policy change. Climate change communication could (and should) be used to encourage people to demonstrate (for example through public demonstrations) about how they would like structural barriers to behavioural/societal change to be removed.

#### Anti-domination is compatible with and essential to decolonial goals – settlerism is produced through contingent and redressable exertions of power over native people – anti-domination constitutes reformulating the relationship between settler govts and native people by eliminating the trust conception of governance in favor of indigenous self-determination

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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.

#### That orientation is best – the question of how we get to the alt matters in the context of transformative ideals – conflating all attempts of change as redemptive of the settler state shuts down our ability to redress concrete instances of harm and ignores the necessity of engaging with state structures towards transformative ends

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

I. NON-REFORMIST REFORMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Aff turns their K of liberal civil rights – the failure of the civil rights movement was its refusal to connect racial equality to a critique of liberalism, capitalism, and domination – we both can and must go further in our political commitment to universalizing freedom

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Aziz Rana, “Conclusion: Democracy and Inclusion in the Age of American Hegemony,” *The Two Faces of American Freedom*, Harvard University Press 2010, pp. 328-337.

Even with such developments, however, the present moment is not without its resources for confronting both the internal decline of free citizenship and the globalized commitment to pacification. And these resources are closely tied to the politics of inclusion and its implications in the post– New Deal order. This is because the previous vision of more robust equality has never entirely died. In fact, recent reform efforts have had a second and competing trajectory, although this trajectory is often obscured at present. For radical reformers, inclusion required overcoming the general reduction in the meaning of citizenship and thus recovering the historic project of independence— only now expanded to incorporate everyone. In the process, this meant fundamentally dismantling the structures of authority at home and abroad that undermined self-rule and made free citizenship impossible. At its most expansive, the American civil rights movement of the 1950s and 1960s in particular combined arguments about internal freedom and external power, while at the same time claiming a popular capacity to speak for the common good. This often-submerged legacy of the movement hints at the continued potential for thinking systemically about today’s problems. It also provides the connective historical link between nineteenth- century mass mobilization and reform projects in the present day, which similarly would seek to defend a universal and nonimperial ideal.

Despite the demise of settler empire, the American practice of international police power and global primacy persists in treating outsiders as instruments for the achievement of national ends. In the nineteenth century, these ends took the form of rich internal accounts of liberty and political possibility. Now, however, they increasingly appear to be domestic security as such and the indefinite protection of American status. In effect, the United States’ orientation to the world combines some of the most problematic ideological features of the settler past without its emancipatory aspirations. It continues to view outsiders— including immigrants within our borders— as part of a dependent periphery, to be used for the extension of national wealth and dominance. Yet these practices have become detached from the meaningful provision of economic and political self-rule for Americans. In a sense, the key challenge for the present is to invert such developments, to revive accounts of self-rule, and to dissolve their connections to external subordination at home and abroad— to make freedom truly universal. These final pages employ arguments from the civil rights period to draw out the contemporary implications of this project and to suggest current possibilities for connecting efforts at inclusion with a broader revision of the substance and goals of collective membership.

The Two Civil Rights Movements

Since the entrenchment of the New Deal order, the civil rights movement has embodied the most sustained effort to revive both the vision of liberty as self-rule and to connect this vision with a critique of empire. Today this legacy is almost entirely forgotten, in large measure because the mid-twentieth-century struggle for black equality always had two conflicting dimensions. On the one hand, efforts to end racial segregation and formal legal discrimination sought to incorporate blacks fully into American projects of hegemony abroad and security at home. They emphasized social mobility for middle- class blacks and inclusion for some into arenas of corporate, professional, and political power. These features are perhaps most tellingly illustrated by the legal prong of black attempts to end racial inequality. The best-known civil rights litigation of the 1950s involved segregated primary schools, but the earliest test cases of the National Association for the Advancement of Colored People (NAACP) focused on postgraduate professional study— especially law school. One of the first serious victories in the NAACP legal strategy was 1938’s Missouri ex rel Gaines v. Canada, which held that Missouri violated equal protection guarantees by failing to provide in-state law school education for black students. A decade later, Sweatt v. Paint er (1950) went further, holding that individuals could in no way be denied access to law school on the basis of race.1 For these NAACP lawyers, equality was crucially about winning for blacks the opportunity to achieve professional status and to participate at the highest echelons of corporate and political leadership.

In the mid-1960s, in the wake of tremendous popular unrest and mobilization across the American South, President Lyndon Johnson pressed Congress to end legalized segregation and to provide all blacks with voting rights. In many ways, these reforms embodied a choice by white politicians at the national level to protect New Deal liberalism by removing the eyesore of southern segregation and by making regional practices consistent with those prevailing elsewhere in the country. In other words, such reforms sought to preserve American domestic economic and political stability while strengthening U.S. moral standing internationally. This essentially preservative role was shared by many in the black middle class, who had long viewed the civil rights struggle in terms of liberal inclusion and elite social mobility. In fact, much of the traditional leadership within the black community was opposed to combining a critique of legal discrimination with either more extensive domestic reform initiatives or with challenges to U.S. global power, particularly in the context of Vietnam. For instance, Whitney Young, the head of the Urban League, warned activists at the NAACP’s 1966 convention that the League would denounce any groups that tied issues of “domestic civil rights with the Vietnam Conflict.”2

The long-term victory of these voices within the civil rights movement not only has set the terms for today’s discussions of race but also has shaped the very meaning of those previous struggles and therefore our political inheritance as Americans. In particular, it has meant that goals of black equality in the United States are largely disconnected in the political imagination from broader independence struggles in Asia, Latin America, and Africa. Racial equality is understood as a specifically American project of integration, one that primarily consists of providing worthy elements within the black community with an equal opportunity to achieve professional and middle-class respectability. There is no doubt that this project has brought with it clear benefits, especially the steady reduction of those everyday forms of humiliation— from name calling to formal discrimination and random violence— that historically marked the black experience. Yet the focus on incorporating black elites into the structures of American authority has also come at a clear cost. It has involved nothing less than ignoring our most recent collective attempt to create a truly inclusive community premised on democratic self-rule—to imagine inclusion as a call to elevate everyone to the status of free citizens.

For many civil rights activists, the goal of popular mobilization and the hope embedded in the project of black emancipation lay precisely in the fulfillment of this vision. At the end of his life, W. E. B. Du Bois warned civil rights leaders that simply eliminating legal segregation would not alter the position of economic and political subordination confronting most blacks. Shortly before leaving for exile in newly independent Ghana, Du Bois told a college audience in North Carolina that although the United States was “definitely approaching . . . a time when the American Negro will become in law equal in citizenship to other Americans,” this represented only “a beginning of even more difficult problems of race and culture.” Ending formalized in equality was only a prerequisite for creating a community grounded in the substantive freedom of its members. Such freedom required challenging corporate and governmental hierarchies, which denied most individuals, regardless of race, economic independence and daily control over their work life. Only if these hierarchies were dislodged would Americans finally “restore the democracy of which we have boasted so long and done so little.”3

Moreover, Du Bois directly tied this project of freedom at home to confronting empire in all its manifestations, including the persistent and informal modes of external control wielded by powerful states. Du Bois understood the black experience in the United States as a particular variant of Europe’s larger colonial legacy and thus believed that any meaningful commitment to eliminating the vestiges of colonialism meant supporting its elimination everywhere. It was no accident that Du Bois chose to live the remainder of his life in Nkrumah’s Ghana, as a symbol of anti-imperial unity. Du Bois hoped that blacks in the United States would take the lead in reshaping America’s position in the world and in making common cause with colonized peoples throughout the globe to alter their conditions of political and economic dependence. In the words that echoed the United States’ own postcolonial founders, he imagined a truly free Africa, which “refuse[d] to be exploited by people of other continents for their benefits and not for the benefit of the peoples of Africa” and that would “stress peace and join no military alliance and refuse to fight for settling European quarrels.”4

One leader who not only heard Du Bois’s call but struggled to situate it as the basis of an organized social movement— capable of standing as a government behind the government— was Martin Luther King Jr. Today King is widely viewed as the patron saint of civil rights activism, conceived largely as an effort to end legal discrimination and to provide upwardly mobile blacks with an equal opportunity to achieve social power. However, his actual views and those of many of his supporters were far more expansive. In King’s final book before his death, Where Do We Go from Here? (1967), he explicitly joined his vision of liberty to the universal republican ideals of radical Populists and Progressives. King argued that the black condition in the United States was that of “educational castration and economic exploitation” and that overcoming racism required more than merely ending formal segregation; it entailed “a radical restructuring of the architecture of American society.” According to him, black subordination drew sustenance from the same forces that concentrated wealth and political control in fewer and fewer hands while justifying the permanent global extension of America’s military footprint. In his view, the “evils of racism, poverty and militarism” were deeply intertwined and had to be overcome by actions that addressed both American international police power and the domestic elimination of popular authority.5

The first challenge for King was not to assert a particular programmatic agenda but rather to reclaim collective agency, eroded by the rise of centralized corporate and state institutions. He hoped that the civil rights movement would develop new organizational means by which a constituency within society could be permanently mobilized to wield democratic control. He argued that without such a social base, government would “elude our demands” and that whatever measures it passed would be for “use as supplicants” rather than products of a self- actualizing public will. According to him, for democracy to exist in practice, there had to be more than regular elections; individuals had to participate directly in shaping collective life. As King wrote, “We must develop, from strength, a situation in which the government finds it wise and prudent to collaborate with us.” In a sense, he hoped that civil rights groups and their supporters would replace the nineteenth-century laboring community as the stand-in for the public writ large. Rather than relying on the presumed virtue of those in power, or “wait[ing] passively until the administration had somehow been infused with . . . blessings of goodwill,” such mobilized agency would direct politics to conform to ideals of self-rule. Like the old collectivity of farmers and wage earners, this new constituency had the potential to connect its particular interests— in economic and political freedom— to the interests of all. It thus could serve as a voice of popular power, compelling state and economic elites to impose needed structural changes.6

Like Weyl, King outlined these changes by beginning from the recognition that American society was marked by tremendous abundance; in fact, the black position in the United States was that of “poverty amid plenty.” As such, it was time to abandon prevailing efforts “to compress our abundance into the overfed mouths of the middle and upper classes until they gag with superfluity.” Instead, social wealth should be employed not simply to free individuals from the most extreme forms of immiseration but also to establish the conditions for everyone to enjoy creative and meaningful work. In calling for the abolition of poverty, especially through measures such as a guaranteed income for all, King did not see the provision of economic security as an end in itself. Rather, he imagined it as an essential requirement for a society committed to making labor an activity of personal fulfillment— or, as Kallen would have phrased it, to transforming labor into leisure. To this end, he quoted at length from Henry George’s Progress and Poverty (1879), a classic text of the nineteenth- century’s robust populist tradition:

The fact is that the work which improves the condition of mankind, the work which extends knowledge and increases power and enriches literature, and elevates thought, is not done to secure a living. It is not the work of slaves, driven to their task either by the lash of a master or by animal necessities. It is the work of men who perform it for their own sake, and not that they may get more to eat or drink, or wear, or display. In a state of society where want is abolished, work of this sort could be enormously increased.

For King, as for Henry George before him, freedom entailed both economic self-rule and practical political control through mobilized and assertive social constituencies.7

Moreover, precisely because of the historic black position of exclusion, King saw any project of emancipation as admitting no color line or national barrier. At home this required imagining the civil rights movement as properly a poor people’s movement that incorporated blacks, impoverished whites, and immigrant communities (particularly from South and Central America). Since each group found itself denied both the benefits of economic independence and basic political authority, according to King, “only through their combined strength” would it be possible “to overcome the fierce opposition we must realistically anticipate.”8

Internationally, King’s commitment to self-rule meant following in Skidmore’s and Bourne’s footsteps and seeing the interconnections between in equality at home and continuing practices of global expropriation. In King’s view, “Equality with whites will not solve the problems of either whites or Negroes if it means equality in a world stricken by poverty and in a universe doomed to extinction by war.” In the context of the Cold War, he considered the ideological power of communism as in large measure a product of Western efforts to sustain systems of formal and informal rule across much of the globe. King wrote, “Communism is a judgment on our failure to make democracy real and to follow through the revolutions that we initiated. Our only hope today lies in our ability to recapture the revolutionary spirit and go out into a sometimes hostile world declaring eternal opposition to poverty, racism, and militarism.”9

In practice this meant two basic transformations in American foreign policy. First, it entailed repudiating the emerging modes of global authority, which, just as Nkrumah had worried, undermined the formal sovereignty of newly in de pen dent states and reduced large swaths of the global south to the de facto control of external forces. King saw the legacy of the Monroe Doctrine in Latin America as “tremendous resentment of the United States,” resentment motivated by permanent U.S. interference with local economic and political practices:

The life and destiny of Latin America are in the hands of the United States corporations. The decisions affecting the lives of South Americans are ostensibly made by their governments, but there are almost no legitimate democracies alive in the whole continent. The other governments are dominated by huge and exploitative cartels that rob Latin America of her resources while turning over a small rebate to a few members of a corrupt aristocracy.10

According to King, American complicity in local authoritarianism and economic expropriation was ultimately due to its commitment to maintaining an international police power. As a consequence, the second key transformation needed in American foreign policy involved the ideological rejection of such interventionism and the dismantling of the global military footprint that supported it. This police power asserted the right to intervene whenever and wherever the United States believed that democratic order was imperiled. King contended that, rather than promoting actual self- determination, American actions had the tendency to freeze disputes in ways that undermined lasting resolution or served external interests rather than local publics. They also propped up regimes with little internal legitimacy, which meant that these regimes could stay in power only with the continual investment of yet greater economic and military resources. King saw American support for apartheid governments across southern Africa— through corporate capital investments, trade, and defense alliances— as stark proof of how international police power, and its stated aims of promoting peace, had been transformed into an instrument of pop u lar suppression.

For King, the most explicit consequence of this American orientation to the world was that, rather than creating an actual condition of peace, it ultimately justified greater military adventurism. It treated local communities as means to the end of U.S. ideological ambitions and as instruments for the perpetual extension of global power. Precisely because of the need to overcome international disorder no matter where it existed, the United States was trapped in a project of endlessly extending its geographic footprint and defense commitments. According to King, such realities underscored how “the leaders of nations again talk[ed] peace while preparing for war.”11 It also meant that America found itself, as in Vietnam, forever subject to local insurrections and new potential dangers, which in turn warranted even greater military spending and territorial presence.

In his view, as in the view of republicans dating back to Harrington, the logic of the United States’ military infrastructure brought with it the steady reduction of economic and political freedom at home. It necessitated the centralization of power and entailed that America’s unprecedented social wealth be diverted from its appropriate task— creating an inclusive community committed to economic independence and the democratic elevation of all its members. Looking at an America marked by internal inequalities and external interventionism, King remarked, “A nation that continues year after year to spend more money on military defense than on programs of social uplift is approaching spiritual death.”12

In the years since King’s death, his account of universal republican freedom— let alone his stark warning to fellow Americans— has more or less been ignored in the public discourse. While King is deified as a twentieth- century hero, one to stand alongside the founders, his actual views are quietly discarded. To the extent that the civil rights agenda is pursued at all, it mostly involves further incorporating black elites into the institutions of American economic and political power. The notion of tying economic subordination within the United States to global patterns of inequality, let alone the democratic ideal of a permanently mobilized social agent, is hardly ever broached. Nonetheless, it is precisely this vision that holds out the possibility of restructuring collective institutions and of combining a mass politics of inclusion with a broad-based commitment to self-rule at home and abroad.

Humanitarian Imperialism, Immigration, and the American Periphery

King’s vision, as well as the more expansive legacy of the civil rights movement, raises a basic question for the current moment. What spaces exist not only for locating arguments about dependence but also for developing the popular potential to confront prevailing frameworks? Answering this question involves imagining the social constituencies and reform initiatives capable of pursuing an ideal of self-rule. It therefore means linking the concrete material interests of specific groups to the larger common good and thus showing how experiences of inequality or subordination illuminate a more pervasive social predicament. In particular, it involves addressing today’s twin realities: the retreat of robust ideals of collective possibility and the seemingly permanent expansion of American power. This power, although now disconnected from internal freedom as self-rule, continues to generate relations of external control as well as to justify the near limitless growth of presidential authority. These external relations both instrumentalize outsiders and transform U.S. dominance into an end in itself. Such realities are most strikingly highlighted by the dramatic alteration in the place of immigrants in collective life, from co-ethnic participants in settler empire to nonwhite members of a dependent periphery— one that exists even within our borders. In a sense, sustaining the expansive civil rights legacy means confronting this fact. It also suggests a new politics of inclusion, one with the potential to rehabilitate self-rule as a general and guiding social commitment.

#### 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.

#### It’s historically inaccurate – indigenous people relate to settlerism in different ways – their theory is homogenizing

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ONE OF THE PROBLEMS OF WRITING AUSTRALIAN COLONIAL HISTORY is the tension between presenting colonisation as displacement, dispossession and destruction, on the one hand, and presenting it as the production of opportunities for the survival of a self-conscious series of enclaves that would eventually form an ideologically potent, land-rich (if unevenly), national Indigenous constituency, on the other. In my current work, I find it fruitful to explore the geographical variety of Australia’s colonial history and to consider the diversity of Indigenous identities that this history has generated. In doing so, I have sensed the increasing influence of an approach led by Patrick Wolfe and Lorenzo Veracini that, in my view, has reduced sensitivity to Indigenous heterogeneity. My purpose, in this essay, is first to critique that approach and then to sketch my alternatives—highlighting the regional sequence of Australia’s colonial occupation and the different ways in which senses of Indigenous distinction have remained robust.

A recent, themed issue of Arena Journal had the title ‘Stolen Land, Broken Culture’. 1 Whenever I glance at that cover I want to add some adjectives: ‘restored’ and ‘increasing’ to ‘stolen’, and ‘adapted’ and ‘heterogeneous’ to ‘broken’. There is now such a vigorous debate about what has survived and what should survive, that historical scholarship should have more to say about survival than about ‘erasure’. The least impeachable protagonists of the debate about what should and should not survive identify as Indigenous (though some dislike that term). From this discord among Indigenous intellectuals, I have found the strongest stimulus to rethink the history of Australia’s internal colonialism. How is it possible to make sense, historically, of the proliferation of Indigenous views about their heritage and future that began to emerge publicly in 1995 (the Hindmarsh Island controversy) and that has continued in the speeches and writings of the Indigenous intelligentsia? The quest to explain such Indigenous proliferation animates my current work and prompts the following challenge to the growing influence of the historiography of ‘erasure’ and ‘elimination’.

Structures that eliminate

In his paper distilling and (as it seemed to me) commending the work of Wolfe and Veracini, Ed Cavanagh has reminded us that settler colonies—by definition— cannot decolonise.2 The invasion of colonising settlers into Indigenous territories and life worlds is never reversed: colonial authority endures as a structure, and it does not abate or withdraw. ‘Invasion is a structure not an event’, in Patrick Wolfe’s much quoted phrase.3 That structure has a logic and, in the events and contingencies of the enduring colonial relationships, it is persistent and discernible to the trained eye. The task of social and historical analysis is therefore twofold: to infer the underlying logic of settler colonisation, and to demonstrate that the most significant feature of any instance of settler colonial authority is its conformity to this underlying logic. The historiography presented by Wolfe, Veracini and those who sympathetically cite them is a historiography of continuity, of repetition, of demonstrating persistent patterns beneath the surface of apparent discontinuities. To quote Wolfe, to narrate the history of a settler colony is to chart ‘The continuities, discontinuities, adjustments, and departures whereby a logic that initially informed frontier killing transmutes into different modalities, discourses and institutional formations as it undergirds the historical development and complexification of settler society’. 4 In his account of Wolfe’s view, Cavanagh attributes to ‘indigenous subjects of settler societies’ (whom he does not identify) the perception that ‘there is little different about the structures of invasion or the dominance of a majority over time’. 5 Settler colonialism is ‘relentlessly active in the present’. 6

‘Elimination’ is the single most important word in Wolfe’s account of the underlying logic that he has discerned in the colonial history of Australia and other settler colonies. (Veracini tends to favour the word ‘transfer’; he lists the many ways that settler colonies have effected ‘transfer’. 7 ) In his contribution to Arena Journal (an essay about Israel), Wolfe writes that since 1994 he has been refining his formulation of the ‘central concept/project of settler colonialism … as primarily governed by a logic of elimination’. 8 In the same essay he argues: ‘The key characteristic of settler colonialism is not Europeanness but the dual outcome of destruction and replacement’. 9 Wolfe makes it clear that by ‘eliminate’, ‘destroy’ ‘replace’, he does not necessarily mean physically exterminate. Many different formations of settler colonial authority that do not physically exterminate colonised people can be understood as effecting some kind of ‘elimination’. Similarly, Veracini writes of the ‘progressive disappear[ance] [of Indigenous people] in a variety of ways: extermination, expulsion, incarceration, containment, and assimilation … (or a combination of all these elements)’. 10

Those who cite these formulations of the logic of settler colonial society may offer compelling illustrations of ‘erasure’ or ‘elimination’: frontier violence, the removal of Indigenous children and (as some see it) the Northern Territory Emergency Intervention. However, if the ‘erasure’ thesis is to be paradigmatic, then many other illustrations must be possible. The intention of those offering the settler colonial paradigm is to outline the persistent determinant logic of a pervasive settler colonial structure, making it reasonable to ask of any instance of settler colonial authority: how does it manifest the structure of ‘elimination’ (or ‘erasure’ or ‘transfer’)?

The possible answers to that question are more numerous and diverse to the extent that we accept a feature of Wolfe’s account of the logic of elimination in the settler state and society: the concept of ‘repressive authenticity’. 11 The phrase refers to one of the ways that ‘elimination’ is effective. In performing ‘repressive authenticity’ the settler society recognises Indigenous people as bearers of a precontact culture that remains always different from the culture of the settler society. Benefits—both material and symbolic—may accrue to the Indigenous people who claim such recognition, but to gain these benefits Indigenous Australians have to perform according to certain settler colonial notions of their authenticity as Indigenous people. In a 1994 paper, Wolfe called these prescriptive notions ‘state-conceded Aboriginalities’. 12

The jurisprudence of native title could be cited as an example of ‘repressive authenticity’ or of a ‘state-conceded Aboriginality’. As critics of native title determinations—not least Noel Pearson—have pointed out, judges have spelled out what the customs of the claimants were and then translated those customs into incidents of title that are specific to each adjudicated case. The resulting ‘bundles of rights’ have been criticised for not entitling Indigenous owners to do some of the things that—as modern Indigenous people—they would now like to do with their land.13 ‘Repressive authenticity’ prescribes Aborigines’ pre modernity. Thus fortified with the concepts of ‘repressive authenticity’ and ‘state-conceded Aboriginalities’, the historian can find the settler colonial structure of elimination to be pervasive, right up to our apparently more progressive present times. For example, Wolfe invites us to see Australian land rights legislation as a ‘culturalist’ continuation of the ‘logic of elimination that the initial invasions had expressed’. 14

This settler colonial paradigm thus has the appealing quality of being empirically exhaustive: whether through the removal of children or the erection of a monument to the Stolen Generations, through the denial of native title or the recognition of native title, through the remembrance of violence or the forgetting of violence, the structure of erasure/elimination/repressive authentication does its work. The discursive power of the settler colonial state and society is inexorably effective. All representations of Indigenous Australians and all self-representations by them are subject to the suspicion that they are best understood as the tactical moves of a deeply cunning settler colonial governmentality.

I have three concerns about this influential paradigm. First, can it account for itself? If the settler colonial narrative is so pervasive, how can we be sure that our self-consciously critical historiography is not just another one of its tactics? If that question seems merely a clever debating point, consider my second point: those writing within this paradigm have trouble dealing with Indigenous agency. The ‘elimination thesis’ logically requires its adherents to postulate Indigenous difference and Indigenous agency. Rarely do they forget to note and honour Indigenous agency, crediting it with indomitable persistence against the shapeshifting settler colonial hegemony. However, the paradigm encourages hesitation about characterising Indigenous difference, for to formulate Indigeneity— that is, to describe the contingent content of its difference—risks falling into the trap set by the paradigm’s own critical hermeneutics: any construction of agency as ‘Indigenous’ might be just another version of that ‘authenticity’ that is said to be repressive. Every instance of Indigenous agency is under suspicion of being ‘state-conceded’. For practitioners of the eliminationist paradigm, the inscription of ‘Indigenous agency’ is something to be left to others; for the practitioners of the eliminationist paradigm any such characterisation is always already known to be yet another manifestation of elimination’s inexorable logic. Honouring Indigeneity as ineradicable ‘difference’ tends to be a gesture made at the end of a description of the settler colonial edifice. The tendency of this paradigm is to render Indigenous agency either as ‘state-conceded’ or as an empty, counterfactual narrative space, mentioned out of political piety. The resistant Indigenous subject is beyond empirical specification, an unrepresented and unrepresentable thing that is always already external to the exhaustive discursive work of the settler colonial imagination.

Sovereignty’s moral complexity

My third point has to do with the evocation of settler colonial collective agency as tactical, shape-shifting, never absent, but variously manifest. There seem to be two quite different versions of this settler colonial agency. On the one hand, one evokes its adaptive fluidity, as the structure of settler colonial society somehow finds and invents the agents that perform the myriad tasks of elimination, erasure and repressive recognition; the settler colonial structure is always tactically resourceful in the agencies of its deployment. On the other hand, settler colonial agency is evoked as a collective agent, an enduring national psyche that is anxious, divided, ambivalent, troubled by unresolvable tensions within its project. The attribution of affect to the settler colonial mentality or archive preserves the idea of a singular collective settler agency, as if settler colonies were persons.

It would be easy to exaggerate the idea that settler colonial ambivalence can be narrated as ‘anxiety’. While I have no doubt that there have been anxious agents, the characterisation of particular settler colonial agents as ‘anxious’ is not easy to support empirically, and as a reader I have often had the feeling that the writer depicting ‘anxiety’ is ‘presentist’: ‘From the standpoint of my values, what you did and said back then should have made you anxious’.

A more impersonal analysis enables us to move from anxious agents to contending structures. It is more productive, I suggest, to account more impersonally for ‘settler colonial society’, to evoke it in terms of structures and tendencies to which agents get recruited; I am sympathetic to Wolfe’s structuralism. However, I am not persuaded by his presentation of a singular structure’s relentless consistency, its inexorable logic (of ‘elimination’ or of anything else). Wolfe’s emplotment of settler colonialism interpellates the historian/reader in a compact of epistemological and political certainty: we know what’s going to happen because it always does. My contrary preference is to see history as less predictable, messier, more surprising and occasionally more hopeful. The recent contention of ‘Indigeneities’ has invigorated my uncertainties.

Settler colonial projects give rise to many different kinds of institutions and ethical cultures, and in the duration and physical size of settler colonies (particularly Australia, a vast space whose colonial occupation remains a work in progress) there are many opportunities for diverse settler colonial formations to co-exist. I emphasise ‘contending structures’ in order to distance my approach from the search for the single ‘structure’ that seems to drive Patrick Wolfe towards seeing so many different phenomena as manifestations of the structure of elimination. The tensions structured within the settler colonial project interest me because they seem to me to offer a better chance of understanding historically the diverse ‘Indigeneities’ that we now can see.

Let me give an example of some recent work that I admire, before I proceed to talk about my own work. That the settler colonial project is internally conflicted is the theme of Heather Douglas and Mark Finnane’s recent book Indigenous Crime and Settler Law. 15 By narrating the fraught implementation of criminal law against Aborigines, they show how persistently Australian authorities—from legislators to judges and officials ‘on the ground’—have asserted and recognised Aboriginal difference. They point out that the recurring necessity of this recognition of difference is at odds with the legal doctrine that Australian sovereignty is unified and territorially exhaustive. They do not characterise the settler colony as an anxious subject but as an incoherent project of authority: settler colonial sovereignty is ‘imperfect’ in Australia.

Two features of the argument presented by Douglas and Finnane hold particular interest. First, in their account, the imperfection of Australian sovereignty is revealed not in the application of the law of real property to land and sea but in the administration of the criminal law. Reading the Douglas and Finnane book made me realise that Australia has had relatively little difficulty re-constituting the property regime, in the final third of the twentieth century, so that Aboriginal and Torres Strait Islander people can be owners of land; their customs of ownership are different from the colonists’, but not in a way that troubles Australian law in principle. Aboriginal and Torres Strait Islander property can be encoded, in a political settlement that does not objectively threaten settler property. What has ‘unsettled’ Australian law, Douglas and Finnane argue, is Indigenous agency in their putatively criminal conduct towards one another.

Second, Douglas and Finnane ironise Australian sovereignty, but do not judge it. Unlike so much ‘post-colonial’ analysis that assumes a transcendent morality from whose perspective colonisation can never have done good and Indigenous resistance is always to be celebrated, *Indigenous Crime and Settler Law* has no historically transcendent moral confidence. Its ‘critical’ work is far more modest: merely a juxtaposing of colonial doctrine (unified jurisdiction) with colonial law and order practices (soft legal pluralism). While some would assume that ‘the civilising mission’ has been only a righteous engine of colonial self-interest, Douglas and Finnane allow it a range of possibilities, including the securing of person and property—albeit as the colonists have understood person and property. Nor do they necessarily admire ‘soft legal pluralism’ as a concession won by Indigenous resistance to colonial authority. The legal pluralism that has emerged in Australia is open to the suspicion that it rests on norms and usages that ought, on human rights grounds, to be questioned.16

If there is a plot in the historiography of elimination, it is that the structure of settler colonialism has always already triumphed—either by erasing the Indigenous presence or by determining the forms of its survival. What I appreciate about *Indigenous Crime and Settler Law* is its uncertainty about whose interests are served by the imperfect realisation of settler colonial sovereignty— that is, by the persistence of an Aboriginal normative order.17

So far, I have written much about other people’s work, and in the remainder of this piece, I highlight two ideas of my own that I am trying to work with in order to understand historically the heterogeneity of settler colonial and Indigenous agencies. First, I sketch one way that we can take seriously the continental geography of the settler colonial project in Australia. Second, I survey some ways that the ‘Dying Native’ story resonates in Australian history.

Geographical diversity: a settler colonial nation for a continent

When Australia federated in 1901, there were two Australias: North and South. One of the questions for federal public policy since 1901 has been how to bring these two regions together within a single governmental paradigm.18 The South had evolved a successful social model: racially homogeneous, export-oriented agriculture, protected manufacturing, with a developmental state managing public investment that drew heavily on overseas savings. In the first decade of federation, this ‘Southern Australia’ forged a durable class compromise around the protection of relatively high wages from the competition of cheaper labour and from the import of goods produced from cheaper labour. Frank Castles, Stuart Macintyre and Paul Kelly have described this social model (Kelly calls it the ‘Australian Settlement’).19 All that I wish to add to their accounts is to underline their geographical limitations: this Australian social model was south of the Tropic of Capricorn and confined pretty much to the coast and to zones where agriculture and urban manufacturing were possible.

The North (in which I include the arid Centre, as it became available to British-Australian occupation) was different: in its more demanding geographies, in its more limited opportunities for private and public investment, in its sparser population and in the ethnic composition of that population. To extend the ‘Australian Settlement’ across the continent would require incorporating non-white peoples—Asians, Pacific Islanders, Aborigines and Torres Strait Islanders—into the political culture and political economy of the Australian Settlement. One way we could write the history of Australia’s Indigenous relations since federation would be to ask: to what extent was it possible for the South to colonise the North—that is, to generalise to Northern Australia the model of economic development and social integration that had evolved as the basis of an imagined British-Australian community in the southern agricultural zones and colonial capitals?

It is necessary first to put racism in its place. My generation of historians has been obsessed with the racism and the sexism of the Australian Settlement. We have examined the social policies, the industrial relations policies, the immigration policies and the Aboriginal protection policies of the first half of the twentieth century and we have highlighted the offence that these enactments of the Australian Settlement give to our contemporary multicultural, anti-discrimination liberal sensibilities and principles. While sympathising with that critique, I want to recall that the Southern social model was a set of political devices— state-managed markets for goods, labour and finance—that socially integrated an immigrant population through high levels of employment. Australians who lived through the Depression of the 1930s felt the attrition of that model, when the demand for labour weakened.

The four Northern populations that were problematic—from the Southern point of view—were Asians, Pacific Islanders, Aborigines and Torres Strait Islanders. The Asians and the Pacific Islanders were dealt with either through expulsion or through assimilation. The Torres Strait Islanders, proliferating well beyond the carrying capacity of the Straits colonial economy, either found a place within the Northern mainland as a waged labour force or stayed in the Straits as the more or less contented clients of the Queensland government. The Aborigines of remote Australia have proved to be the most difficult to recruit into the Australian Settlement. Before the Second World War, they developed relationships of symbiosis with governmental and mission authorities and with an undercapitalised and marginal beef industry. A number of factors combined to keep them socially and spatially distant from the institutions of the Australian Settlement: the imperatives of their own social order (including a syncretic response to Christianity); the policy of declaring their vast, road-deprived homelands to be reserves where alien contact could be minimised; the indifference, contempt and cultural respect of Euro-Australians; and, most important, the lack of transformative public and private investment in remote regions.

The Second World War forced a policy experiment to occur. The perceived possibility of Japanese invasion necessitated unprecedented public investment in the North: the resulting acute labour shortage brought curious and venturesome Aborigines into contact—of unprecedented scale and quality—with a relatively open-minded and pragmatic military. Native labour camps were a short-lived experiment in the formation of Aborigines into wage-labouring subjects. Sympathetic observation concluded that their rapid acculturation showed that remote Aborigines could and should be assimilated. For the thirty years following the war, governments in Northern Australia sought ways to convert Aboriginal hunter-gatherer labour power into the kind of human material that was suited to twentieth-century capitalist labour processes. However, there was never enough private and public investment to absorb the quantity of Aboriginal labour that was available in Northern and Central Australia. The pastoral industry obscured this problem until the 1960s insofar as the labour processes of that industry allowed a symbiosis of pastoralists who were defective capitalists with Aborigines who still had one foot in the hunter-gatherer economy.20 With the modernisation of the remote marginal pastoral industry by the late 1960s, the extent of the excess of Aboriginal labour power in remote and very remote regions became apparent.21

Assimilation was an attempt to absorb Aboriginal society into a standard Australian pattern of wage labouring, family formation and household structure. By the early 1970s, assimilation, in one sense, had failed in the remote regions because of the weakness of the required transformative force: public and private investment that would change the use of land and labour. However, assimilation was not only a political economy of wage-labouring and family formation; it was also a political economy of formal citizenship entitlements. That formal dimension of ‘assimilation’ was consummated in the early 1970s, admitting all Aborigines—even the most nomadic—to welfare entitlement. As Noel Pearson has argued, the late 1960s and early 1970s was a bizarre historical conjuncture— and here I am using my own terms, not Pearson’s—in which a legal-formal assimilation substituted for a socio-economic assimilation that had failed to materialise.22 The extension of the Australian Settlement to remote Aboriginal Australia was thus an unintended parody of the Australian Settlement: remote and very remote Aboriginal people secured entitlements designed for an economy and society that did not exist where they lived.

At this point in my narrative—still focused on the early 1970s—I need to highlight one other incongruity between Southern models of social integration and Northern social conditions. In the Southern model, Aboriginal people had become detached economically (and often physically) from their land base. No longer land-based in their economy, ‘southern’ Aborigines faced three options: institutionalisation (under church or state supervision), urbanisation, or impoverished autonomy in rural backwaters. In the North, it had been possible to evolve a quite different way to manage the relationship between Aboriginal people and land. From the point of view of settlers and colonial investors, much of northern and central Australia was unattractive, and it was easy enough to declare huge tracts of northern and central Australia as reserves. Aboriginal ‘protection’ in the South had demanded the remnant population’s rapid acculturation—a project to which many Aborigines were attracted. In the North, authorities of church and state operationalised ‘protection’ as the slowing down of acculturation. Defined by their very lack of transformative investment, reserves were weak instruments of social transformation. However, for reserves to function as zones of deferred social engineering, they had to remain worthless. That worthlessness was challenged, in the 1950s and 1960s, by the Commonwealth’s extensive programme of mineral mapping. Some reserves were found to be minerally prospective, precipitating a political contest between, on one side, government agencies allied with mining corporations and, on the other side, Aborigines, churches and others espousing, with much political success, a new global human right called ‘land rights’.

Through reformed land legislation, Aboriginal peoples can now negotiate with mining companies, and Aboriginal people have land title (of various strengths) over all the lands that the Crown had not alienated to private or public investors by the 1970s: about 23 per cent of the continent. I want to make three points about that Indigenous land base.

First, the arguments in favour of land rights were politically successful because they brought together a number of different projects of settler colonial self-redemption. The supporters of land rights amount to a coalition voicing an ensemble of themes: that land was essential to the well-being of people spiritually connected to it; that land is the basis of a culture whose difference Australians had a duty to honour and preserve; that land was an Indigenous property right that liberal governance was obliged to honour; that, as property, land was the basis of its owners’ recovery from poverty; that Aboriginal people understand better than the colonists what humans owe to Nature.23 Among these themes there are tensions, and we now debate conflicting projections of the use of Indigenous land.

My second observation is that most Indigenous land is situated in those parts of Australia where the Southern social model or the Australian Settlement has had least effect. That is, investment has not yet changed the Aboriginal population of these regions into a people that lives largely by employment; the practices and beliefs of the ‘Aboriginal domain’, in these regions, remain strongly rooted in pre-colonial traditions. The Community Development Employment Projects programme (CDEP, initiated in 1977) was, in this context, a symptomatic public investment programme. Its purpose remains disputed: is it best, in some regions, to allow Aboriginal people to develop their own hybrid economies and modes of individual and collective consumption? Or was CDEP (and now its successors) a short-term, transitional programme for people whose destiny was to move into what some like to call ‘real jobs’?24 How to intervene in the ‘Indigenous Estate’ and into the lives of its small but morally significant Indigenous population is the big unanswered question of Australia’s formation as a continental nation. How could we generalise, across all the regions and peoples of this continent, the institutions that we have evolved in the southern urban and agricultural regions?

My third observation about the Indigenous Estate is that it is currently undergoing revaluation. As Jon Altman and his colleagues have pointed out, there is very extensive overlap between the Indigenous Estate and the regions whose biological diversity Australia is pledged to protect. Just as mineral mapping triggered a revaluation of Australia’s remote lands in the 1960s and necessitated the political compromise we call ‘land rights’, so the ecological review of Australia’s land management policies has the potential to force a new framework for governing the Indigenous Estate. The same Howard government that gave us the notorious Northern Territory Intervention created the ‘Indigenous Protected Areas’ and ‘Working on Country’ programmes.25

The emergence of an Indigenous land and sea estate is trivialised if we see land rights as just another ‘state-conceded Aboriginality’ expressive of the deeper logic of erasure/elimination. The geographic, cultural and political contingencies of Australia’s colonial history have thrown up a set of economic and ecological possibilities and Indigenous identities that is just too complex and important to be approached in such a reductive way. As well, recognition of Indigenous Australians from some regions as owners and the denial of such status to others has created a distinction within Indigenous Australia whose significance (including competitive dynamics) demands closer attention than we are likely to give if we see them simply as variations on ‘state-conceded Aboriginality’.

Indigenous heterogeneity: what happened to the ‘Dying Native’?

The history of the settler colonial story that the Aborigines were doomed to die out is an interest I share with those who advance the ‘elimination’ thesis. In his essay ‘The Imagined Geographies of Settler Colonialism’, Lorenzo Veracini points out that settler colonial Australia now seeks reconciliation with peoples whose disappearance they once fantasised.26 How has that come about? To answer this question requires that we look more closely at the Dying Native fantasy and distinguish versions of it that seem to have existed at the same time. To pursue these distinctions is another path to understanding Indigenous diversity. There have long been three different versions of the Dying Native fantasy.27 As I describe each version, I will briefly comment on two things: what policy response that meaning aroused in governments and the concerned public; and how Indigenous Australians have responded.

One ‘Dying Native’ story pointed to catastrophic infertility and mortality; Aborigines might cease to exist physically—death in its most literal sense. Until the 1970s (and the recognition of mixed descent people as ‘Aboriginal’) this was widely understood to have been what happened in Tasmania: there were no Aborigines left in that State. Not believing this outcome to be inevitable in continental (particularly northern) Australia, influential humanitarians strove to avert this ‘Tasmanian’ scenario by various measures of ‘protection’: reserves, missions, government settlements. This intervention was successful: Aborigines—even if only so-called ‘full-bloods’ were counted—did not die out and by the 1950s the known continental ‘full-blood’ population was in recovery. Indigenous responses to being ‘protected’ varied regionally, depending on what contact there had been previously and on whether institutional control demanded their severance from ‘country’ and/or kin. Indigenous people were critical of institutional controls, but they also seem to have valued the different kinds of security that they found: biological security, social, even spiritual. The Indigenous memory of the institutional enclaves that arrested their depopulation seems mixed and ambivalent.28

Second, there was ‘death’ by genetic adulteration. This ‘death’ did not involve excessive mortality (and it could even work by proliferation). It had more to do—in the public and official imagination—with who impregnated Aboriginal women: through sex with a man who was not a ‘full-blood’ Aboriginal, the progeny of Aboriginal women would not be fully ‘Aboriginal’ genetically. Over a few generations of such partnering, a genetically distinct Aboriginal population would dwindle; eventually it would be reduced to zero. Policy responses to this possibility varied across jurisdictions and through time. Remote missions were designed to minimise opportunities for miscegenation. Three jurisdictions legislated to regulate Aboriginal marriage choices, but there were contending eugenic visions. Queensland under J. W. Bleakley wanted to prevent or severely limit miscegenation. A. O. Neville in Western Australia and C. E. Cook in the Northern Territory aspired to manage interbreeding. The likelihood of this ‘dying’ scenario was contingent partly on the common opinion between the world wars that ‘half-castes’ were not ‘Aboriginal’. However, official enumerations often followed administrative practice in presenting a more genetically inclusive ‘Aboriginal population’, and this was known to be increasing. We do not yet have an adequate history of Indigenous approaches to miscegenation. Their responses included: continuing intermarriage (across real/imagined racial boundaries) by those Aborigines that could or would marry; passing as non-Aboriginal; the persistence of ‘Aboriginal identity’ among ‘mixed’ people (no doubt assisted by official practices of treating ‘half-castes’ as ‘Aboriginal natives’); the formation of the folk category ‘yella fella’; the assertion of ‘half-caste’ as distinct from ‘full-blood’ entitlement. Ethnogenesis produced a pan-Aboriginal ideology that criticised the idea that hybridity extinguished the race, but a worthy question for historians is to document how and when the reckoning of descent and the interpretation of its meaning have been controversial among Aborigines themselves. The Census has accommodated self-identification since 1971, changing the humanitarian narrative: the Tasmanian Aboriginal population was never extinguished, and the ‘Aboriginal population’ (on the imperfect figures available since 1921) has been recovering since the 1920s.

The third ‘Dying Native’ scenario was about the rapid attrition of the economy, customs and beliefs of Aboriginal people. Even were Aborigines to remain numerous, and whatever their genetic constitution, they would ‘die out’ as a distinct way of life as they acculturated. This version of the ‘Dying Native’ scenario aroused more hope than dread: it was widely thought to be in Aborigines’ interests to acculturate, and it was the duty of governments to promote this. To manage such a cultural transition became the dominant and official policy approach after Second World War experience (the practical repudiation of myths of Aboriginal intellectual incapacity) and as an effect of the displacement of ‘racial’ by ‘cultural’ determinism among policy intellectuals. A complementary policy response was ‘salvage’ ethnography and museology, resulting in a scholarly archive of the ‘classical’ forms of Aboriginal life that seemed to be doomed. Intellectuals promoting and effecting this second response also supported remote inviolable reserves, but they were forced increasingly to concede the necessity of certain transforming interventions. Land rights and native title legislation revived the public policy value of ‘salvage’ ethnography from 1973 to 1993, and cultural policy harnessed a global market in ‘Indigeneity’. However public policy has never given up the duty of acculturation, and Aborigines and Torres Strait Islanders now debate their ‘modern’ socioeconomic aspirations. What is their growing land and sea base good for? Does ‘custom’ exacerbate or ameliorate Indigenous pathology? Indigenous responses to the prospect of the rapid attrition of their distinct way of life have varied enormously; the content and worth of Aboriginality are now matters for their vigorous debate. Many aspired to acculturate (some articulating folkloric heritage), and many were critical of their exclusion from mainstream education, employment, housing. A subsequent generation has criticised this attraction to ‘the mainstream’ and reasserted difference (passages in Jackie Huggins’ Auntie Rita, an intergenerational autobiography, make interesting reading).29 As well, the Indigenous evocation of heritage has bifurcated: the recognition of classical tradition has enabled ‘land rights’ and native title, but from the point of view of many Aborigines such valorisation of ‘tradition’ was also discriminatory against those most affected by colonisation. For such people, the ‘Stolen Generations’ story has been especially important, adding to the terms in which ‘Aboriginality’ could be affirmed at the end of the twentieth century. Thus themes of both survival and loss arise from regional differences of Aboriginal experience.

Conclusion

This schematic parsing of the notion of the ‘Dying Native’ is intended to complement my broad geographical ‘take’ on the colonising sequence. Australian colonisation has been a sequence of frontiers differentiated by shifts, over time, in theories about colonial responsibilities and about the colonised themselves; it has been differentiated also by the physical, social and economic demands and opportunities of Australia’s regions. The diverse meanings and implications of the Dying Native story and the sequenced differentiation of frontier experience combine to make it both necessary and possible to disaggregate and historicise settler colonial agency and Indigenous agency. For me as a historian, the greatest contemporary stimulus to historical revision is the diversity evident in contemporary Indigeneity, and the narratives of difference that I offer here are my way of making sense of that diversity. Since the public dispute among Ngarrindjerri about the ‘heritage’ significance of Hindmarsh Island in 1995, it has become increasingly evident that Indigenous Australians recall oppression and opportunity in different ways, and this underpins the variety of their projections of survival and future flourishing. Thus I find unhelpful the homogenising, psychologising and dehistoricising tendencies of the ‘elimination’ paradigm. By attaching its analytical ambition to establishing the teleological sameness of all narratives of colonisation, that approach not only dampens historical curiosity about distinctions of period, place and agent, it also renders uninteresting an arresting feature of the recent empowerment of Indigenous Australians: the diversity of their remembered pasts and projected futures.

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#### Turns alt solvency

Borrows and Tully 18 – John Borrows is the Canada Research Chair in Indigenous Law at the University of Victoria. He is Anishinaabe/Ojibway and a member of the Chippewa of the Nawash First Nation in Ontario, Canada. James Tully is emeritus distinguished professor of Political Science, Law, Indigenous Governance, and Philosophy at the University of Victoria.

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).

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.

#### Their logic is Exxon’s dream – that’s because only the government can stop warming

Monbiot 8 – Political & environmental activist, recipient of the UN Global 500 Award for outstanding environmental achievement, author of several award-winning books on environmental crises and corporate capture in politics, reporter for The Guardian Neoliberalism.

George Monbiot, August 22 2008, “Climate change is not anarchy's football,” The Guardian, https://www.theguardian.com/commentisfree/2008/aug/22/climatechange.kingsnorthclimatecamp

But in seeking to extrapolate from this experience to a wider social plan, she makes two grave errors. The first is to confuse ends and means. She claims to want to stop global warming, but she makes that task 100 times harder by rejecting all state and corporate solutions. It seems to me that what she really wants to do is to create an anarchist utopia, and to use climate change as an excuse to engineer it.

Stopping runaway climate change must take precedence over every other aim. Everyone in this movement knows that there is very little time: the window of opportunity in which we can prevent two degrees of warming is closing fast. We have to use all the resources we can lay hands on, and these must include both governments and corporations. Or perhaps she intends to build the installations required to turn the energy economy around – wind farms, wave machines, solar thermal plants in the Sahara, new grid connections and public transport systems – herself?

Her article is a terrifying example of the ability some people have to put politics first and facts second when confronting the greatest challenge humanity now faces. The facts are as follows. Runaway climate change is bearing down on us fast. We require a massive political and economic response to prevent it. Governments and corporations, whether we like it or not, currently control both money and power. Unless we manage to mobilise them, we stand a snowball's chance in climate hell of stopping the collapse of the biosphere. Jasiewicz would ignore all these inconvenient truths because they conflict with her politics.

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"Changing our sources of energy without changing our sources of economic and political power", she asserts, "will not make a difference. Neither coal nor nuclear are the 'solution', we need a revolution." So before we are allowed to begin cutting greenhouse gas emissions, we must first overthrow all governments and corporations and replace them with autonomous communities of happy campers. All this must take place within a couple of months, as there is so little time in which we could prevent two degrees of warming. This is magical thinking of the most desperate kind. If I were an executive of E.ON or Exxon, I would be delighted by this political posturing, as it provides a marvellous distraction from our real aims.

#### They also can’t just assert all natives are practicing sustainable practices that’s incredibly homogenizing – many extract large revenues from oil which is why only large governmental regs can solve.

Estus 20 – Joaqlin Estus, Tlingit, is a national correspondent for Indian Country Today. Based in Anchorage, Alaska, she is a longtime journalist.

Joaqlin Estus, April 22 2020, “Tribes' billion dollar oil industry ... and now?,” Indian Country Today, https://indiancountrytoday.com/news/tribes-billion-dollar-oil-industry-and-now

The future price for a barrel of crude oil dropped below zero on Monday. A new record. A minus sign for a future contract. And a day later the price was not much better.  A barrel of crude was trading as low as $6.50 a barrel Tuesday, more than 80 percent lower than the start of the year.

For the tribes and Alaska Native corporations that produce oil or support the oil industry the collapse of the industry means less money across the board.

A year ago the Interior Department was hailing tribal production as a billion dollar business.

Assistant Secretary for Indian Affairs Tara Sweeney, Inupiaq, representing the Trump administration, told the U.S. Senate Committee on Indian Affairs that oil and gas production from Indian Country had almost doubled in one year.

The ten or so tribes with significant oil reserves include the Mandan, Hidatsa, and Arikara tribes in North Dakota, Southern Ute tribe in Colorado, Wind River Eastern Shoshone and Northern Arapaho tribes in Wyoming, Jicarilla Apache tribe in New Mexico, Navajo Nation in the Southwest, and the Osage Nation in Oklahoma. It’s hard to see how they can make a billion dollars in 2020 if prices stay so low.

Several for-profit Alaska Native corporations own subsurface mineral rights and provide oil support services. The dividends they issue to shareholders are likely to be affected by the record low oil prices too.

As a state and federal official, and as a journalist, Larry Persily has long tracked oil development world-wide. He’s Atwood Chair of Journalism at the University of Alaska Anchorage and an oil-and-gas columnist for the Alaska Journal of Commerce.

Persily said this week's drop in oil prices is not a surprise.

“The world has been over producing oil for months now. This is not new. What's new now is how much more we’re producing than the world needs.” He said a few months ago the gap between need and supply was small. “It was making people nervous but not nervous enough to kill prices.”

“This pandemic has made it worse, five times worse" said Chairman Mark Fox of the Mandan, Hidatsa, and Arikara Nation, also known as the Three Affiliated Tribes, in North Dakota, "because now all of a sudden, there's nowhere to put the oil.” Trucks, cars, and airplanes are parked, he added.

And if the companies can’t sell it or store it, Fox said, “then what's going to happen is you're going to take losses in your company because of what it costs to break even.”

He said the price will have to rise significantly before producers can come back on line. “I know a few companies that think they can keep their head above water in the upper thirties, but you know, most of them need to be at 40 [dollars per barrel] or more and we're in the same boat as well too.”

Fox said this price drop has "an immediate effect on all tribes involved in energy" production because so many developers will have to curtail their losses and close wells.

Fox said 90 percent of his tribes’ revenue is from oil.