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Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism

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Introduction

In the infamous 1905 case of *Lochner v. New York*,[1] the Supreme Court struck down the New York state legislature's attempt to institute labor protections for bakers.[2] While *Lochner* has become a touchstone of the contemporary "anti-canon" of constitutional law,[3] at the time it was excoriated by the progressive press from the young *New Republic* to *The Atlantic*.[4] In the following years, bashing the *Lochner* Court and the threat of "judicial oligarchy" would become a recurring theme for presidential candidates from Teddy Roosevelt to William Jennings Bryan to Robert LaFollette.[5] The problem was not just the decision, but the pattern of a hostile judiciary and a failing political system, stymieing the efforts of reformers to tackle the upheavals of an industrializing economy. Today, over a century later, the Supreme Court is again at the center of a series of controversial decisions that seem to tilt the economic balance of power in favor of business and economic elites. From its campaign finance decisions like *Citizens United*[6] to its new invocation of First Amendment religious

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1. 198 U.S. 45 (1905).

2. *Id.* at 65–66.

3. *See* Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1988) (describing the concept of an "anti-canon" and including cases like *Lochner*).

4. *See* Karl T. Frederick, *The Significance of the Recall of Judicial Decisions*, ATLANTIC MONTHLY, July 1912, at 46, 52 (criticizing *Lochner*); *The Supreme Court's Power*, NEW REPUBLIC, Mar. 31, 1917 at 250, 252 (criticizing the *Lochner* Court's use of "formal logic" as an "illusion" and arguing that, in reality, the Court was exercising a political function).

5. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1393–96, 1444 (2001).

6. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

freedoms as a shield against economic regulation in *Hobby Lobby*[7] to its dismantling of unions in cases like *Harris v. Quinn*,[8] the Roberts Court has been charged with "neo-*Lochner*ism."[9]

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

The Supreme Court is, in one sense, an obvious front line for the battle to redress problems of economic and political inequality. To the extent that the Court's constitutional interpretation magnifies disparities of political

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7. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

8. 134 S. Ct. 2618 (2014).

9. *See generally* Jedediah Purdy, *The Roberts Court v. America*, J. DEMOCRACY, Winter 2012 at 46 (describing how the Roberts Court's jurisprudence evokes *Lochner* and exacerbates economic inequalities); *see also* Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 706–09 (2014) (discussing how the Roberts Court's election law decisions depend on an implicit and controversial understanding of liberty and democracy).

10. *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 1–28 (2008) (investigating the interconnection of economic inequality and political inequality).

11. *See, e.g.*, *id.* (investigating and detailing the potential impacts of economic inequality on American democracy and the potential impacts of economic inequality on politics); NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 83–84 (2013) (showing that "class-based inequalities in legislative effectiveness have unambiguous consequences for the substantive representation of the working class," one of which is "bills . . . sharply slanted in favor of white-collar Americans"); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 142–43 (2010) (linking a decline in union membership to an increase in inequality and a decrease in political clout for the middle class); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 564–68 (suggesting that modern American politics exhibit a strong pattern of favoring elite interests); Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013) (suggesting the United States is more of an oligarchy than a democracy); *see generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012) (describing the disparities in political influence between wealthy, middle-class, and poor Americans).

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

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

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

By placing legal realism in its political-economic context of reformers and thinkers struggling with the upheavals and inequities of industrialization, this argument also offers an important reinterpretation of legal realism as more than just a critique of judicial formalism, and instead as part of a larger effort to imagine a more egalitarian and democratic political economy. By "political economy" I mean to evoke a moral and institutional conception of how our politics and economics relate to one another, how they are structured by law and institutions, and how they ought to be structured in light of fundamental moral values. The political economy of the Roberts Court, like that of the *Lochner* era, evinces a particular view of markets and politics that exacerbates underlying inequities of power. In contrast, this Progressive Era-inspired view suggests an alternative account of democratic political economy.

Second, I argue that this vision of democratic political economy also suggests a particular theory of social change. The moral focus on domination and democracy orients us towards reform strategies that look to the ways in which law structures economic and political processes to allocate power, capabilities, and opportunities. These underlying structures emerge as critical sites of contestation, reform, and change. Thus, we might shift the terms of economic power through legislative and regulatory moves like antitrust and public utility; and we may magnify the democratic political power of citizens by creating alternative vehicles for voice and participation at the national or local level.

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

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

The Paper proceeds in four parts. Part I outlines the underlying conceptions of market equality and market freedom that animate both the Roberts Court and the laissez-faire constitutionalism of the *Lochner* era. But while the Court is playing a role in codifying a particular view of political economy, I will argue in this Part that ultimately the Court's activities are better understood as lagging behind longer-term currents in ideas, values, and on-the-ground structures. This then suggests that it is on the levels of public philosophy and structural conditions that an alternative vision to counteract laissez-faire political economy must first emerge. Part II then develops out of a reinterpretation of Progressive Era political thought the moral vision of domination and democracy that offers a starting point for this alternative account of political economy. Part III then explores how these normative ideals might inform efforts to rebalance the terms of economic and political power through restructuring the dynamics of the economy and the political process. Evoking the reforms of the Progressive Era, this part suggests similar reform pathways that are starting to manifest in contemporary scholarship and politics. While the Progressives do not offer a literal blueprint for us to adopt, their ethos of addressing problems of domination through expanding democratic agency, and of doing so through legal and regulatory reforms that alter the basic structures of political economy, is instructive for us today. Part IV then concludes by returning to the question of constitutionalism, political economy, and social change. In what way is the account of political economy and social change described in this Paper "constitutional"? I would argue that it is, and the ways in which it is suggest important shifts to

how we understand constitutionalism and its relationship to other domains of law, reform, and public philosophy.

I. *Lochner*ism 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.

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12. Directv, Inc., v. Imurgia, 136 S. Ct. 463 (2015).

13. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

14. *Directv*, 136 S. Ct. at 465–66; *Concepcion*, 563 U.S. at 344–52.

15. *See, e.g.*, Jessica Silver-Greenburg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, DEALBOOK, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1 [https://perma.cc/SJP5-R2T3] (describing the rise of arbitration clauses in consumer contracts, their impact on class action lawsuits, and their effect on the economy).

16. For a discussion of the power imbalances behind such "fine print" in contracts, see generally MARGARET RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012).

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-

17. For a discussion of "political law" as a field encompassing electoral, campaign finance, voting rights, and other laws of the political process, see generally Spencer Overton, *Foreword: Political Law*, 81 GEO. WASH. L. REV. 1783 (2013).

18. *See, e.g.*, Katz, *supra* note 9, at 698–99 (characterizing *Citizens United* as an example of the Court's skepticism about electoral rules that displace traditional forms of political participation to alter the balance of power).

19. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

20. As of this writing, the Court has not yet ruled in the *Fisher* affirmative action case, but if it strikes down the University of Texas's affirmative action program, as some expect it will, we might see a similar conceptual framework operating to undermine efforts to combat social inequalities as in the case of racial discrimination. Here too there is a preference on the Court for a nominal, surface-level equality that sanctions more persisting forms of structural inequality. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3682 (U.S. June 29, 2015) (No. 14-981). *See, e.g.*, Adam Liptak, *Supreme Court Justices' Comments Don't Bode Well for Affirmative Action*, N.Y. TIMES (Dec. 9, 2015), http://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html [https://perma.cc/N7WB-93MX].

21. *See* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 1–4 (2014) (describing "neoliberalism" as the tendency to support market imperatives at the expense of equal democratic power).

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

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22. *See, e.g.*, Pamela S. Karlan, *Foreward: Democracy and Disdain*, 126 HARV. L. REV. 1, 12–13 (2012) (contending that the current Court's disdain for congressional power colors its approach across an array of doctrinal areas).

23. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10 (1993) (arguing that courts during the *Lochner* era attempted to maintain the distinction between valid economic regulation and invalid "class" regulation); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298 (1985) (suggesting that laissez-faire constitutionalism in the nineteenth century was based on certain "laws" of economics and on the concept of human liberty). On how even *Lochner*-era constitutionalism involved a validation of expansive state police power regulation, albeit a vision of state regulation premised on a market-based notion of equality, see generally WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 83–113 (1996).

24. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) (striking down the dual for-cause protections for the accounting oversight board and grounding its decision in a vision of presidential administration of the board); Cuomo v. Clearinghouse Ass'n., 557 U.S. 519, 535–36 (2009) (upholding expansion of the Office of the Comptroller of the Currency's power because of a clear congressional mandate).

25. *See, e.g.*, Grewal & Purdy, *supra* note 21, at 18 (noting that distributive decisions are often "couched in the neutral-sounding language of efficiency"); Jedidiah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 197 (2014) (comparing ideas of moralized market transactions in *Lochner*-era cases to today's neoliberal constitutionalism).

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.

II. Domination and Democracy in Progressive Era Political Thought

In the traditional account of *Lochner* and laissez-faire constitutionalism, the primary response to these intellectual currents emerged from the legal realist movement. Legal realism is conventionally understood as an enormously influential attack on *Lochner*-era judicial formalism and overreach, focusing on revealing the malleability and indeterminacy of legal rules, and the ineradicable role of subjectivity and arbitrariness on the part of judges.[27] This critique has been understood as a legal, social scientific, and philosophical project.[28] Yet this account undersells the broader implications of legal realist and Progressive Era political thought more broadly. It is true that many of the legal realists often backed away from offering a more substantive normative account of the policies they advocated, preferring instead to rely on the democratic process and the potential of emerging social sciences to provide these answers.[29] But within the broader ecology of legal, economic, and

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26. There is now a rich and diverse scholarship documenting these intellectual origins of conservative political economy, emerging from the 1970s onwards. *See generally* ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION (2012); DANIEL T. RODGERS, AGE OF FRACTURE (2011); STEVE M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

27. *See* Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335–40 (1988) (summarizing the problems highlighted by legal realism and scholarly responses); Frederick Schauer, *Legal Realism Untamed*, 91 TEXAS L. REV. 749, 749–51 (2013) (defining this standard notion of legal realism).

28. *See* Brian Leiter, *Rethinking Legal Realism: Toward A Naturalized Jurisprudence*, 76 TEXAS L. REV. 267, 271–72 (1997) (criticizing "postmodern" readings of legal realism as failing to account for the emphasis on social sciences key to the legal and philosophical underpinnings of the theory).

29. BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 20–22 (1998) (noting the ways in which legal realist critique stopped short of moralized advocacy); *see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 209–10

philosophical thinkers of this time period, we can recover a more normatively- and sociologically-driven critique of the market economy that takes as its focal point disparities of economic and political power, and structural remedies for them.

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.

(1992) (questioning whether legal realism's turn to social science research undermined its critical edge).

30. *See generally* MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900–1933 (1994) (discussing the Progressive movement and using government to regulate various institutions); CHARLES POSTEL, THE POPULIST VISION (2007) (describing the Populist movement, which was a precursor of and laid the foundation for the Progressive movement); DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998) (describing the intellectual origins and underlying commitments of Progressive Era reformers); SHELTON STROMQUIST, REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM (2006) (describing the central concern of Progressive Era reformers with private power and economic dislocation).

31. FRIED, *supra* note 29. *See also* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970, at 80 (2015) (referencing Progressive Era works and describing the origins of this first law-and-economics movement).

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

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32. Louis D. Brandeis, Big Business and Industrial Liberty, Address Delivered at the Ethical Culture Meeting House in Boston (Feb. 10, 1912) *in* THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 38, 39 (Osmond K. Fraenkel ed., Kennikat Press 1965) (1935).

33. *Testimony Before the United States Commission on Industrial Relations*, 64th Cong. 1 (1915) (statement of Louis D. Brandeis) *in* THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS, *supra* note 32, at 70, 73.

34. *See* ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 6 (2015) (noting the Knights of Labor considered wage labor a form of dependent labor based on relations of mastery and subjection, and in tension with republican principles); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767, 769 (1985) (explaining that the Knights of Labor espoused an "ideology which held that being forced to sell [one's] labor contradicted the worker's status as a citizen").

35. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 142, 450 (Princeton Univ. Press 2014) (1909).

36. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), *reprinted in* AMERICAN LEGAL REALISM 101, 108 (William W. Fisher III et al. eds., 1993).

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

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37. Walton H. Hamilton, Lecture Delivered at the New School for Social Research, Freedom and Economic Necessity, *in* FREEDOM IN THE MODERN WORLD 25, 36–39 (Horace M. Kallen ed., reprt. 1969).

38. This normative recasting of Progressive Era thought frames it in terms of recent efforts in political theory to develop a normative, philosophical account of republicanism that prioritizes the values of democracy and equality, and highlights especially the threat of domination. *See, e.g.*, JOHN P. MCCORMICK, MACHIAVELLIAN DEMOCRACY 168–69 (2011) (discussing the Machiavellian conception of Republican Democracy and noting "historically, the vast majority of citizens within republics explicitly denounced electoral and senatorial institutions as vehicles of their own domination by socioeconomic and political elites"); PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 28 (2012) ("[F]reedom in a choice requires just the absence of domination; it is equivalent to the freedom that was hailed as an ideal in the long tradition of republican thought."); Patchen Markell, *The Insufficiency of Non-Domination*, 36 POL. THEORY 9, 9, 12–13 (2008) (discussing Pettit's conception of non-domination and finding it insufficient as an "over-arching political ideal").

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

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39. *See, e.g.*, Schauer, *supra* note 27, at 754–56 (discussing legal realists' challenge to the view that traditional legal sources and rules alone explain judicial decisions).

40. FRIED, *supra* note 29, at 109; HORWITZ, *supra* note 29, at 193–94, 206–08; Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 495 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

41. Horace M. Kallen, Lecture Delivered at the New School for Social Research, Why Freedom Is A Problem, *in* FREEDOM IN THE MODERN WORLD, *supra* note 37, at 1, 16.

42. *See generally* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. (1927), *reprinted in* AMERICAN LEGAL REALISM, *supra* note 36, at 109, 109–14.

43. *Id.* at 114.

44. Justice Louis Brandeis exemplifies this concern. Large corporations, to Brandeis, enjoyed immense profits while paying below subsistence wages, creating a disparity in political power that was akin to slavery where workers were "absolutely subject" to the will of the corporation.

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

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Brandeis, *supra* note 32, at 38–39. These private actors had acquired a size and a degree of economic and political power that could affect a wide range of other actors in society—not only their own workers, but also small businesses, and governments threatened by competitive pressure and corporate influence. *See also* David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 139–40 (2013) (describing the theoretical roots of corporate domination of workers and consumers).

45. For an example of this view among Progressive Era thinkers, see the discussion of John Dewey on pp. 1342–43, *infra*. For a contemporary equivalent of this view, see, e.g., IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 52 (2011) (describing the problem of structural injustice as being beyond the scope of individual action); KARL POLANYI, THE GREAT TRANSFORMATION 60–61 (1944) (arguing that the challenge of achieving social justice in a capitalist economy stems from the illusion that market forces are "natural" and beyond the scope of human agency).

46. John Dewey, *Liberty and Social Control*, 2 SOC. FRONTIER 41 (1935), *reprinted in* 2 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 360, 362–63 (Jo Ann Boydston ed., 1987).

47. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 121 (Melvin L. Rogers ed., 2012).

48. *Id.* at 129.

49. *Id.* at 48.

50. *Id.* at 69, 119.

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 "[f]ear of encroachment upon the liberties and opportunities of the individual[;] [f]ear of the subjection of labor to capital[;] and [f]ear 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

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51. John Dewey, *Public Opinion*, NEW REPUBLIC, May 3, 1922, at 286; *see* John Dewey, *Practical Democracy*, NEW REPUBLIC, Dec. 2, 1925, at 52, *reprinted in* 2 JOHN DEWEY: THE LATER WORKS, 1925–1953, *supra* note 46, at 213, 215–17 (discussing how the public could evolve and learn through the process of participation).

52. DEWEY, *supra* note 47, at 120.

53. *Id.* at 119.

54. 288 U.S. 517 (1933).

55. *Id.* at 540.

56. *Id.* at 548 (Brandeis, J., dissenting).

57. *Id.* at 568–70.

democratic agency: "[O]nly 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 "[m]an 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.

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58. *Id.* at 580.
59. 285 U.S. 262 (1932).
60. *Id.* at 280.
61. *Id.* at 306 (Brandeis, J., dissenting).
62. *Id.* at 310.
63. *Id.* at 310–11.

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]

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64. Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18, 18.

65. For a growing documentation of this problem of modern monopoly, see *infra* note 71.

66. *See* K. Sabeel Rahman, *Curbing the New Corporate Power*, BOSTON REV. (May 4, 2015), http://bostonreview.net/forum/k-sabeel-rahman-curbing-new-corporate-power

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

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[https://perma.cc/BW9W-8D7P] (arguing that Uber and other online "platforms" represent a new form of private power today).

67. *See generally* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Transaction Publishers 1991) (1932).

68. *See id.* at 119 ("[T]he past century has seen the corporate mechanism evolve from an arrangement under which an association of owners controlled their property on terms closely supervised by the state to an arrangement by which many men have delivered contributions of capital into the hands of a centralized control.").

69. *See* Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 444 n.6 (2001) ("Dodd and Berle conducted a classic debate on the subject in the 1930s, in which Dodd pressed the social responsibility of corporate managers while Berle championed shareholder interests. By the 1950s, Berle seemed to have come around to Dodd's celebration of managerial discretion as a positive virtue that permits managers to act in the interests of society as a whole."); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 327 (1976) ("[T]he total gross agency costs . . . are the costs of the 'separation of ownership and control' which Adam Smith focused on in the passage quoted at the beginning of this paper and which Berle and Means (1932) popularized 157 years later."); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 347 (2005) ("In the mid-1970s, a number of economists attempted to delve inside the black box of the firm . . . . Two lines of development in this research agenda have had a lasting impact on the thinking of corporate law academics. . . . The second is the agency costs theory of the firm. This line of research was introduced in 1976 by Michael Jensen and William Meckling, who, working from the corporate finance literature, gave systematic economic content to the much earlier key observation of Adolf Berle and Gardiner Means in 1932, that ownership was separated from control in the modern U.S. corporation.").

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

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70. *See, e.g.*, BERLE & MEANS, *supra* note 67, at 309–10; Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 193 (2005) (noting that corporations represented a unique form of power that could organize and direct the actions of a wide range of constituencies—workers, investors, managers, consumers, suppliers, and the like—but lacked meaningful constraints on the use of such power).

71. *See, e.g.*, Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 23 (2008) ("Using corporate law to adjust the composition or duties of the board to force the consideration of stakeholder interests could be a powerful tool, not only to rein in the worst excesses of the corporation, but also to take advantage of the unique capabilities of the corporation to achieve important gains in social welfare."); Kent Greenfield, *The Stakeholder Strategy*, 26 DEMOCRACY 47, 52–53 (2012) ("[I]n our current regulatory scheme, the concerns of the other stakeholders are not considered within the internal, structural machinery of corporate governance. These stakeholders are to be taken care of (to the extent they are at all) by way of protections they can gain through contract or external regulation. There's one way to change that: adjusting the structure of corporate governance.").

72. The shift over the course of the twentieth century from this early conception of antitrust to the modern focus on maximizing consumer welfare has been well-documented. *See, e.g.*, Richard Hofstadter, *What Happened to the Antitrust Movement?: Notes on the Evolution of an American Creed*, *in* THE BUSINESS ESTABLISHMENT 113, 151 (Earl F. Cheit ed., 1964) ("In passing from a phase in which it was largely an ideology to one in which it has become largely a technique, antitrust has become, like so many other things in our society, differentiated, specialized, and bureacratized."); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH FOR A PUBLIC PHILOSOPHY 231 (1996) ("Antitrust law . . . enjoyed a longer career, under shifting ideological auspices. Born of the political economy of citizenship, it lived on in the service of the political economy of growth and distributive justice that, by the mid-twentieth century, was ascendant."); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS 331–32 (1988) ("In the regulatory legislation of 1914, the nation's prevalent political forces found a nonstatist method of market administration that succeeded in 'taking the trust question out of politics.' . . . The FTC solution, based as it was on the Supreme Court's Rule of Reason decisions, represented an advance in positive government and at the same time a triumph of corporate liberalism, in an early phase of its development, over statist tendencies whether of a libertarian or authoritarian hue."); Gerald Berk, *Corporate*

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]

Liberalism Reconsidered: A Review Essay, 3 J. POL'Y HIST. 70 (1991); Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75, 75 (1990) ("One of the great myths about American antitrust policy is that courts first began to adopt an 'economic approach' to antitrust problems in the relatively recent past. At most, this 'revolution' in antitrust policy represented a change in economic models. Antitrust policy has been forged in economic ideology since its inception."); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1220 (1988) (stating that the Sherman Act represented "the dying words of a tradition that aimed to control political power through decentralization of economic power, which in turn was to be achieved through protection of competitive opportunity"); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) ("Although the political forces that produced the major antitrust statutes—in 1890, 1914, 1936, and 1950—varied widely, those statutes once enacted have almost always been enforced and interpreted so that economic considerations were paramount.").

73. *See* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 2014, at 38, 73 (observing that concentration of economic power in the financial, agricultural, and manufacturing sectors "has left a few dominant companies that each wields enormous power over their respective industries and our polity").

74. *See, e.g.*, *id.* After lamenting that "[e]xisting antitrust is far too feeble for the task of unwinding the [corporate] power," Professors Teachout and Khan observe:

> You can see the American impulse to antitrust appearing in Jonathan Macey and James P. Holdcroft Jr.'s recent article about limiting bank size, in the business journalist Barry C. Lynn's book *Cornered*, in Robert Reich's support for breaking up banks, and even in Alan Greenspan's suggestion that companies too big to fail are too big to exist. This impulse is gradually creeping out and finding its way into legislation. During the financial reform fight, Senator Sherrod Brown of Ohio and Senator Ted Kaufman of Delaware proposed a simple new law that the New York Times endorsed: They wanted to put a cap on bank size.

Id. (footnotes omitted). *See also* David Dayen, *Bring Back Antitrust*, THE AMERICAN PROSPECT, Fall 2015, http://prospect.org/article/bring-back-antitrust-0 [https://perma.cc/9DDT-A8HD] (arguing that "at a time of political disempowerment, teaching about the dangers of monopolies and how we have the laws on the books to fight them, and creating upward pressure to do it, offers great potential for a paradigm shift"); Philip Longman, *Bloom and Bust*, WASHINGTON MONTHLY, Nov./Dec. 2015, http://www.washingtonmonthly.com/magazine/novemberdecember_2015/features/bloom_and_bust058470.php?page=all [https://perma.cc/N6FJ-5CDV] (observing "a vast retreat from antitrust enforcement of all kinds").

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, "[f]or 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

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75. William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1638–44 (2014) (observing that rate regulation was used to preserve reasonable rates in natural monopoly industries rather than antitrust regulation).

76. William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377, 400 (2010).

77. *Id.*

78. Boyd, *supra* note 75, at 1637–41; Novak, *supra* note 76, at 399–400.

79. Boyd, *supra* note 75, at 1639–40 (noting that regulation by state commissions of water and electricity production began in the early twentieth century and spread rapidly across the country).

80. Novak, *supra* note 76, at 400.

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]

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81. *See, e.g.*, FFC, 10-201, Preserving the Open Internet; Broadband Industry Practices (Dec. 23, 2010) https://apps.fcc.gov/edocs_public/attachmatch/DA-12-740A1_Rcd.pdf [https://perma.cc/YY7U-PV4V] (describing the rationale for common carriage and public utility-type obligations); FFC, 14-61, Protecting and Promoting the Open Internet (Feb. 26, 2015) https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1_Rcd.pdf [https://perma.cc/VN6Y-XN9V] (reaffirming those same policies but formally reclassifying Internet).

82. *See generally* Boyd, *supra* note 75 (arguing that a revitalized concept of public utility has much to offer for any effort to decarbonize the electric power sector).

83. For an example of a proposal for a public option in banking through "postal banking," see generally MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY (2015).

84. *See, e.g.*, Rahman, *supra* note 66 (arguing that Progressive policy ideas that focus on the "broader problem of economic power, not just prices or welfare or efficiency . . . suggest important directions for regulating the new forms of private power in the Internet era").

85. *See* STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA 1–13 (2003) (describing the origins of and intellectual underpinnings of the direct democracy movement that gave rise to ballot, recall, initiative, and referendum procedures).

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

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86. *See, e.g.*, KEVIN MATTSON, CREATING A DEMOCRATIC PUBLIC: THE STRUGGLE FOR URBAN PARTICIPATORY DEMOCRACY DURING THE PROGRESSIVE ERA 34–35 (1998) (arguing that home rule encouraged political responsibility and self-government); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2298 (2003) (explaining that delegates to constitutional conventions in St. Louis and San Francisco hoped that home rule would stop corruption).

87. *See, e.g.*, David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 HARV. L. & POL'Y REV. 1, 2 (2009) (crediting state and local progressive movements for shifting the national political spectrum); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2005) (valuing decisions to dissent for providing a "robust marketplace of ideas" which improves the quality of future decisions).

88. *See generally* JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2012) (offering a political and legal account of the American administrative state from the 1940s through the early 1960s); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010) (describing the evolution of equal employment rights through battles over the hiring and promotion practices in regulatory agencies like the Federal Communications Commission and the Federal Power Commission); Karen M. Tani, *States' Rights, Welfare Rights, and the "Indian Problem": Negotiating Citizenship and Sovereignty, 1935-1954*, 33 LAW & HIST. REV. 1 (2015) (documenting efforts by Native American activists to secure access to welfare benefits under the Social Security Act and the Constitution through skilled advocacy that navigated state and federal bureaucracies in the 1930s and 1940s).

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]

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89. *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEXAS L. REV. 1897, 1897–98 (2013) (theorizing the role of agencies in shaping constitutional meanings and understandings through agency policymaking activities and internal debates).

90. *Id.*

91. *See, e.g.*, Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1677 (2011) (discussing performance metrics and their use for increasing and insuring agency accountability).

92. *See, e.g.*, HOLLIE RUSSON GILLMAN, DEMOCRACY REINVENTED: PARTICIPATORY BUDGETING AND CIVIC INNOVATION IN AMERICA (2016) (describing the origins of participatory budgeting and examining its impact on democracy and citizenship); BETH SIMONE NOVECK, SMART CITIZENS, SMARTER STATE: THE TECHNOLOGIES OF EXPERTISE AND THE FUTURE OF GOVERNING (2015) (outlining a theory for how technology can expand participation and transparency); Archon Fung, *Varieties of Participation in Complex Governance*, 76 PUB. ADMIN. REV. 66, 66 (2006) (outlining strategies for expanding participation in governance).

93. *See, e.g.*, Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014) ("Although democratic accountability as a normative matter includes citizen mobilizations organized to influence a single election, a discrete piece of legislation, or a judicial victory, we focus on the interaction between lawmaking and popular, purposive mobilizations that seek significant, sustainable social, economic, and/or political change.").

94. But there was a core ambivalence among reformers over the degree to which such civic mobilization should emphasize conflict between classes and social groups—such as through labor militancy—or instead transcend political conflict to promote conciliatory deliberation among citizens. *See, e.g.*, NANCY ROSENBLUM, ON THE SIDE OF ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 171 (2008) (describing the unease many Progressive Era reformers had for political contestation and conflict). For example, the government crackdown following the Pullman strike of 1894 split reformers; some reformers embraced the aggressive conflicting vision

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

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of labor strikes, while others, including John Dewey and Jane Addams, became disenchanted with destructive class antagonisms, seeking ways to shift politics away from such conflict towards more conciliatory and productive reform. *See, e.g.*, STROMQUIST, *supra* note 30, at 25–32. Reformers seeking labor legislation often focused on efforts, such as social insurance, that could draw the support of multiple classes, putting them in conflict with organized labor itself. *See, e.g.*, *id.* at 90–93. In other reform debates, Progressives exhibited a similar ambivalence between mobilizing to contest the power of big business and seeking reforms with cross-class appeals to "good government" in hopes of transcending class conflict, partisanship, and other forms of social conflict. *See, e.g., id.* at 53–55; *see also* LOUIS MENAND, THE METAPHYSICAL CLUB 310–16 (2001) (describing the debate between Dewey and Addams over whether the clash of class and social interests in the labor movement could ever be fully reconciled).

95. On this critique of the New Deal order, see generally RAHMAN, DEMOCRACY AGAINST DOMINATION (forthcoming October 2016) and THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 (Steve Fraser & Gary Gerstle eds., 1989).

96. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1389–90 (2001) (discussing critical views of the Supreme Court during the *Lochner* era).

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 earlytwentieth 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

97. See, for example, the confluence of new legal–historical scholarship on the emergence of conservatism, the challenges of post-crisis political economy, and alternative historical sources for democratic- and egalitarian-reform politics in recent conferences. Program of the Annual Meeting of American Society for Legal History (Nov. 6–9, 2014) http://aslh.net/wordpress/wp-content/uploads/2014/10/2014-ASLH-Program-LR.pdf [https://perma.cc/7TD9-4T2K]; Program of the Annual Meeting of American Society for Legal History (Oct. 29–31, 2015), http://aslh.net/wordpress/wp-content/uploads/2015/10/2015-ASLH-Annual-Meeting-Program.pdf [https://perma.cc/3TV2-VZGA]; CENTER FOR THE STUDY OF WORK LABOR AND DEMOCRACY, *Beyond the New Deal Order*, http://www.history.ucsb.edu/labor/news/event/388 [https://perma.cc/AZZ3-N246]; THE POTOMAC CENTER FOR THE STUDY OF MODERNITY, *Society for U.S. Intellectual History 2015 Conference* (Oct. 15–18, 2015), http://thepotomaccenter.org/event/society-for-u-s-intellectual-history-2015-conference [https://perma.cc/53EP-96F5].

98. *See generally* BARADARAN, *supra* note 83.

99. *E.g.*, PREVENTING REGULATORY CAPTURE 1–5, 10–11 (Daniel Carpenter & David A. Moss eds., 2014).

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

100. *See* HORWITZ, *supra* note 29, at 269–72 (sketching contemporary trends within legal theory that claim to have evolved from legal realism).

101. Victoria Nourse & Gregory Shaffer, *Varieties of a New Legal Realism: Can a New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61, 96–98 (2009).

102. ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 32 (Verso 2015).

103. *Id.*

104. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 832–34 (2008) (casting legal realism as the use of social science analysis to reveal biases in judges administering administrative law doctrines).

105. *See, e.g.*, William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 709 (1991) (explaining that "New Public Law scholarship rejects objectivist imagery about law," arguing instead that "law is socially constructed, a matter of continuous popular, as well as institutional, interpretation").

106. *E.g.*, Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1393–94 (1996).

analyze micro-scale behaviors and macro-scale costs and benefits of different institutional systems.[107]

But as the anxieties about neo-*Lochner*ism 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

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107. For a good example of the pragmatic and institutional design applications of law and economics insights, see, for example, ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2009); Henry E. Smith, *Law and Economics: Realism or Democracy?*, 32 HARV. J.L. & PUB. POL'Y 127 (2009).

108. Nourse & Shaffer, *supra* note 101, at 125–26.

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.

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