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JEDEDIAH BRITTON-PURDY, DAVID SINGH GREWAL,  
AMY KAPCZYNSKI & K. SABEEL RAHMAN

## Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis

**ABSTRACT.** We live in a time of interrelated crises. Economic inequality and precarity, and crises of democracy, climate change, and more raise significant challenges for legal scholarship and thought. “Neoliberal” premises undergird many fields of law and have helped authorize policies and practices that reaffirm the inequities of the current era. In particular, market efficiency, neutrality, and formal equality have rendered key kinds of power invisible, and generated a skepticism of democratic politics. The result of these presumptions is what we call the “Twentieth-Century Synthesis”: a pervasive view of law that encases “the market” from claims of justice and conceals it from analyses of power.

This Feature offers a framework for identifying and critiquing the Twentieth-Century Synthesis. This is also a framework for a new “law-and-political-economy approach” to legal scholarship. We hope to help amplify and catalyze scholarship and pedagogy that place themes of power, equality, and democracy at the center of legal scholarship.

**AUTHORS.** The authors are, respectively, William S. Beinecke Professor of Law at Columbia Law School; Professor of Law at Berkeley Law School; Professor of Law at Yale Law School; and Associate Professor of Law at Brooklyn Law School and President, Demos. They are cofounders of the Law & Political Economy Project. The authors thank Anne Alstott, Jack Balkin, Jessica Bulman-Pozen, Corinne Blalock, Angela Harris, Luke Herrine, Doug Kysar, Zach Liscow, Daniel Markovits, Bill Novak, Frank Pasquale, Robert Post, David Pozen, Aziz Rana, Kate Redburn, Reva Siegel, Talha Syed, John Witt, and the participants of the January 2019 Law and Political Economy Workshop at Yale Law School for their comments on drafts at many stages of the project.



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## INTRODUCTION

We live in a time of rolling political, economic, social, and ecological crises. In the United States and across the world, income inequality has returned to the levels of the Gilded Age.<sup>1</sup> Conventional monetary policy seems unable to generate the stable and shared growth that previous generations of economists and policymakers took for granted.<sup>2</sup> Factors such as the weakness of labor unions,<sup>3</sup> the increasing concentration of industry,<sup>4</sup> and the degradation of social insurance schemes<sup>5</sup> have contributed to inequality and intensified precarity.<sup>6</sup> Markers of

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1. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harvard Univ. Press 2014) (examining and documenting the rise in income inequality); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 629 (2014) (reviewing PIKETTY, *supra*, and noting that “there are numerous parallels between current tendencies and those of earlier times, particularly the Gilded Age of the late nineteenth and early twentieth centuries”); see also David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 THEORETICAL INQUIRIES L. 61, 64 (2017) (discussing the period between 1945 and 1973, when income inequality shrank, and associated “Golden Age optimism”).
  2. On the difficulty of contemporary macroeconomic policy under present conditions, see *EVOLUTION OR REVOLUTION? RETHINKING MACROECONOMIC POLICY AFTER THE GREAT RECESSION* (Olivier Blanchard & Lawrence H. Summers eds., 2019); and Kenneth Rogoff, *Dealing with Monetary Paralysis at the Zero Bound*, 31 J. ECON. PERSP. 47 (2017). See also Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REG. 791, 791 (2017) (arguing that the “costs associated with introducing macroeconomics into law are worth bearing”).
  3. See Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 516 (2011).
  4. See *The Problem with Profits*, ECONOMIST (Mar. 26, 2016), <https://www.economist.com/news/leaders/21695392-big-firms-united-states-have-never-had-it-so-good-time-more-competition-problem> [<https://perma.cc/5JGR-HKVC>] (providing evidence that two-thirds of U.S. industries “have become more concentrated since 1997”). Recent studies suggest that the increase in concentration is hurting both wages and investment. See David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. (forthcoming 2020), <https://economics.mit.edu/files/12979> [<https://perma.cc/ZKN2-AF25>]; José A. Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* (Nat’l Bureau of Econ. Research, Working Paper No. 24395, 2018), <https://www.nber.org/papers/w24395> [<https://perma.cc/XL69-QHSU>]; Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* (Nat’l Bureau of Econ. Research, Working Paper No. 23583, 2017), <https://www.nber.org/papers/w23583> [<https://perma.cc/M5C4-2JDZ>].
  5. See JACOB S. HACKER, *THE GREAT RISK SHIFT* (2d ed. 2019).
  6. On stagnant incomes in the United States, see Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 557 (2018). For discussions of the changing workplace and its consequences, see SARU JAYARAMAN, *FORKED: A NEW STANDARD FOR AMERICAN DINING* (2016) (regarding restaurant workers); ARNE L. KALLEBERG, *PRECARIOUS LIVES: JOB INSECURITY AND WELL-BEING IN RICH DEMOCRACIES* (2018); ALEX ROSENBLAT, *UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK*

despair, including early death, are on the rise for young and middle-aged adults in the United States.<sup>7</sup>

This economic crisis is creating a crisis of care and social reproduction.<sup>8</sup> Low wages mean longer work hours, high rents mean longer commutes, and unaffordable childcare and weakening social-insurance schemes mean heavier burdens on caregivers.<sup>9</sup> These trends are intensified, particularly among the poor and people of color, by mass incarceration,<sup>10</sup> misdemeanor-control policies,<sup>11</sup>

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(2018) (regarding the precarity of gig economy workers); BENJAMIN H. SNYDER, *THE DISRUPTED WORKPLACE: TIME AND THE MORAL ORDER OF FLEXIBLE CAPITALISM* (2016); GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014) (regarding the precarity of franchised workers); and Daniel Schneider & Kristen Harknett, *Consequences of Routine Work-Schedule Instability for Worker Health and Well-Being*, 84 AM. SOC. REV. 82 (2019). On the cruel ironies of conventional means of upward mobility in conditions of severe and persistent precarity, see Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019).

7. Lauren Gaydos et al., *The Depths of Despair Among U.S. Adults Entering Midlife*, 109 AM. J. PUB. HEALTH 774 (2019); see also Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT'L ACAD. SCI. 15078 (2015) (documenting an increase in the all-cause mortality of white non-Hispanic people in the United States between 1999 and 2013); Steven H. Woolf & Heidi Schoomaker, *Life Expectancy and Mortality Rates in the United States, 1959-2017*, 322 JAMA 1996, 1996 (2019) (providing evidence that “[b]y 2014, midlife mortality was increasing across all racial groups, caused by drug overdoses, alcohol abuse, suicides, and a diverse list of organ system diseases”).
8. See Nancy Fraser, *Contradictions of Capitalism and Care*, 100 NEW LEFT REV. 99 (2016).
9. See Helen Hester, *Care Under Capitalism: The Crisis of “Women’s Work,”* 24 IPPR PROGRESSIVE REV. 343 (2018). In addition, as women move into the workforce in greater numbers, they are less able to do unpaid work at home—a shift that does not show up in GDP and that surely blunts the impact of economic growth as described by GDP. See Nancy Folbre et al., *Women’s Employment, Unpaid Work, and Economic Inequality*, in *INCOME INEQUALITY: ECONOMIC DISPARITIES AND THE MIDDLE CLASS IN AFFLUENT COUNTRIES* 234 (Janet C. Gornik & Markus Jäntti eds., 2013); Nancy Folbre, *Valuing Unpaid Work Matters, Especially for the Poor*, N.Y. TIMES: ECONOMIX (Sept. 21, 2009, 7:00 AM), <https://economix.blogs.nytimes.com/2009/09/21/valuing-unpaid-work-matters-especially-for-the-poor> [<https://perma.cc/M5G7-9CY7>].
10. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* (2010); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); see also Loïc Wacquant, *Class, Race, and Hyperincarceration in Revanchist America*, 28 SOCIALISM & DEMOCRACY 35 (2014) (arguing that we are experiencing “hyper” incarceration rather than “mass” incarceration owing to stratification by race, class, and gender).
11. See ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018).

penal welfare,<sup>12</sup> and penal debt.<sup>13</sup> Racialized violence and structural inequity pervade the American social order, even the physical structure of our cities, and foster unequal vulnerability to environmental problems, economic exploitation, and physical insecurity.<sup>14</sup>

Climate change threatens to exacerbate all of these crises. It challenges our way of life so fundamentally that it is hard to adequately conceptualize the potential harms in relation to current institutions and intellectual frameworks.<sup>15</sup> The model of economic growth and resource extraction at the heart of today's capitalism is on a collision course with human existence as we have known it.<sup>16</sup> Even short of widespread catastrophe, the costs of climate disruption will fall on those least able to bear them.<sup>17</sup>

The political response to these problems has proven insufficient. Our democratic structures of decision-making are hollowed out.<sup>18</sup> Government enacts the

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12. See Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1337 (2016) (defining penal welfare as “states’ growing practice of providing social benefits through criminal court”); see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 38 (2012).
  13. See Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090 (2017); AM. CIVIL LIBERTIES UNION, *A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT* (2018), [https://www.aclu.org/sites/default/files/field\\_document/022318-debtreport\\_o.pdf](https://www.aclu.org/sites/default/files/field_document/022318-debtreport_o.pdf) [<https://perma.cc/987B-QP92>].
  14. See, e.g., MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017) (describing the racial wealth gap and its relationship to financial institutions and structures); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017) (describing the racialized impact of police violence); JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* 29-54, 76-101 (2019) (describing the pervasive intersection of economic inequality, the built environment, and differential environmental vulnerability); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing the racialized impact of urban planning).
  15. See AMITAV GHOSH, *THE GREAT DERANGEMENT: CLIMATE CHANGE AND THE UNTHINKABLE* (2016); JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* 6-7 (2015) (discussing “environmental imagination”); Jedediah Purdy, *Climate Change and the Limits of the Possible*, 18 DUKE ENVTL. L. & POL’Y F. 289, 289-90 (2008) (proposing a “dynamic view of political economy” to help see beyond the problem of climate change).
  16. See, e.g., KATE ARONOFF ET AL., *A PLANET TO WIN: WHY WE NEED A GREEN NEW DEAL* (2019) (exploring contradictions between capitalist growth and ecological viability).
  17. See PURDY, *supra* note 14, at 35-46 (discussing how “environmental vulnerability is intimately involved in American inequality”); Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 821-29, 858-62 (2018) (exploring distributive questions surrounding environmental justice).
  18. See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 150-55 (2017). In the European context, see Ignacio Sánchez-Cuenca, *From a Deficit of Democracy to a Technocratic Order: The Postcrisis Debate on Europe*, 20 ANN. REV. POL. SCI. 351, 353 (2017). For

policy preferences of the rich over those of the majority<sup>19</sup>: political scientists studying the problem have deemed money itself “the root of representational inequality.”<sup>20</sup> Citizen frustration with this intertwined and increasing concentration of economic and political power is visible on the right in the rise of the Tea Party and the election of Donald Trump and on the left in social movements such as Occupy and Black Lives Matter and in growing calls by prominent parts of the Democratic Party for socialism or renewed social democracy. All of these movements express deep dissatisfaction with political elites. They manifest ordinary people’s anger at their limited influence over both their individual lives and our collective political future.

Together, these developments pose a deep challenge to prevailing models of legal thought and scholarship, which have been profoundly shaped by a misconception of the relationship between politics and the economy. That misconception inhibits our ability to address urgent problems of distribution, democracy, and ecology. Indeed, legal discourse has helped consolidate these problems by serving as a powerful authorizing terrain for a set of “neoliberal”<sup>21</sup> political projects that have fueled these same crises.

Although a full defense of these claims will take many pages, any first-year law student can appreciate the problem’s basic contours. She may begin her education imagining it as an invitation to ask fundamental questions concerning justice and power. But she is likely to “learn” quickly that serious legal thought in areas such as contracts and property prizes a certain version of efficiency over all else. Meanwhile, constitutional law advances visions of equality and liberty

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a global account, see CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber et al. eds., 2018) (discussing troubled constitutional democracies throughout the world).

19. MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1* (2012) (providing evidence that U.S. policy is “strongly tilted toward the most affluent citizens” such that, “under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt”); see also Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC. 152, 174 (2010) (discussing how “many Americans . . . lack confidence in public officials’ willingness or ability to address [inequality] effectively”).

20. GILENS, *supra* note 19, at 10.

21. As used in this Feature, “neoliberalism” is “a set of recurring claims made by policymakers, advocates, and scholars in the ongoing contest between the imperatives of market economies and nonmarket values grounded in the requirements of democratic legitimacy.” David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 2-3 (2014). Neoliberalism is a mode of governance and legitimation that enforces specific distributions and configurations of “market discipline” that support profits and managerial power over democratically determined social guarantees—for instance, labor market “liberalization,” erosion of unions’ role in the economy, and rollbacks of social provision. See *id.*

that leave many forms of unequal power and vulnerability unchallenged or even enshrined as constitutionally fundamental. Upper-level courses such as antitrust and antidiscrimination law extend and consolidate the same lessons. To enter law school today—particularly the elite law schools that send the most students into powerful legal and political positions—is to join a conversation shaped by the depoliticization and naturalization of market-mediated inequalities.<sup>22</sup>

The sum of these parts is a division of labor among legal fields that we dub the “Twentieth-Century Synthesis.”<sup>23</sup> It rests upon two interrelated developments. First, some legal subfields have been reoriented around versions of economic “efficiency.” These are the fields in which law and economics has become dominant and which are generally considered to be “about the market”: contracts, property, antitrust, intellectual property, corporate law, and so on. Here, efficiency analysis anchors both the descriptive framing and the normative assessment of law. Efficiency itself is typically defined—in practice if not always in theory—as a kind of “wealth maximization” that works to structurally prioritize the interests of those with more resources.<sup>24</sup> This methodological approach offers no framework for thinking systematically about the interrelationships between political and economic power. Its commitment to summative conceptions provides it no means to analyze, let alone counter, contemporary concentrations of wealth and power, except insofar as they interfere with overall efficiency.<sup>25</sup>

The second move has redefined so-called political and public legal fields, centrally constitutional law. Here, questions of coercion and legitimacy remain central but are delimited to exclude economic power and other structural forms of inequality. Scrutiny in these fields tends to be restricted to narrowly defined differential treatment of individuals, especially by the state. As the economy was

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22. These inequalities include life-defining differences in power that operate in intersectional ways to impact health and well-being. See, e.g., RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007) (offering an influential definition of racism as “the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death”); NANCY KRIEGER, *EPIDEMIOLOGY AND THE PEOPLE’S HEALTH: THEORY AND CONTEXT* 167–201 (2011) (theorizing and providing references to work on social epidemiology and the political economy of health).
  23. One might also call it the “late twentieth-century synthesis,” since the consolidation occurs from the 1970s onward. But, as we describe, the Synthesis is also a kind of apotheosis or apogee of the century. It is the culmination of developments that reach back to the era of *laissez-faire*, Progressivism, and the New Deal; and from Reconstruction to Jim Crow and the Civil Rights Movement. We favor the broader “Twentieth-Century” term for this reason.
  24. See, e.g., Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018).
  25. Antitrust law and theories of monopoly provide no exception, because they too have been reworked to focus on narrow conceptions of efficiency. See *infra* text accompanying notes 60–63 (discussing evolution in the domain of antitrust theory).

read out of working conceptions of constitutional equality, it was read back into constitutional law to enshrine certain forms of economic liberty through developments in free-speech law. Meanwhile, more diffusely, pessimism about the possibilities of politics and the effectiveness of the state rippled through our constitutional imaginary and doctrine, shaped by ways of thinking that transposed market logics onto politics and political subjects. The result is a vision of constitutional equality and liberty that enshrines structural inequality and economic power.<sup>26</sup>

Altogether, the Synthesis has muted problems of distribution and power throughout public and private law. As a result, the economy has receded as a subject in fields now reconstituted as fundamentally political, and politics has receded as a subject in fields reconstituted as fundamentally economic.

A word is in order about how we envision the contributions of this Feature—a sort of “How to Use This Argument” manual. We seek to map the broad sweep of legal argument, interpret a professional culture, and bridge scholarship and doctrine, across decades and across a variety of substantive fields. To everything we say there will be counterexamples. We have many of them in mind ourselves. There are also many areas of law we do not discuss. We expect that readers will be able to identify many confirming examples and details from their own fields, some outside our knowledge, others simply beyond the scope of our drafting.

With all due caveats, we believe this argument captures essential shifts and stakes that have constituted the legal era of the last several decades. The Twentieth-Century Synthesis makes up the air we breathe, and is the only disciplinary atmosphere younger scholars and lawyers have known. This Synthesis was always contested, often passionately, and many tools to contest it have been built over decades. We note some of our precedents, but they are so many and our debt is so great that we lack the space here to acknowledge each individually. Having said that, we also believe that—at a moment when structural and political shifts have reopened essential questions about the meaning of liberty and equality, the relationship between the state and the economy, and the interactions between capitalism and democracy—a reassessment of legal scholarship and its tasks is in order.

In this moment, it is newly possible to reorganize the fundamental orientations of legal scholarship. The conditions that made the regnant legal culture halfway plausible to so many people have shifted. Its costs are now clearer. We propose a statement of the current stakes and offer some preliminary ideas about how we might best reconstruct legal scholarship to address the fundamental challenges of our time. We must replace the Twentieth-Century Synthesis with

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26. See *infra* Section II.A.



a different framework for legal thought. At the core of this reconstruction is a renewed commitment to questions of political economy. With others, we have thus begun to practice a scholarship of “law and political economy” (LPE), rooted in a shared set of insights, concerns, and commitments.<sup>27</sup>

The term “political economy” is historically variable and contested. We do not mean the “political economy” analysis of institutions and policies as practiced in mainstream economics departments, which turns on the application of rational-choice models to government actors or institutions.<sup>28</sup> Rather, we intend the older and more foundational usage familiar to nineteenth-century audiences, which persisted in traditions of “radical” political economy until a few decades ago. *This* political economy investigates the relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences.

This insight was once influential among legal scholars, and indeed, received some of its defining formulations from them. The Legal Realists, in their battle against laissez-faire ideology in the late nineteenth and early twentieth centuries, explained how law specifies the rights, powers, and enforcement mechanisms that constitute economic transactions and, more broadly, economic ordering. These laws are the output of political order, making law the essential connective tissue between political judgment and economic order.<sup>29</sup>

Attention to political economy today requires attentiveness to the ways in which economic and political power are inextricably intertwined with racialized and gendered inequity and subordination. Significant critiques of the “private” and self-sustaining economy after the realists came from feminists, who pointed

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27. One useful place to access the work of other scholars and advocates engaged in this practice is the *Law & Political Economy* blog, founded in 2017 by a group of faculty and students, including the authors, who were keen to renew a political-economy approach in legal scholarship. This Feature is indebted to the insights of these students and the blog’s many contributors, as well as legal scholars and activists associated with the Association for the Promotion of Political Economy and the Law (APPEAL) and the *Journal of Law and Political Economy* (JLPE). For additional perspectives on the LPE approach and a description of an associated new casebook, see Martha T. McCluskey et al., *Law and Economics: Contemporary Approaches*, 35 *YALE L. & POL’Y REV.* 297 (2016). We also acknowledge the support of the Hewlett Foundation, which has permitted us to launch a new “Law and Political Economy Project,” housed at Yale Law School.

28. Samuel Bowles & Herbert Gintis, *Power and Wealth in a Competitive Capitalist Economy*, 21 *PHIL. & PUB. AFF.* 324, 324 (1992) (“The term *political economy*, once synonymous with economics, now generally refers either to the study of the interface between economy and state or to the application of models of rational choice to the analysis of state decision-making.”).

29. On the relation to the older “institutional” political economy and what it could mean for legal scholarship, see Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 *J. COMP. ECON.* 188 (2017); and Grewal, *supra* note 1.

out that the productive circuits of capitalism relied upon reproductive labor done largely by women—labor that was uncompensated and thus not captured in foundational economic measures such as GDP (and, arguably, unable to be adequately appreciated in terms of conventional political economy or its measurement of exchange value).<sup>30</sup> Scholars focused on racial subordination have worked for decades to theorize the way that the state gives force to nominally private racism by selectively enabling certain kinds of choice. More recently, theorists of the “carceral state” have highlighted the role that criminal law plays in regulating markets and market subjects.<sup>31</sup> Nonetheless, criminal law is conventionally understood apart from legal fields that address “the economy.” Unfortunately, these problems have been effectively obscured by separating the fields focused on these domains as not about economy at all.

Despite decades of telling criticism, “the economy” has become a kind of unquestioned foundation or backdrop of law, policy, and politics in modern intellectual and mainstream political discourse. Whatever it touches has been treated as susceptible to technical management but not to political judgment. In parallel, places where political or moral judgment predominate are assumed not to be spaces of economic ordering. How were the lessons of legal realism elided and lessons of other critical legal traditions resisted? How were so many issues of justice recast as something *other than* political-economy questions? And in what ways has the consolidation of neoliberalism established a set of new problems that the realists and critical legal scholars did not confront?

We explore these questions in Part II, explicating the two moves important to the Twentieth-Century Synthesis, and the features of law and economics (for example, its claims to tractability and neutrality) that provided some of its appeal. We end with reference to the broad historical background that is essential to understanding the fragile success of the Synthesis. That background includes the exceptional economic conditions of the postwar “*trente glorieuses*”; the neoliberal age’s multivalent retreat from the political; and an urgent set of emer-

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30. SYLVIA FEDERICI, *The Reproduction of Labor Power in the Global Economy and the Unfinished Feminist Revolution*, in *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE* 91 (2012); Nancy Fraser, *Crisis of Care? On the Social-Reproductive Contradictions of Contemporary Capitalism*, in *SOCIAL REPRODUCTION THEORY: REMAPPING CLASS, RE-CENTERING OPPRESSION* 21 (Tithi Bhattacharya ed., 2017); see also Folbre et al., *supra* note 9.

31. See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011); Loïc Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 *SOC. F.* 197 (2010); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 *SEATTLE U. L. REV.* 927 (2016).

gent questions that seemed, especially in a time of regnant neoliberalism, to require redress via “recognition,” rather than “redistribution.”<sup>32</sup> The well-funded and organized promotion of law and economics mattered too, as did its interconnection with an increasingly conservative and activist judiciary.<sup>33</sup>

The crises of today challenge this fragile Synthesis and make vivid the denial of democracy that it implies. These same developments have also rejuvenated reconsideration of the relationship between questions of distribution and matters of inclusion, citizenship, and democracy, on both left and right. Part III explores a series of questions that might connect critical scholarship, past and present. What might a mode of legal analysis that took the political nature of the economy seriously look like? What questions would it foreground, and how would it address them? We offer a possible set of broad reorientations: from the analysis of efficiency to the analysis of power, from the pursuit of neutrality to the pursuit of equality, and from the antipolitics of the Twentieth-Century Synthesis to a candid and risky embrace of democracy.

## I. THE TWENTIETH-CENTURY SYNTHESIS

Beginning in the 1970s, but drawing from developments in the laissez-faire era and earlier, a new division of labor in legal thought coalesced into what we call the Twentieth-Century Synthesis. It consisted of two interrelated moves. First, in fields denoted as about “the economy,” the rise of law and economics centered efficiency and sidelined questions of distribution, power, and democracy. Second, in fields understood as more “political” — fields including constitutional law, for example — a parallel set of moves worked to render economic power hard to find and correct: it was background and not foreground, allowed to operate according to its own ostensible rules and protected in various ways from democratic reordering. The success of this Synthesis has never been complete, always fragile. Dissenting voices have contested these intellectual and political developments along the way and done a great deal to highlight some of their problems. Despite this, the landscape of legal thought shifted decisively, setting the stage for our new Gilded Age.

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32. See NANCY FRASER, FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS 227-43 (2013) (describing and theorizing differences between recognition and redistribution). See generally NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE (Joel Golb et al. trans., 2003).

33. See *infra* Section II.C.

A. *The Autonomy of the Economy*

The first move of the Synthesis can be best understood by charting the rise in the 1970s and 1980s of modern law and economics, an intellectual enterprise that approached law using the tools of neoclassical economics.<sup>34</sup> Law and economics represented a return to the ideal of what we call the “autonomy of the economy,” familiar in laissez-faire thinking, but with a twist.

Laissez-faire thought envisioned the economy as a self-subsistent domain of freedom, in which individuals could organize their affairs through a few relatively simple principles of property and contract. It found legal expression in cases such as *Lochner v. New York*<sup>35</sup> and *Hammer v. Dagenhart*.<sup>36</sup> In legal culture, laissez-faire advocates argued both that the U.S. Constitution sharply constrained the ability of democratic majorities to “interfere in economic matters”<sup>37</sup> and that this was good because markets were a domain of freedom where—as marginal productivity theory had ostensibly revealed—all were rewarded “in proportion to their just deserts.”<sup>38</sup> Legal realists, over decades of trenchant cri-

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34. For a discussion of the first law-and-economics movement, which operated quite differently than the law and economics of the 1970s and 1980s, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

35. 198 U.S. 45 (1905).

36. 247 U.S. 251 (1918). For more on laissez-faire, see FRIED, *supra* note 34. The theoretical backdrop to this image has been some blend of a natural-rights theory (sometimes traced to John Locke, though commerce was not much of his concern) in which economic life is organized in a Lego-like way by individuals linking up their property rights (including property in their own labor) through the hinges and rivets of contract and a more psychological and protosociological theory that treats property and exchange as emerging spontaneously from the reciprocal relations of social animals, as set out by Adam Smith, David Hume, and others. The theoretical premises of these accounts have tended not to matter much in what one might think of as their ideological work, as they coincide in imparting an image of naturalness and harmony to an idealized picture of market relations. In this, such traditions all enact a form of antipolitics. What unites them is their rationalization of a set of limits on, and specific instructions for, the deployment of state power to shape economic and social life: limits against “interference” with market distributions and relations, and instructions for organizing those relations through the law.

37. FRIED, *supra* note 34, at 1.

38. *Id.* at 2. Decades of scholarship have enriched our picture of the origins of *Lochner* and the legal culture that surrounded it, whose influences included Jacksonian antimonopoly politics, the free-labor ideology of the Republican Party before and after the Civil War, and the emerging culture of corporate legal practice in the Gilded Age. See, e.g., 8 OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN*

tique, eventually buoyed by political victory in the New Deal, elevated an explicitly functionalist account of law as serving varying social aims rather than embodying perennial and abstract concepts.<sup>39</sup> They also showed that law is never absent from economic life but rather generates the order of rights that market advocates invoke to defend the boundaries of the economy.<sup>40</sup> Most fundamentally, in response to the laissez-faire claim that markets could and should be free from state coercion, they showed that legally constituted and distributed coercion is the sine qua non of market relations.<sup>41</sup>

Steeped in the realist skepticism of formalism, law and economics embraced law as a functional and instrumental domain and even embraced the realization that law makes markets.<sup>42</sup> But it defined law's goals and methods in a manner that demanded a new kind of rule of the market. It argued for what we might call "market supremacy," or the *necessary* subordination of the political to the economic. And along the way, this inheritor of legal realism abandoned the concern with economic life's character as a site of struggle amid unequal power. It gave up the urgency of both criticizing coercion and inequality and asking how they might be justified, if at all.

Three theories are key to the market supremacy model of law and economics. First is the elevation of efficiency—and more particularly, "wealth maximization"—as a value to guide decisionmakers. Wealth maximization is the theory that law should be oriented to ensure the greatest aggregate "wealth," or the greatest "total consumer and producer surplus generated by those goods and services" in the economy.<sup>43</sup> The problems with wealth maximization as a moral

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STATE, 1888-1910, at 3-21 (1993) (arguing for the ideological and historical complexity of laissez-faire jurisprudence); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1-18 (1993) (surveying methodological and substantive approaches to *Lochner*-era jurisprudence); Jack M. Balkin, *Wrong the Day It Was Decided: Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005) (tracing and assessing efforts to relate laissez-faire jurisprudence to constitutional canon and anti-canon); see also WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (documenting, in the state and common law of nineteenth-century America, a distinctive logic of shared obligations and public duties).

39. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

40. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 534-35 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

41. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

42. 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).

43. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 60 (1981).

matter are many and by now quite well understood. To offer just one salient example, it would be “wealth maximizing” to take bread from a poor man in order to forcibly transfer it to a rich man, even when the former is starving and the latter merely peckish, as long as the latter is “willing” – because he is able – to pay more.<sup>44</sup> Wealth maximization thus enacts a “willingness to pay” principle – it demands that goods move to those with the highest willingness to pay, whether or not they have in fact paid, and with no requirement that the move increases utility or welfare.<sup>45</sup> Few find that appealing, and few today in fact defend wealth maximization as a normative theory.<sup>46</sup> In practice, however, law and economics almost invariably reverts to wealth maximization as a criterion, because costs and benefits are both hard to measure, and transfers (if ever actualized) hard to achieve, without a common denominator like money.<sup>47</sup>

Elevating efficiency as a value also marginalized questions of distribution, so that the law of economic exchange was itself “encased,” protected from distributive or other political demands beyond the demand for efficiency itself.<sup>48</sup> The Coase Theorem as commonly understood, for example, not only entrenches

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44. For formative critiques that point out this problem, among others, see DANIEL M. HASUMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY* (2d ed. 2006); Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 465 (Peter Newman ed., 1998); and Ronald M. Dworkin, *Is Wealth a Value?*, 9 *J. LEGAL STUD.* 191 (1980). In a folk sense, the idea has some appeal, because it is assumed to be growing the economic pie in a manner that can later be redistributed. See *infra* notes 49–52 and accompanying text.

45. See Liscow, *supra* note 24, at 1658–59.

46. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 5 (2002). Richard Posner claimed to move toward a “common sense” economic libertarianism, while other leading law-and-economics scholars instead retreated—in theory—to the criterion of welfare maximization. See Richard Posner, *Law and Economics Is Moral*, 24 *VAL. U. L. REV.* 163, 166 (1990) (defending “economic libertarian views” not as a matter of philosophy, because philosophy was a “weak field, a field in disarray, a field in which consensus is impossible to achieve in our society,” but because “the minimum state defined by the economic analysis of market failure is the state that works best to achieve the common goals of most people in the world”).

47. See, e.g., KAPLOW & SHAVELL, *supra* note 46, at 32 n.34 (noting the need for a common denominator for costs and benefits and acknowledging that “[i]n law and economics writing, this denominator is usually money”); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 14–16 (2010) (making a similar point).

48. For the terminology of “encasement,” see QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 5–7, 13 (2018). This is similar to the process described as “depoliticization” (which is achieved through a political commitment to take something out of politics), as described by WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* 46 (Patrick Camiller trans., 2014).

ideas about efficiency but also obscures matters of distribution and initial endowment.<sup>49</sup> As a framing device, the Theorem effaces the otherwise inescapable nub of the problem: who wins and who loses, and who may do what to whom? The former was ruled irrelevant, and a near-nihilistic response was given to the latter: it does not matter where law places the entitlement, for the market will determine where it belongs.<sup>50</sup> Louis Kaplow and Steven Shavell's "double distortion" argument represents the most sophisticated expression of the marginalization of issues of distribution. They purport to establish that legal entitlements should always be designed to maximize efficiency, shunting issues of distribution elsewhere (commonly, to the tax code), lest production suffer two shortcomings rather than just one.<sup>51</sup> Here too, sophisticated critiques both revealed the many problems with this account and failed to stem its influence.<sup>52</sup>

The second and third theories – externalities and "transaction costs" – serve to bridge the core account of the market in neoclassical economics, as articulated in general equilibrium theory, with the traditional institutional focus of law. Beyond their common usage, these theories operationalize a neoclassical conception of the market and its purposes in post-realist legal analysis.<sup>53</sup> Externalities are features of a transaction or economic process that are "external" to it, and

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49. Its chief lesson is commonly said to be that it does not matter to efficiency where a legal entitlement goes if transaction costs are low. Framed that way, the decisive distributive effects of entitlement allocation disappear as an issue. In our experience, incoming law students often present an instructive reality test. Despite their general eagerness to adopt and adapt to the novel norms of legal reasoning, they tend to see Coase's arguments as weirdly artificial and beside the point. They reassert ideas of fairness about who does what to whom and are sincerely baffled by the indifference to distributive outcomes, often expressing the thought that they must themselves be missing something, as Coase could hardly be so eminent if he failed to engage meaningfully with such an important issue. In the end, many grudgingly accept that "This Is Important," while some, having got the knack of the linking theories, eagerly deploy them for the rest of the first year.
50. Or, with more sophistication: if transaction costs are high, the entitlement should be allocated to produce the most efficient result, with efficiency defined in terms that themselves carry a distributive bias.
51. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).
52. Among these criticisms, see Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511, 519-23 (2004); and Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2478-83 (2014).
53. The original neoclassical conception of the market is formalized in F.Y. EDGEWORTH, *MATHEMATICAL PSYCHICS* (1881). For a modern definition of neoclassical economics by an advocate of the theory, see E. Roy Weintraub, *Neoclassical Economics*, LIBR. ECON. LIBERTY, <https://www.econlib.org/library/Enc1/NeoclassicalEconomics.html> [https://perma.cc/A7VG-PN9B].

thus are not priced through the market or otherwise accounted for.<sup>54</sup> Externality is often treated as a problem of “market failure,” whether a failure within a particular market to make some costs “internal” to the relevant agents or the outright absence of any relevant market.<sup>55</sup> Transaction costs are costs of market exchange: of locating parties; negotiating deals; overcoming strategic bargaining problems; and, in some cases, supporting the institutions required to enable transactions. The concept was first used by Ronald Coase to explain why firms pursue certain tasks through internal hierarchies – bosses and supervisors giving orders to workers – rather than do everything through market contracts.<sup>56</sup> This same logic was then extended to rationalize all forms of command that coexist with contract: the question was always whether hierarchical command costs less on net than market contracting, once the transaction costs of the latter were taken into account. Various features of institutional life could thus be homogenized into one capacious concept that also helped to naturalize market exchange: as long as transaction costs were low, Coase implied, it could be assumed that entitlements would naturally flow to their “best” or “highest value” use through voluntary exchange. Where they were high, planners could reengineer entitlements to approximate the most efficient (i.e., hypothetical market) outcome. This assumption epitomizes law and economics: it simultaneously recognizes and embraces the fact that law makes markets, while demanding that the satisfaction of markets becomes the aim of politics.

Law and economics, elevated amid the antiplanning rhetoric of the Chicago school, was inevitably itself a form of planning. Planning was essential if politics was to serve the goal of efficiency, precisely because “transaction costs” and “externalities” meant that efficiency in many cases required redesigning the market. The role of scholarship was to identify transaction costs and externalities (and,

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54. See ANDREAS A. PAPANDEOU, EXTERNALITY AND INSTITUTIONS 169-71, 197 (1994) (noting that “external” is used to describe a situation in which some relevant activity is outside the unit of account, whether a household, firm, organization, some aggregate of these, or even the economic system altogether, and used to describe an activity that is inefficient with respect to some specified objective function, such as Pareto optimality). A standard example is when water pollution from a factory affects downstream users who have no control over and cannot readily transact with the upstream owner’s decisions.
55. Kenneth Arrow, *Political and Economic Evaluation of Social Effects and Externalities*, in THE ANALYSIS OF PUBLIC OUTPUT 1, 1-2 (Julius Margolis ed., 1970); Walter P. Heller & David A. Starrett, *On the Nature of Externalities*, in THEORY AND MEASUREMENT OF ECONOMIC EXTERNALITIES 9, 9-10 (Steven A.Y. Lin ed., 1976).
56. Coase recuperated this as a response to the efficiency mandate by theorizing that firms would emerge whenever the costs of market transaction were higher than the cost of internalizing decisions into a command structure. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 395 (1937).



in the public-choice vein, motives and opportunities for rent seeking) and to recommend a shift in entitlements. The agent of law reform imagined here was not the people but the technician: the judge, economist, or bureaucrat who would calculate hypothetical consumer and producer surplus to order law and policy to serve the aims of wealth maximization. Transaction costs also became the central means of describing why externalities exist and persist: markets do not internalize some values because the “costs” of internalizing them are too high. Transaction costs and externalities became the centerpiece of modern law and economics, bridging the gaps between neoclassical economic theory and problems of private law.<sup>57</sup>

Wealth maximization, transaction costs, and externalities have served as “linking theories” that connect analysis of legal rules and institutions with the general equilibrium model of neoclassical economics. These theories rationalize legal institutions (with their inevitable basis in coercion) against the backdrop of a sophisticated account of perfect markets. For example, the theory of externalities redefines domains that might have been conceived as part of the market’s “outside” as part of a comprehensive theoretical “inside.” Transaction-cost analysis rationalizes nonmarket institutional development and political conflict over and within market orderings as a kind of “friction” to be minimized. Both have the effect of reorienting the normative assessment of markets and their consequences to an ultimately self-valorizing standard, wealth maximization, that assumes the social good is generally achieved through the maximization of market transaction.<sup>58</sup> They translate an abstract but mathematically elegant account, in which questions of coercion and distribution play no formal part, into a set of rougher and more fragmentary, but conveniently modular, moves that constitute the “law-and-economics” method and can be deployed across a variety of fields of law. Their combined effect is to make market ordering central and seemingly inevitable by grounding legal analysis in neoclassical descriptive and justificatory concepts. Through these linking theories, law and economics has developed into the “normal science” familiar to legal academics today. Among the achievements of law and economics has been its claim to analytic *tractability* (using externalities and transaction-cost analysis to make progress possible on questions about how law should be ordered) and a form of *neutrality* (using efficiency as a principle to make social decisions that ostensibly make everyone better off).

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57. See, e.g., R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-2 (1960).

58. Sophisticated critics have shown that this is more rhetoric than reality. As with other forms of capitalism, neoliberalism in fact relies on certain institutions remaining outside the formal market, for example in order to perform – under extractive conditions – the work of social reproduction. On this, see, for example, MELINDA COOPER, *FAMILY VALUES* (2016); and Fraser, *supra* note 8.

B. *The Law of the Economy Remade*

The many criticisms of this way of reasoning did not halt the influence of modern law and economics in legal thought. Law and economics spanned substantive areas of law, delivering a simplicity and method that any first-year student could learn and that a wave of dedicated scholarship on alternative field-specific idioms did little to displace. The result was far from a comprehensive defense of market ordering, much less one that overcame the many telling criticisms of the normative case for law and economics that issued in the 1980s.<sup>59</sup> Nonetheless, adherents of law and economics reorganized an array of legal fields. They did so using a variety of argument types, sometimes shifting among them. Arguments that idealize a version of market ordering as neutral and “good for us all,” which would characterize the elevation of consumer welfare in antitrust law or efficiency reasoning in intellectual property, are *market fundamentalist*. Arguments to the effect that the state simply cannot be trusted to make substantive judgments about value and distribution on account of the dynamics revealed by public-choice theory take the form of *market tragedy*. Here, market-modeled insight reveals that the market is the best we can do, perhaps regrettably but ineluctably nonetheless. This style of argument persistently accompanied the more optimistic market-fundamentalist moves, enabling scholars and advocates to insist without fear of contradiction that economic policy deviating from market models would invite rent seeking. The combination of the first two supported a third, subtler style of argument: *market hegemony* simply assumed that “serious” law and policy thinking would adhere to market models, as in environmental law’s focus on cost engineering to the exclusion of infrastructure investment and political engagement. The latter kinds of proposals simply have no place at the table, and raising them suggests the discrediting failure to understand that market reasoning provides the authoritative and exclusive way of engaging urgent questions.

Antitrust law, our first example, was remade to address a drastically narrowed conception of the problem of monopoly.<sup>60</sup> Market power was to be disciplined only when it interfered with consumer welfare, and sometimes, still more

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59. For examples of these criticisms, see Kennedy, *supra* note 44; and Dworkin, *supra* note 44.

60. See, e.g., Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. (forthcoming 2020) (manuscript at 43-54) (describing Robert Bork’s narrowed conception of antitrust’s aims); Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655 (2020) (reviewing TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018)); Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 717-22 (2017) [hereinafter Khan, *Amazon’s Antitrust Paradox*].

narrowly, only when it increased prices.<sup>61</sup> Historically, antitrust law and scholarship took a broader view: it emerged from a concern about the power of large corporate entities to influence politics and not just prices, and imposed structural limits and bright-line rules to guard against an array of possible political-economic implications of firm dominance.<sup>62</sup> Replacing this political-economic version of antitrust, the field came to target a much narrower conception of market collusion. The result is a regime that privileges firms as favored instances of (vertical) coordination but repudiates certain forms of (horizontal) coordination among market participants and certain workers (such as independent contractors).<sup>63</sup> In the name of supposed efficiency, antitrust now blesses mergers and big firms but restrains cooperation among Uber drivers and church organists.<sup>64</sup> This remade antitrust law has in turn helped to remake the corporate world, facilitating the substantial new forms of market concentration and priority for capital over labor that we previewed above.

Intellectual-property law is another field that was remade—indeed, *made*—by law-and-economics thinking. The term “intellectual property” itself was hardly used before the 1960s, and its use exploded only in the 1980s and 1990s.<sup>65</sup> “Intellectual property” gathers together distinct legal regimes under the banner of information production. These regimes were once thought to be about scientific and technical advancement (patent), the cultivation of learning and culture (copyright), and the enforcement of standards of commercial morality (trademark and trade secrets). Each of these fields responded to a set of distinctive institutional contexts and sought to promote forms of flourishing that were measured against distinctive political values. But economic thinking—the notion that information has “public goods” qualities of nonrivalry and nonexcludability—joined these radically different legal regimes together into one subject and rendered the pursuit of efficiency their aim. It inaugurated a new language for debating the contours of these laws and redescribing some of their features in a manner that empowered rightsholders.

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61. Khan, *Amazon's Antitrust Paradox*, *supra* note 60, at 720-21.

62. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980-81 (2019); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236-37 (2017).

63. Paul, *supra* note 60, at 13-14.

64. *Id.* at 16, 34.

65. See William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* 22 n.105 (unpublished manuscript), <https://cyber.harvard.edu/people/wfisher/iphistory.pdf> [<https://perma.cc/YZL2-F8QR>].

Leading law-and-economics scholars tended—especially early on—to presume that stronger rights were good, applying a simplistic version of the command to internalize externalities, rather than any sophisticated analysis of information economics.<sup>66</sup> Critics concerned with overprotection came to argue against these claims in the same efficiency-oriented register, in ways that subtly but consequentially shaped the debate and the law. The most powerful argument for “fair use,” for example—the doctrine in copyright law that permits copying for criticism, commentary, and educational uses—became the argument that it resolved “market failures.”<sup>67</sup> Transaction costs were assumed to be the measure of the reach of this critical public safeguard, and a statute that marked out a set of uses that had much more to do with democratic citizenship and distribution was slowly (and, we might say, undemocratically) rendered responsive to arguments from efficiency.<sup>68</sup> In a host of other domains, too, the law of intellectual property was subtly revised under the sign of a set of claims about efficiency, in

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66. For example, law-and-economics scholars like Richard Posner, William Landes, and Richard Epstein strongly argued for the need to expand intellectual-property law to internalize the externalities of information production. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 403-19 (2003); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 *STAN. L. REV.* 455, 457-59 (2010); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325, 325-26 (1989).

67. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 *COLUM. L. REV.* 1600, 1610-12 (1982).

68. The result was a law that strongly protected certain privileged “transformative” uses because they were assumed to be subject of transactional failures. See Clark D. Asay, *Is Transformative Use Eating the World?*, 61 *B.C. L. REV.* (forthcoming 2020) (charting the growing importance of transformation as a fair use criterion). Google was a great driver and recipient of this doctrine, winning a series of cases that legitimated its copious copying on the grounds that its new industrial uses were “transformative.” See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216-18 (2d Cir. 2015) (concluding that Google’s digitization of books, combined with a search functionality and the display of “snippets,” was transformative and a fair use); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that Google’s use of “thumbnail” images for image search was “significant[ly] transformative” and a fair use). At the same time, reproductive uses (one might say socially reproductive uses), such as those in educational settings, were deemed unlawful without payment because the notion was lost that our law held commitments to education, including *distributive* commitments that militated against payment, that were not subject to the dictates of efficiency analysis. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535, 556 (2004) (noting how the transformative-use doctrine undermined educational copyright, which was increasingly rejected as “pure copying”). For more examples of the way that market-supremacist ideas helped reconfigure law and so enable growing corporate power in the age of informational capitalism, see JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 15-47 (2019); and Amy Kapczynski, *The Law of Informational Capitalism*, 129 *YALE L.J.* (forthcoming 2020) (reviewing SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* (2019) and COHEN, *supra*).

ways that empowered corporate owners of intellectual property over workers and consumers and set the stage for today's extraordinary forms of platform power.<sup>69</sup>

Environmental law was also transformed, with enormous and perhaps irreparable consequences for the planet. The field emerged from a long history of legislation over public lands and natural resources that had always been closely engaged in questions of public value and collective identity: it was generally understood that making a landscape was part of making a nation.<sup>70</sup> Modern environmental law, constructed in a wave of legislation between 1970 and 1977, began amid legislative and popular debate over fundamental questions of political economy: what kind of human flourishing could be compatible with the flourishing of the larger living world?<sup>71</sup> By the 1980s, however, both scholarship and policy were increasingly bound to public-choice models of legislation and cost-benefit assessment of policy.<sup>72</sup> In recent decades, the looming climate crisis has met with scholarship and political initiatives shaped by the dominance of economic method: meditations on the public-choice challenges to climate action, or—at the outer limits of what we could be supposed to achieve—proposals to change the cost structure of the economy through a carbon tax or cap-and-trade initiative.<sup>73</sup> Such scholarship is admirable in its constructive aim to guide a basic reorientation of the economy. But, it has steadily avoided the demand for massive public investment and reconstruction of infrastructure that characterized

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69. See Kapczynski, *supra* note 68, at 40-49.

70. See PURDY, *supra* note 15, at 7-9 (summarizing substantive political and social visions associated with historical developments in environmental law).

71. See Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1174-90 (2010) (discussing the wealth of normative visions involved in the environmental legislation of the late 1960s and early 1970s).

72. See *infra* notes 101-104 (tracing these developments); see also THOMAS O. MCGARITY & WENDY WAGNER, BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH 20-43 (2008) (discussing the political drivers of cost-benefit analysis in environmental and public-health policy); Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969-1973*, 9 DUKE ENVTL. L. & POL'Y F. 29 (1998) (surveying methodological developments in the field).

73. See, e.g., RICHARD B. STEWART & JONATHAN B. WIENER, RECONSTRUCTING CLIMATE POLICY: BEYOND KYOTO (2003) (concentrating on the interest-mediating structure of projected global climate policy); Kirsten H. Engel & Barak Y. Orbach, *Micro-Motives and State and Local Climate Initiatives*, 2 HARV. L. & POL'Y REV. 119, 129-30 (2008) (foregrounding economically rational incentives and lumping moral and otherwise other-regarding motives into a residual category); Eric A. Posner & Cass R. Sunstein, *Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?*, 97 CALIF. L. REV. 51, 86-92 (2009) (arguing that the incentives of self-interested nation-states should be regarded as an intractable constraint on distributive politics of climate policy).

earlier interventions as fundamental as this one and that have emerged as necessary to any rapid transition to a sustainable economy.<sup>74</sup> It has also avoided engagement with the fundamental questions of value that are necessarily implied in political judgments about what should count as “costs” and “benefits” in a reconstruction of the economy that is, by virtue of climate dynamics, also a global reconstruction of the natural world.<sup>75</sup> Most fundamentally, it has also obscured from view the kinds of political mobilization that are essential for engaging these fundamental questions.

In a host of other fields, similar moves have been made with varying degrees of success. In civil procedure, law and economics led to reforms, often at the state level, that reined in the plaintiffs’ bar, limited class-action lawsuits, and empowered judicial “managerialism”<sup>76</sup> and, more recently, arbitration.<sup>77</sup> In corporate law, the shift to an ideal of shareholder-value maximization, while not legally required, became hegemonic.<sup>78</sup> In international economic law, a neoliberal conception of cross-border activity gradually became dominant, institutionalized in the immediate post-Cold War context in new trade and investment treaties that served to limit the possibility of political interference with cross-border economic activity.<sup>79</sup>

In fields where law and economics came to dominate, it helped to turn legal scholars’ attention persistently to certain questions. Law and economics centered the identification and elimination of transaction costs, channeling the Paretian utopia of Ronald Coase’s famous frictionless plane of exchange—a kind of heaven, not of legal concepts (as Felix Cohen had wryly described classical legal

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74. See PURDY, *supra* note 14, at 83-101 (discussing the infrastructure demands of meaningful climate policy).
75. See KYSAR, *supra* note 47, at 1-16 (discussing the inseparability of basic questions of value from environmental policy).
76. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386-413 (1982) (defining and describing the move to managerialism in judging).
77. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2836-47 (2015).
78. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”). For critiques, see K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1682-87 (2018); and Lynn A. Stout, *New Thinking on “Shareholder Primacy,”* ACCT. ECON. & L., June 2012, Article 4, at 1.
79. For descriptions and critiques, see generally ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* (2011); SLOBODIAN, *supra* note 48; and David Singh Grewal, *Three Theses on the Current Crisis of International Liberalism*, 25 IND. J. GLOBAL LEGAL STUD. 595, 595 (2018) (“The turn to neoliberalism involves a shift from the inter-state orientation that characterized the first decades of international liberalism to a ‘dialectic of globalization[.] . . .’”).

liberalism) but of general equilibrium. The emphasis on externalities reframed the conflict among competing interests that had properly struck realists as central to law's concerns as a failure of accounting or pricing, a failure in properly rendering the boundaries of a potential transaction. Coase's point that a householder can harm a factory by reducing its profits just as a polluting factory can harm a downwind householder was familiar, of course, from Hale's description of all exchange as mutual coercion. The difference was that law and economics recast this relativizing not as the starting point for a judgment about power and legitimacy but as a nonproblem. We lost the ability to see certain commitments in our law—whether educational exceptions to copyright law, or commitments to clean air—as either reflecting or calling forth certain kinds of political values, or as taking a side in disputes that were inevitably struggles for power. That move, of course, was not neutral. It expressed a particular view of power and legitimacy, one that viewed market ordering as tending to diffuse and neutralize power and as earning legitimacy by producing both a wealthy society and an appropriately constrained state.

### C. *The Twentieth-Century Synthesis Comes to Maturity*

What we call the Twentieth-Century Synthesis put this account of economic life at the center of *both* “economic” and “political” legal scholarship and doctrine. One set of legal subfields came to be treated as “about the economy,” where the goal of scholarship and policy was to overcome inefficiencies and press toward wealth-maximizing outcomes. In parallel, in areas regarded as “essentially about” the liberty and equality of citizens, the last half-century has seen withdrawal from questions of economic distribution and structural coercion.

In “economic” law, the Synthesis took form through a series of legal-theoretic moves that aimed at the fragmentary implementation of aspects of general equilibrium theory. As we will describe below, these were successful only because they both tracked the institutional developments of the American economy during the neoliberal transformation and had essential affinities with the liberal values of personal freedom and state neutrality. Nonetheless, their genealogy is essentially one of economics-informed legal theory, and their power is rooted in the status of microeconomic rationality and general equilibrium theory as the master platform of “hard” social science.

In the public-law half of the Synthesis, the situation is very different. Here, as the postwar decades gave way to the neoliberal era, law and economics did little formal work. Instead, public law took a new shape around a particularly thin version of key liberal values: freedom, equality, and state neutrality. Consti-

tutional law is emblematic of this development, and we focus much of our attention there.<sup>80</sup> Whereas in economic law the Synthesis was driven by scholars working in an influential and often well-funded network, here the decisions of increasingly conservative judges drove the change, and scholarship was often reactive or critical, trying to eke out what little space remained for a robust egalitarianism, even as that space narrowed.

These developments produced a consistent pattern: encasing economic and other structural forms of inequality from answerability to the principle of equality; identifying liberty with certain forms of market participation; and assimilating the political activity of democracy to market paradigms, by turn celebrating a commercialized public sphere as a paragon of self-rule and denigrating the actions of actual government institutions as interest-group capture and entrenchment. The courts produced, and scholarship adapted to, a denuded and distorted version of liberalism, one unable to demand or defend the institutional arrangements necessary for robust conceptions of liberty or equality.

The encasement of markets and the assimilation of political activity to market activity can be seen in three emblematic moves of modern constitutional law. Each of these moves helped recast issues of justice as something *other* than political economy questions. First is an account of constitutional equality that exiled matters of class and material, structural inequality from the reach of constitutional law. Second is an expansion of the conception of First Amendment-protected “speech” to encompass certain economic transactions, including protecting advertising, campaign spending, and even the sale of data from regulation. Third is an aggressive application of public-choice theory’s market-modeled skepticism of the state to legislation and administrative regulation. These together form an encasement of economic power in the constitutional realm, tending altogether to render democracy subject to the market, rather than subjecting the market to democratic rule.

The first key move on the public-law side of the Synthesis was to render material and structural inequality irrelevant to the Fourteenth Amendment’s principles of equal protection and personal liberty. This was not foreordained.

The Court in the 1940s applied elevated equal-protection review to laws falling disproportionately on the poor and described union membership as a “fundamental right” in its ruling upholding the National Labor Relations Act.<sup>81</sup> In

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80. A complete picture of the transformation of public law under the Synthesis will, however, require accounts of many areas of law. We advert to some of these, including antitrust, anti-discrimination law, civil procedure, labor law, and environmental law. Other scholars, we hope, will fill out and add to these accounts.

81. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *see also* *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (applying equal-protection review to state sterilization



the 1970s, with the increasingly conservative turn of the Court, those possibilities were cut off in favor of a denial that constitutional liberty and equality had implications for political economy. The result was the constitutional erasure of the structural subordination of the poor, people of color, and women.

Two steps were key here. First, despite efforts to constitutionalize welfare rights in the late 1960s and early 1970s, the Court held that public-benefits legislation was discretionary and refused scrutiny for poverty as a class, arguing that it was not susceptible to such sharply delineated formal inquiry.<sup>82</sup> When individuals argued that their ability to exercise their constitutional rights was pertinent to the constitutional obligations of the state—for example, when women argued that the state could not constitutionally subsidize childbirth without also subsidizing abortion, or plaintiffs asserted that low funding levels for public schools in high-poverty districts denied students the material basis for exercising the rights to speak and vote—the Court demurred.<sup>83</sup> Just when the achievement of formal equality meant that the major threats to an egalitarian society lay in structural inequality, the Court approved policies that compounded inherited forms of inequality, permitting education funding to vary in proportion to municipal wealth, and the access-to-abortion right to depend on having the money to exercise it.

Second, the Court encased forms of private, material power by rejecting heightened equal-protection review of policies that predictably and persistently reproduced underlying patterns of economic, racial, and gender inequality.<sup>84</sup> In this way, the Court determined that education, public hiring, and criminal-justice policies could reproduce and even amplify social and economic inequality as

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law); Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177, 197-98 (2016) (challenging the boundary between political and economic activity in the context of labor unions).

82. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973) (holding that the poor are not a suspect class in the education context); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) (applying the rational-basis test to state economic and social policies).

83. See *Harris v. McRae*, 448 U.S. 297, 297-98 (1980) (abortion); *Maher v. Roe*, 432 U.S. 464, 464-65 (1977) (abortion); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 1-2 (education); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (housing). In the 1960s, the Court had taken a decidedly different approach. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 663 (1966) (invalidating a poll tax on equal-protection grounds); *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963) (establishing a right to counsel for indigent defendants in criminal cases). The 1970s was the key inflection point, where “a new form of economic libertarianism (sometimes called neo-liberalism) became dominant, and Supreme Court decisionmaking turned in a decidedly more conservative direction.” Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 1, 5-6 (2018). For an argument that class-related concerns did not disappear but were instead woven into substantive due-process cases in more muted form, see *id.* at 7-16.

84. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

long as they did not intentionally treat individuals differently on the basis of a forbidden characteristic. Yet it is precisely the defining character of structural inequality that it persists independently of individually disparate treatment.<sup>85</sup> A conception of equality that ignored material deprivation and focused on improper intent encased the most pressing sources of inequality from constitutional review, *even when they were reproduced and amplified by state action*, and went so far as to invalidate policies that sought to mitigate structural inequality by taking explicit account of characteristics such as race.<sup>86</sup> In time the Court came to forbid all but the narrowest forms of affirmative—and even remedial—action.<sup>87</sup> Congress’s own power to remedy discrimination was also curtailed, with the Court insisting that even an amendment that expressly granted Congress power to intervene in private acts of subordination did not authorize a significantly more expansive view of what it means to live in equality than the courts themselves were willing to impose.<sup>88</sup> This jurisprudence eclipsed the older view that a conception of citizenship had to be in part a *material* conception, concerning both distribution and the structure of power within economic relations (such as that enshrined in collective bargaining or antitrust) appropriate to a self-governing community of equals.

A second defining public-law move in the Synthesis was the merging of First Amendment speech with commerce, specifically with certain commercial transactions. This included invalidating laws that limited private spending or donation to electoral campaigns;<sup>89</sup> regulations on advertising (for instance, of alcohol

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85. *See id.* (concluding that constitutional equal-protection claims could not be based upon disparate impact theories); *see also* *McCleskey v. Kemp*, 481 U.S. 279, 314-15 (1987) (rejecting evidence of racial disparity in capital sentencing, and noting that it would open the door to widespread challenges to all aspects of criminal sentencing). The Court also adopted an extraordinarily narrow definition of what it means to act on the basis of a suspect classification. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (adopting a highly formalistic understanding of when a legislature acts “because of” sex, and finding that a veteran’s preference that selected for ninety-eight percent men was not sex-classificatory and did not reveal an intent to discriminate on the basis of sex).

86. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (concluding that all laws that classified on the basis of race—even those that sought to integrate institutions and remedy past harms—were subject to strict judicial scrutiny).

87. *See Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

88. *United States v. Morrison*, 529 U.S. 598 (2000).

89. *See, e.g., Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).

or tobacco);<sup>90</sup> and expansions in protections for commercial speech (for instance, to encompass the sale of doctors' prescription records).<sup>91</sup> Each of these developments was marked by the Court's revision of what democracy required. In the area of commercial speech, for example, the Court shifted over time from a conception that gave no protection at all to commercial speech to one that provided expansive protection—protection the Court considered necessary, citing the importance of information for consumers and efficient markets, and the specter of legislatures harboring animus and bent on discriminating against corporations themselves.<sup>92</sup>

At a certain level of abstraction, this development seems in tension with the previous two, as it involves increased constitutional concern with economic ordering, where the first and second developments mainly insist on a sharp distinction between state and economy. As we see it, however, the real importance of these cases is that they fortify the line between the political and the economic by *shielding* economic power from political disruption, even when the invalidated political action is aimed at achieving a value basic to democracy, such as the equalizing of influence in elections.<sup>93</sup> As some of us have argued elsewhere, to understand a pattern of jurisprudence such as the Twentieth-Century Synthesis, one must appreciate that more than one style of reasoning may contribute to the same result. Courts “roll back” review on some fronts and “roll out” review on others, but in both cases they tend to protect private power from state interference, whether that interference takes the form of judicial review or legislative action.<sup>94</sup> Moreover, in keeping with the law-and-political-economy premise that state action and economic power are always mutually intertwined, it is key to appreciate that the result of these decisions is not to segregate state power from economic power but to exacerbate an increasingly oligarchic political economy

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90. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

91. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

92. See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. F. (2018) [hereinafter Kapczynski, *The Lochnerized First Amendment*]; Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014); Amy Kapczynski, *Free Speech, Inc.*, BOS. REV., Summer 2019.

93. *Buckley v. Valeo*, 424 U.S. at 48-49 (per curiam) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .”).

94. Grewal & Purdy, *supra* note 21, at 1, 14.

in which private power is readily translated into influence over public decisions.<sup>95</sup>

The third defining move was a growing public-law skepticism toward political judgments about distribution and economic ordering, based on the conviction that these judgments are likely to enforce and entrench the kinds of “capture” that James Buchanan’s “political economy” emphasized.<sup>96</sup> These concerns recur in the Court’s First Amendment jurisprudence, in which the Justices suggest that legislatures setting ground rules for campaign finance must be illegitimately seeking to skew future elections<sup>97</sup> or when they suggest that legislatures applying specific rules to corporate conduct in markets must be “discriminating” against business.<sup>98</sup> It also infuses the Court’s recent First Amendment opinions cutting back dues-based funding for public-sector unions, which treat those unions as signal cases of self-entrenching interest groups likely to distort public policy.<sup>99</sup> These latter strands of law-and-economic thinking have also had substantial influence on other fields of law.<sup>100</sup> The public-choice literature on rent seeking, which models the state as a platform for interest-group competition, deeply reshaped many fields where scholars had previously reasoned about public purposes and participation.<sup>101</sup> “Interest-group capture” became an axiomatic problem of the regulatory state, leading influential academics to argue that the only appropriate response was a move to market-mediated technocracy, in the

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95. See *infra* note 170; see also Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1953 (2018) (asking if the First Amendment has “egalitarian elements that could be recovered”).

96. Jedediah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2172-75 (2018).

97. *Id.* at 2165.

98. Kapczynski, *The Lochnerized First Amendment*, *supra* note 92.

99. See *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); Purdy, *supra* note 96.

100. Foundational law-and-economic pieces here include 3 JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 43-62 (1965); GEORGE J. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); and George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

101. SABEL K. RAHMAN, *DEMOCRACY AGAINST DOMINATION* 40-43 & nn.54-71 (2017). See generally S.M. AMADAE, *RATIONALIZING CAPITALIST DEMOCRACY: THE COLD WAR ORIGINS OF RATIONAL CHOICE LIBERALISM* (2003); DANIEL T. RODGERS, *AGE OF FRACTURE* (2011) (describing a broad intellectual shift away from public, collective purpose to emphasis of individual choice across a range of intellectual disciplines and public debates). Administrative law and civil procedure are two examples of fields affected.

form of cost-benefit analysis.<sup>102</sup> The administrative state was remade along the way, with cost-benefit analysis used to block any regulation that did not meet a market-denominated test of value from the Reagan Administration onward.<sup>103</sup> A new generation of scholarship seeking to influence the application of cost-benefit analysis followed, creating a new center of gravity in fields from environmental law to workplace regulation.<sup>104</sup> More broadly, scholars from across the political spectrum deployed market-making techniques to resolve canonically public-law problems, such as those of environmental protection.

By the 1980s and 1990s, legal scholars were facing courts (and agencies and political parties, though we cannot elaborate the point here) increasingly insensible to dynamics of structural exclusion, and increasingly unwilling to acknowledge the interaction between market relations and citizenship. The legal academy shifted in response, and debates in mainstream legal scholarship migrated to make questions of political economy hard to ask because they were seemingly already settled both theoretically and practically. The end result was a legal-academic discourse that rendered matters of structural subordination increasingly identified as issues of “identity” and institutions that once were robust realms of debate about the institutionalization of democratic voice increasingly subject to expert-denominated claims of efficiency.

Many legal scholars objected to this turn, generating a rich literature on structural discrimination and subordination, and criticizing the elevation of market functions to principles of government. For example, many scholars of constitutional law and antidiscrimination continued to insist on the importance of the economic dimensions of political membership, equality, and liberty, and mapped these questions as centrally related to issues of race and gender.<sup>105</sup> The

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102. See, e.g., Cass R. Sunstein, *The Cost-Benefit State* 4 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 39, 1996) (defending cost-benefit analysis as “as a way of diminishing interest-group pressures on regulation”).

103. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982); Michael A. Livermore & Richard L. Revesz, *Retaking Rationality Two Years Later*, 48 HOUS. L. REV. 1, 13-16 (2011) (recounting the entrenchment of cost-benefit analysis through subsequent administrations).

104. See, e.g., KYSAR, *supra* note 47 (offering critiques of cost-benefit analysis in environmental law).

105. See, e.g., SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014) (describing the history of efforts to enshrine constitutional rights in the workplace); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016) (describing the history and development of New Deal welfare programs); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014) (arguing that antioligarchy and a robust middle class are constitutional principles); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (arguing that U.S. law created a kind of property interest in racial identity).

move to recenter questions of political economy in law is in many ways the outgrowth and elaboration of such efforts.

*D. The Putative Liberal Appeal of the Synthesis*

The Twentieth-Century Synthesis defended market freedom on several interlocking grounds. It represented the market as a domain of uncoerced individual consent by effacing the power relations operating through and behind the market. By the same token, the Synthesis framed the market as an aggregative instrument through which to assess and achieve the social good. The market activity that reflected uncoerced individual voluntarism also delivered “efficient” outcomes that maximized social value, barring circumstances that could be described as a market “failure” (that is, the failure of actually existing markets to behave as the normative instruments they were supposed to be). Thus, both theoretical problems concerning distributive justice and practical problems concerning the assessment and fulfillment of needs could be set aside so long as the market system delivered (or seemed to deliver) at least rough approximations of distributive justice.

The market’s neutrality with respect to any particular version of the social good was central to this account’s appeal. While law-and-economics scholars did not tend to claim neutrality explicitly for their normative position, instead defending wealth or various forms of efficiency as good social ends, the law-and-economics focus on Kaldor-Hicks efficiency (wealth maximization) nonetheless evoked an ideal of neutrality. Appeals to aggregate efficiency promise to avoid controversial political and ethical judgments. In the case of Kaldor-Hicks, they do so by relying on criteria that theoretically *could* make everyone better off. The implicit vision is of a neutral constitutional order encasing a market system that enables the realization of many different conceptions of the good in a liberal-pluralist frame.<sup>106</sup> The affirmative idea that a market order secures an important form of the liberal value of neutrality interacts here with the negative idea that any political judgments about which social interests to secure or advance are likely to involve capture, entrenchment, and spurious claims to a (probably non-existent) “public interest,” giving examples of what we earlier called market-fundamentalist and market-tragedy arguments. As we have argued above and elsewhere, this version of neutrality conceals and enforces significant judgments

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106. See, e.g., MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1990); FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1973).

about who gets what (distribution) and who gets to do what to whom (coercion).<sup>107</sup>

The conceit that market order could provide sufficiently fair and acceptable outcomes more closely resembled the political-economic reality of the immediate postwar period than it would that of the following decades. During the period of relatively high and widely shared growth that followed World War II, when formal barriers to equal market participation were being dismantled, many hoped that market outcomes would roughly correspond to those demanded by various accounts of distributive justice. The markets might render the poor as well off as they could be (as formalized in Rawlsian justice theory) and enable us to overcome racial and gender subordination through formal equalization of economic opportunity.<sup>108</sup> Moreover, rising working-class incomes suggested the promise of yet more needs fulfillment over time, all without having to resort to politically contentious policies of redistribution or direct-needs provisioning by the state. Implementing such policies would have required wrestling with complex and unresolved questions of distributive justice. This also would have raised practical problems attending the political management of the economy, including the reshaping of foundational market processes (that is, the curtailment of “market freedom”), all in a social world beset by conflicts over race and gender that made any kind of redistributive politics extremely contentious.

The use of the market to avoid such theoretical and practical difficulties was not new to the postwar period, though it arguably worked better for those decades than at any point earlier or afterward. It reflected a long-running intellectual effort to champion the market as the appropriate instrument of social choice in modern, pluralist societies. Market activity, on this account, both respects individual will and discloses information about individual preferences, while ostensibly remaining neutral with respect to controversial arguments about the social good. This characterization of the market as uniquely respectful of individuality and diversity helped to advance it as the key institution of liberal social order.

So depicted, the market proves a unique site in which to determine and achieve social good in liberal societies: the consenting individual is the author of

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107. See, e.g., Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 993-1006 (2012); Purdy, *supra* note 96.

108. Grewal & Purdy, *supra* note 1, at 66-67 (discussing Rawls's political theory and the elite assumption that incorporation into the market would overcome status subordination). On postwar political liberalism and its assumptions, see generally KATRINA FORRESTER, *IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY* (2019). See also David Singh Grewal, *Closing Remarks: Law and Inequality After the Crisis*, 35 YALE L. & POL'Y REV. 337 (2016) (discussing the ways that the postwar exception was described in the countries that experienced it).

the norms under which she will live, disciplined only by the general expectation that the others with whom she cooperates must also be treated as such normative agents. Inclusion in the market's private ordering thus became a central aim of many accounts of individual rights and their purposes, including the rights of individuals subordinated in racialized and gendered hierarchies. Arguments about market freedom thus paralleled liberal arguments about self-realization, even while promising more than liberal accommodation alone. The market would deliver more of what everyone wanted without requiring anyone to consent to a comprehensive account of the social good. This view imagined the *economy* as what *society* was embedded in, rather than the other way around. But in fact a market embedded in society with continued group stratification and persistent wealth gaps could not yield freedom for all, any more than it could provide returns equal to individuals' marginal product.

*E. The Fragile Success of the Synthesis in Historical and Political Context*

Although we have highlighted the development of ideas, we mean to locate this disciplinary history in a larger account that is itself alert to political economy. In some respects, the development of methods is relatively autonomous, and so we can recount the "internal" reasons for the plausibility of the Twentieth-Century Synthesis. In other respects, the success of these methods, and especially their rise to institutional dominance, depended on "external" drivers in their historical moment. The *institutional* origins of law and economics, as Steven Teles has shown, lie in a rebellion against the New Deal that brought a small group of economists into the University of Chicago Law School, supported by Friedrich von Hayek and the Volker Fund.<sup>109</sup> Judicial appointments mattered, too: validation in the courts is important to legal scholars' profiles and to the genre of legal scholarship that seeks to influence the interpretation of the law and the development of doctrine.

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109. As Steven Teles describes, the "organizational history of law and economics, like so much of the modern conservative movement, begins with the University of Chicago." STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 91 (2008). It was Henry Simons, an economics professor who moved into the law school in the 1930s and who had helped to publish Friedrich von Hayek's influential *Road to Serfdom* in the United States, who created the institutional preconditions of the movement. *Id.* With the support of Hayek and the Volker Fund, Simons brought Aaron Director to the law school, who would teach, found the *Journal of Law and Economics*, and, as Ronald Coase memorably put it, serve as the "Christ" to Coase's "St. Paul": "[Director] got the doctrine going, and what I had to do was bring it to the gentiles." *Id.* at 96.



It is unlikely, though, that all of these rationalizations of market relations would have gained the same traction absent unique historical conditions. Without being reductionist, we can recognize law and economics as both autonomous scholarship and as a partial rationalization that gained support within a specific political economy. For example, compared to the conflict-ridden and highly unequal decades that produced the work of Robert Hale and other legal realists, the years from the mid-1950s through the early 1970s were marked by several salient characteristics. In economics, it was a time of significant growth that was widely distributed among households.<sup>110</sup> In policy, despite considerable ideological contestation from a right wing that had never accepted the New Deal, there was unusual détente among professional and governmental elites, who broadly presupposed the necessity and persistence of a strong regulatory and redistributive state.<sup>111</sup> The Cold War helped foster a rare degree of cohesion among elites, who projected the view that American institutions were fundamentally sound and that problems like racial hierarchy could be addressed with simple acts of liberal integration.<sup>112</sup> A quasicorporatist state-and-party system seemed to uphold the redistributive and regulatory consensus.<sup>113</sup> The system and consensus were underpinned by unions, which represented a substantial share of private-sector workers and played a central role in the Democratic Party, which controlled Congress for most of these decades.<sup>114</sup>

Under the supposition that these conditions represented a “new normal,” when law and economics came to prominence in the late 1970s and 1980s, many centrist and liberal scholars and policy elites likely found some plausibility in its assumptions, even if they were not themselves its vanguard. Wealth maximization may have seemed a plausibly desirable goal of economic policy because, in fact, new income seemed to be widely shared. Where distribution fell short, the Kaldor-Hicks formula of redistributing through the tax code to compensate losers, while of course never approaching its Paretian utopia, was a plausible rough description of how the redistributive state might operate. Even more basically, many assumed that the problems of democratic capitalism had basically been

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110. See PIKETTY, *supra* note 1, at 14-15; Grewal, *supra* note 1, at 630-31; Grewal & Purdy, *supra* note 1, at 64-70.

111. See Grewal & Purdy, *supra* note 1, at 64-65.

112. See Aziz Rana, *Goodbye Cold War*, N+1 (Winter 2018), <https://nplusonemag.com/issue-30/politics/goodbye-cold-war> [<https://perma.cc/85YV-CSE5>] (“[T]he new assumption of the cold-war order was that American institutions were essentially just, and the only necessary change would be to open these institutions to worthy members of black and brown communities.”).

113. See JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF POLITICS* (2016) (sketching the institutional terms of this era).

114. See *id.*

solved through the application of Keynesian macroeconomic policies to tame the business cycle. On this view, law now required mainly tinkering and maintenance, casting legal scholars – not only in fields like antitrust but also critically in domains such as environmental law, administrative law, and the like – as a band of methodologically equipped efficiency inspectors. They could confirm that core doctrines and institutions were sound, while sending up reports proposing incremental adjustments. The importance of democratic justification for economic ordering receded as actual conflict over the economic order quieted (though more in the experience and self-understanding of elites than in fact). Instead, a relatively unified, technocratic mission coalesced that coincided neatly with the linking theories: facilitate transactions, internalize externalities, and maximize economic activity. The tasks that law and economics set for itself were legal scholarship’s version of the ABCs for the period’s mainstream, technocratic agenda.

The popularity of law and economics and of a certain form of revived left liberalism should also be understood in the context of the conflicts of mid-century political economy. The civil-rights movement’s goals included not just the end of formal segregation in the Jim Crow South but also stronger forms of reparation. For example, black-freedom advocates sought massive redistributive investment in black communities and intervention in the “private” and “voluntary” spheres.<sup>115</sup> They pointed to residential and employment patterns, which had laundered centuries of racialized inequality, explicit segregation, and outright violence.<sup>116</sup> It was in the face of these demands for a more material conception of equality that constitutional equality was decisively dematerialized. A denuded conception of equality moved off the state’s balance sheet both historical maldistribution of wealth and new forms of segregation such as “white flight” into de facto segregated schools. In other words, as old inequalities came under new pressure and new, market-facilitated inequalities arose, constitutional equality concerns were quietly withdrawn from the field.

The early 1970s saw a new political assertion of business-led hostility toward the regulatory and redistributive state.<sup>117</sup> The hostility was bolstered by anxiety about the “new social movements” such as feminism and environmentalism, a growing popular radicalism in political ideas and rhetoric, and spiraling cycles

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115. See Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENT., Feb. 1965.

116. See Nathan Hare, *Black Ecology*, 1 BLACK SCHOLAR 2 (1970); Rustin, *supra* note 115.

117. See KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* (2010) (tracing the twentieth-century history of antiregulatory politics).

of wage demands and inflation.<sup>118</sup> These forces together formed a transatlantic “legitimation crisis” that called into question postwar Keynesian liberalism.<sup>119</sup> These forms of anti-Keynesianism ran together in the beginning of American neoliberalism, as the reassertion of an aggressive and expansive program of market-modeled law reform that cut back the New Deal and Great Society state and launched new frontiers in marketization.<sup>120</sup> The extension of neoclassical analysis from the law of the economy to the theory of the state thus helped to produce another, overlapping constituency: the anti-Keynesians who saw public-law concern with distribution and power as a dangerous folly best replaced with market-modeled versions of formal liberty and equality.<sup>121</sup>

It is against this broader backdrop that the Twentieth-Century Synthesis took hold. But the context is changing for reasons both internal to legal scholarship and connected to the troubled combination of crisis and stasis that mark our era. We argue that these reasons demand a new set of critical questions and orientations in legal scholarship.

## II. CRITICAL QUESTIONS AND REORIENTATIONS

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

### A. *From Efficiency to Power*

By centering efficiency as a value and making key assumptions about markets and how they work, the Twentieth-Century Synthesis marginalized questions of power that had been central to legal analysis since at least the time of legal realism. Realists understood that the law generates the very order of rights that market advocates invoke to define the boundaries of “the economy.” As they pointed

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118. See JURGEN HABERMAS, *LEGITIMATION CRISIS* (1973) (giving an early theorization of the new social movements).

119. See *id.* (laying out an account of the structural conditions in which a capitalist social order could not maintain its stability and legitimacy).

120. Grewal & Purdy, *supra* note 1, at 77-80.

121. See RAHMAN, *supra* note 101, at 31-53 (analyzing how this anti-Keynesian assault was absorbed and mainstreamed by the technocratic and managerial liberalism of the 1990s and 2000s).

out, when the state orders “private” rights it acts coercively, but in indirect fashion, allocating powers and immunities that authorize individuals to act on or with disregard for others.

Take as an example the thought of legal realist and institutional economist Robert Hale. Hale characterized economic life as a system of mutual coercion, with the degree of each person’s coercive power arising directly from legal entitlements. “The law,” Hale stressed, “confers on each person a wholly unique set of liberties with regard to the use of material goods and imposed on each person a unique set of restrictions with regard thereto.”<sup>122</sup> Law, that is, allocates the powers and resources that are necessary to most human projects, thus defining the terrain on which people must work with others to fulfill their needs and pursue their purposes. Property law, for instance, tells you whom you must induce to give you access to what you need to meet your needs; conversely, it says which resources others can only access by winning your permission. This power to drive a (more or less hard) bargain was what Hale called coercion, and he saw it everywhere. For him, every bargain was conducted in the spirit of the strike and the lockout. (It is no coincidence that his was a theory of economic life for a time of fierce labor conflict.)

This account centers the power, rooted in state decisions and articulated through law, that constitutes the field of economic life. The Twentieth-Century Synthesis held that such power was unimportant, either by redirecting attention from it or by denying that power was stratified or structured in ways that matter. By refocusing scholarship on questions structured by transaction costs and externalities, law-and-economics analysis placed questions of distribution and coercion outside the lamplight of methodology. It thus neglected the actual social world comprised of highly disparate resource allocations that are themselves products of background legal rules: the power of the venture capitalist to bring to life or quash the plans of others; the trust beneficiary’s option to refuse unwelcome offers in favor of idleness; and the acute need of the person living without any savings (as forty percent of Americans do) to find and accept an unequal bargain in order to stay alive.<sup>123</sup> As important were a host of assumptions about markets and market subjects. Markets were typically presumed to be sufficiently

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122. ROBERT HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 15 (1952).

123. See Jeff Larrimore et al., *Report on the Economic Well-Being of U.S. Households in 2017*, BOARD GOVERNORS FED. RES. SYS. 21 (May 2018) (noting that four in ten adults would need to sell property, borrow money, or not be able to pay at all if confronted with a four hundred dollar expense), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf> [<https://perma.cc/G4EZ-3QD2>].

competitive that concentrated power generally could not last.<sup>124</sup> Some suggested that politics might “clear” as markets did, so that when wealth was reallocated, when, for example, a new legal rule took from one side and gave to the other, it would be transferred back via a seamlessly adjusting market of politics.<sup>125</sup>

Under the pressure of these various conceptual moves, legal thought was effectively disabled from centering questions about power and distribution that would once obviously have been its main concerns. Who gives the orders, who dictates the plans, and who must aim to win a place as a cog in someone else’s scheme? Who takes profits, who takes wages, and whose wages make for a secure life versus a precarious one? When the questions are posed in this way, it becomes clear that in the economists’ standard definition of their subject matter, “choice under constraint,” the emphasis should fall soundly on “constraint” and its legally constituted allocation. The study of that constraint, what Hale called the ubiquitous mutual coercion of economic relations on the basis of (almost always unequal) bargaining power, is the question that should replace the focus on the feasibility and comprehensiveness of bargains and the sum of economic activity that they make up.

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

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124. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957) (suggesting that market forces would end discrimination in labor markets); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928-34 (1979) (noting that in the Chicago School, not only could firms not unilaterally “obtain or enhance monopoly power” but that problems of collusion were unlikely to be serious because, for example, cartels were unstable and barriers to entry could be presumed low enough to attract entrants to any supracompetitive market).

125. *But see* Zachary Liscow, *Are Court Orders Sticky? Evidence on Distributional Impacts from School Finance Litigation*, 15 J. EMPIRICAL LEGAL STUD. 4 (2018) (critiquing the point and providing empirical evidence against it); *see also* William A. Darity Jr. et al., *Stratification Economics: A General Theory of Intergroup Inequality*, in *THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY* 35, 43 (Andrea Flynn et al. eds., 2017) (offering criticisms, within a neo-classical framework, of notions of unbiased preferences for redistribution, given racial stratification in the United States).

Regarding constitutive power, an LPE reorientation would mean less attention to Coasean problems and what we might call (following the lead of economic sociologists) the “social geometry of bargains.”<sup>126</sup> Whom does law endow with bargaining power, and with what justification? How, if we aspired to more egalitarian distribution of power and resources, might law reconfigure these endowments—through both redistribution and “predistribution”? This way of reasoning would also invite attention to the history of state creation of systemically unequal endowments and to how legal regimes and lawyers by coding resources as capital have contributed to stratification and patterned disadvantage.<sup>127</sup> For example, we might, as some scholars of law and political economy already have, map the relations between techniques to render land a source of credit and the historical dispossession of native lands,<sup>128</sup> or rules of finance, property, and inheritance that have systematically undermined both black wealth and black land ownership in recent years.<sup>129</sup> Insofar as property and contract law serve as first-year allegories for economic life in general, our reorientation would also—in conjunction with attention to market and political power—redirect the pedagogical spirit of “private law” courses toward examining inequality and encasement of private power in markets as an ongoing product of law. The same reorientation would mean asking in other “economic” courses how law patterns the landscape of bargaining power: how antitrust law, for instance, has produced—but might instead restrict—new forms of enhanced bargaining power for firms, or how shifts in labor law have reduced labor’s endowments but correspondingly might be revised to generate more meaningful countervailing power and negotiation over workplace governance.<sup>130</sup>

Market power, too, requires attention from a political-economy perspective. Economic power cannot be reduced to market power, as our discussions of constitutive and political power indicate. But in the presence of market power—the ability to dictate prices and the terms of market transactions due to one’s dominant position as a buyer or seller—allocating decisions to markets will generate

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126. See, e.g., Georg Simmel, *The Number of Members as Determining the Sociological Form of the Group*, 8 AM. J. SOC. 1 (1902).

127. See KATHARINA PISTOR, *THE CODE OF CAPITAL* (2019) (setting out the legal architecture of capitalist markets).

128. See K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006 (2016).

129. See BARADARAN, *supra* note 14.

130. See Khan, *Amazon’s Antitrust Paradox*, *supra* note 60, at 790–802; Brishen Rogers, *Beyond Automation: The Law & Political Economy of Workplace Technological Change* 38–43 (Roosevelt Inst., Working Paper, 2019).

significant problems both within a conventional economic framework and beyond it. For example, where employers have pervasive monopsony power, we can expect implications for wages and working conditions that lend credence to new arguments for antitrust intervention, employment regulation, and the affirmative support of labor as countervailing power.<sup>131</sup> Notably, a new wave of scholarship in economics argues that market power is today a pervasive rather than occasional phenomenon.<sup>132</sup>

Finally, to do justice to the conjunction that is *political* economy, we must also ask when and how economic power relates to political power. Political-science literature has begun to document the influence of wealth on legislation.<sup>133</sup> We should ask about the means by which economic power translates into political power and how law structures, or could restructure, these channels of influence.<sup>134</sup> Of special importance here are measures that encase market power from politics, disabling ordinary democratic means of defining the place of markets in our political order. For example, investigations of where and how property or markets receive constitutional protection, as well as the limits of such regimes and their potential for reinterpretation, deserve to be central subjects of political economy.<sup>135</sup>

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131. Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 556-60 (2018).

132. See *supra* note 4; see also Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AM. ECON. REV.: INSIGHTS 77, 87-88 (2019) (finding consolidation without investigation among newly exempt deals); Azar et al., *supra* note 4, at 13-16 (calculating significant percentages of highly concentrated labor markets); Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017) (documenting a radical rise in markups from the 1980s onward, and arguing that this increase in market power helps explain the decrease in labor's share of profits and output slowdowns, among other macroeconomic trends); Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* (Wash. Ctr. for Equitable Growth, Working Paper, 2019) (observing reduced wage growth in certain hospital merger cases and proposing implications for antitrust regulation).

133. See, e.g., GILENS, *supra* note 19.

134. See, e.g., K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, *CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS* (2019); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 421 (2015) ("Rising inequality has been accompanied by the concentration, or reconcentration, of political power among wealthy individuals . . ."); Fishkin & Forbath, *supra* note 105; Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016) (reframing public law debates through the lens of power); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315 (2018); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016).

135. Important examples of the former include takings law, constitutional caps on punitive damages, and the constitutionalization of campaign finance. For examples of academic work to

In a broader frame, the move to political economy requires a shift in our view of interpersonal relations – not as presumptively equal market transactions that are further legitimated by being voluntary and theoretically “making everyone better off” but rather as fundamentally power-laden bargains that require law and policy to be rendered more equal and fair. It also requires a shift in our view of inclusion from the individual to the structural level, looking not just at individualized experience but rather at how law and policy construct systematic forms of hierarchy and domination through a market that is always embedded in social relations. This is one of the key insights of critical legal thought and literature from both feminists and scholars of critical race theory.<sup>136</sup>

Then, we may ask: how might public power be reconstituted where the market has been insulated from democratic control? Which legal tools are required? What is the proper relationship between expertise and democratic authority, and how can that be institutionalized? How might one envision the process of democratizing control over the economy, while recognizing the harms that governments have done – always to some more than others – in the name of the people?

### B. From Neutrality to Equality

A claim of neutrality was at the center of the synthesis that sutured together efficiency claims that came to dominate “economic” law and the thin form of liberalism that made way for the entrenchment of private power on the “public” side. But market ordering is only neutral if one takes power off the table and assumes a self-valorizing perspective on market transactions. Neutrality is a valid goal for the law in certain circumstances (such as fact finding in criminal prosecutions) but neutrality as an ultimate end fails on various grounds.<sup>137</sup> Through

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rediscover public authority over market conditions, see Hannah Brennan et al., *A Prescription for Excessive Drug Pricing: Leveraging Government Patent Use for Health*, 18 YALE J.L. & TECH. 275 (2016); and Amy Kapczynski & Aaron S. Kesselheim, ‘Government Patent Use’: A Legal Approach to Reducing Drug Spending, 35 HEALTH AFF. 791 (2016).

136. See, e.g., DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 4-5 (2014) (describing how dynamics can “lock-in” privilege over time, even assuming only unequal starting points and not the continuation of malicious intent to discriminate); John B. Davis, *Stratification Economics as an Economics of Exclusion*, 2 J. ECON. RACE & POL’Y 163, 164 (2019) (describing the new field of “stratification economics” that assumes that “the economy is embedded in society and social relationships explain market relationships, so that the laws or dynamics of society explain how the economy works, not that society is explained by how the economy works”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (providing an intersectional analysis of law’s relation to race and gender).
137. See, for example, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998); and CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989),



its elevation of wealth as an orienting public value, it has reinforced a very non-neutral drift toward elite control of government, increasingly described by political scientists as “oligarchy.”<sup>138</sup>

Which alternatives might supplant this dubious neutrality ideal, with its oligarchic drift? We suggest orienting law and policy analysis around an ideal of equality — particularly a vision of equality animated by a commitment to self-rule and sensitive to the importance of social subordination along intersectional lines. Moving from neutrality to equality requires the difficult and overdue work of assessing the appropriate scope and limits of private ordering — and the role for market transaction in particular — in light of a political ideal of citizen self-rule. This is not a new claim. As the Twentieth-Century Synthesis was consolidated into neoliberalism, there was an outpouring of interest from legal scholars and others concerning the appropriate scope and limits of private ordering in light of a variety of theories of distributive justice, many with an explicitly egalitarian dimension.<sup>139</sup> As these decades of reflection on egalitarianism have shown, rejecting welfarism leads quickly to the question: equality of what?<sup>140</sup> A call for equality must suggest how that equality is to be conceptualized and institutionally realized.

Nonetheless, we can sketch a broad direction in which normative critique can proceed. We do so on three fronts, each developing longstanding arguments running back to the Realist and Progressive Eras.<sup>141</sup> The first approach would be to develop a normative theory of bargaining that centers a substantive ideal of freedom, rather than relying upon the formal idea of uncoerced agreement. One might distinguish, for instance, among three registers in which people can seek to win the assent of others: (1) by threatening violence (the archetypal relationship of war or enslavement, which liberal political economy foundationally rejects); (2) by threatening to withhold economic opportunity, even down to bare necessities (the basic character of much market bargaining); and (3) by offering cooperation that enables others to achieve vocation or flourishing.<sup>142</sup> The law

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for canonical critiques of how liberal neutrality erases central elements of social and communal subjectivity in ways that undercut its ability to conceptualize and realize justice.

138. See, e.g., JEFFREY A. WINTERS, OLIGARCHY 211–53 (2011); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 566 (2014); Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSP. ON POL. 731, 733–44 (2009).

139. See Grewal & Purdy, *supra* note 1, at 73–80.

140. See AMARTYA SEN, INEQUALITY REEXAMINED (1992); Amartya Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 195 (Sterling McMurrin ed., 1980).

141. See FRIED, *supra* note 34; RAHMAN, *supra* note 101, at 66–68.

142. See Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047 (2007).

constitutes bargaining situations that sort participants among these three registers – nominally prohibiting the first and setting up the third as the ideal, but with most bargaining actually falling in the second category – inflected in important ways by race and gender.

To the extent that basic needs are guaranteed, whether through direct provision, robust income support, or egalitarian wealth distribution, people move along the spectrum from appeals to economic necessity toward appeals to flourishing or vocation. Similarly, decarceral projects, as well as projects that make the state’s commitment to stopping private violence more real for women, people of color, LGBT individuals, and people with disabilities, would be central to realizing a world of genuinely free social cooperation. This version of economic freedom would support diverse ways of life, and so be neutral in that sense, while at the same time being decidedly non-neutral as to the distribution of power in bargaining that determines whose dreams come true. In these respects, to demand more substantive equality is to express genuine respect for the individuality and diversity that Hayek and other neoliberals attributed to the *laissez-faire* marketplace but which the actual marketplace undermines. Hazards such as hunger, loss of shelter, loss of dignity, the safety or basic opportunities of one’s children, and the dignity of the disabled should be taken off the table in individual bargaining as already socially resolved. To say this is to insist that there are aspects of what we owe one another that must be fulfilled if we are able to live in equality together.

A second and related approach that reorients law to equality moves from the setting of interpersonal bargaining to structural questions. How does law pattern power and vulnerability, not simply at the level of individuals (asking what rights and entitlements someone can claim) or through its shaping of the scope of interpersonal cooperation (bargaining), but with reference to the intersection between these legally constituted distributions and the other ways in which people are already differentiated socially and legally? One of the most formative accounts of legal modernity describes it as a move from the age of “status” to “contract.”<sup>143</sup> But old forms of racial and gender hierarchy persist, alongside sexual hierarchies and hierarchies of ability and disability. An approach that puts inequality at its center would need to ask how “status” – meaning the differentiation of citizens according to categories – persists and is reproduced in the age of contract. How might law operating in a highly unequal political economy recreate an ordering according to status, now produced by or at least laundered through contract? The fact that, descriptively and historically, such hierarchies persist

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143. HENRY SUMNER MAINE, *ANCIENT LAW IN CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 96 (Batoche Books 1999) (1861). On Maine’s work, see KARUNA MANTENA, *ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM* (2010).

suggests that they are more important to the construction of liberal market society than is generally appreciated.

Relatedly, one might assume that particular patterns of class interest arise in contemporary market economies and ask how the legal regime preserves the interests of employers and owners of capital or those of working people and the economically marginalized. For instance, two of us have characterized neoliberalism in part by reference to its use of the law to serve the imperatives of profit, capital mobility, and “freedom to manage” over competing, democratically articulated distributional priorities.<sup>144</sup> One of us has suggested that, in certain areas in which First Amendment jurisprudence has come to bear on economic ordering, the spurious version of state “neutrality” secured under free-speech principles should be replaced by substantive political judgments about the allocations of power that a democracy should make between its owning and laboring classes.<sup>145</sup> Any version of this approach would borrow from an empirical and theoretical account of some of the salient divisions in social life to create a rough matrix on which to consider the distributional consequences of law.

Finally, regrounding law and policy analysis in a broad conception of equality will require scholars to articulate substantive notions of what a commitment to equality should mean in different domains of law (just as legal scholars have done using the broad ideal of neutrality). This means reengaging with lines of argument developed in law and neighboring disciplines during the early decades of neoliberal consolidation.<sup>146</sup> The common aim to destabilize welfarism and its questionable metaethical underpinnings reflected a welter of perspectives ranging from liberal theorists concerned with the autonomy-degrading aspects of welfarism to Marxian-inspired accounts of need.<sup>147</sup>

These debates must be reengaged—and reengaged by scholars working in the many “private law” fields to which they were thought somehow not to apply.

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144. See Grewal & Purdy, *supra* note 1, at 65.

145. Purdy, *supra* note 96, at 2175-81.

146. The role of wealth maximization in the Twentieth-Century Synthesis was resisted on two grounds. The first was an internal critique of wealth maximization and welfarism more broadly shared by critical scholars and others. See, e.g., Dworkin, *supra* note 44, at 192; Frank Michelman & Duncan Kennedy, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711 (1980). The second was the attempt to identify an alternate normative grounding for social choice in which markets and market-mimicking institutions were valued only to the extent that they produced outcomes we had reason to value, as part of a more comprehensive account of social choice and distributive justice. See Sen, *supra* note 140.

147. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* vii (1977); KATE SOPER, *ON HUMAN NEEDS* (1981); Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30 (Martha Nussbaum & Amartya Sen eds., 1993); Kate Soper, *A Theory of Human Needs*, 197 *NEW LEFT REV.* 113 (1993) (reviewing LEN DOYAL & IAN GOUGH, *A THEORY OF HUMAN NEED* (1991)).

A concrete focus on what kinds of equality we want law to generate directs attention to questions such as: what do people need to achieve certain kinds of life, and what does it take to get those goods to them? Besides distribution, issues of public provision become essential concerns here, from health care to transport infrastructure. No such shift, however, will be complete without a *political* conception of the capable agent, and it is in the turn from antipolitics to democracy that any such normative reorientation finds its ultimate stakes.

### C. *From Antipolitics to Democracy*

Our basic commitment is to democracy. By that we do not (yet) mean to take a position in the fierce and multifarious debates over which set of political procedures and institutions counts as democratic or which is “most” democratic. We mean something simpler: law’s creation of economic order should be accountable to those who live in that order, and the ultimate standard of accountability is the democratic will of the people, expressed in procedures that accord equal weight to all members in structuring our shared life. The versions of legal neutrality that we have been criticizing—wealth maximization and other forms of efficiency analysis in “economic” law and formal (structurally indifferent) equality and liberty in “public” law—erect barriers to political judgments about economic order. These antipolitical consequences are not accidental—they are rooted in the contexts in which these theories came to prominence and the goals and fears of those who advanced them. Indeed, part of the allure of discourses of efficiency and neutrality lies precisely in the claim that these discourses—and the system of market governance itself—can produce optimal outcomes without the messiness of politics and, ultimately, the acknowledgement that political conflict is resolved in an exercise of public power in which some win and some lose. Because distribution and coercion are central to economic life, political judgments that legally constitute and shape the economy cannot avoid this hard consequence. The antipolitics of spurious neutrality serves to make it seem inevitable, and to preserve its results from democratic contest and control. Breaking down the Twentieth-Century Synthesis’s artificial barriers between political and economic ordering means embracing the need for political judgments about the gravest questions: who should exercise power, of what sort, and over whom? What should count as a human need, and what claims should politically recognized needs give us against the state and thus against one another? Whose dreams come true, and who is enlisted in the realization of others’ schemes?

The antipolitics of the Twentieth-Century Synthesis reshaped the practice of governing itself. At various moments of social transformation, radical reformers—from the rise of the labor and antitrust movements in the late nineteenth

century to the civil-rights movement of the 1960s—imagined a radically democratized state reflective of and responsive to affected communities themselves.<sup>148</sup> But in the Twentieth-Century Synthesis, governance—even in its more progressive, reform-oriented aspects—came to be viewed as an antipolitical operation. As discussed earlier, this shift emerged in part from the neoliberal critique of the state itself, led by “public-choice theory” thinkers like James Buchanan and Gordon Tullock, which portrayed government as inherently prone to capture and corruption. These arguments gained political favor as business interests and critics of civil-rights reforms, among others, advanced them as part of a decades-long attack on the New Deal and civil-rights state.<sup>149</sup> In response to this onslaught, many policymakers, including liberals as well as conservatives, pursued an agenda of deregulation. What remained of the state was chastened, as policymakers took refuge in a model of technocracy with two touchstones: first, the importance of apolitical “good governance” that emphasizes transparency, cost-benefit analysis, and expertise;<sup>150</sup> and second, the preferred technique of using government to better optimize markets themselves, such as through “nudge”-style regulations<sup>151</sup> or measures to improve market efficiency.<sup>152</sup> But this approach meant that governance was minimalist—silent on the deeper, background disparities of power and in retreat from transformative structural reform. It also implied a turn toward a more individualistic picture of democratic participation and authority and a turn away from a vision of democracy as a process of building collective power. Lost along the way was a commitment to institutions like unions that once were understood as important vehicles for “countervailing

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148. See, e.g., NOEL CAZENEVE, IMPOSSIBLE DEMOCRACY: THE UNLIKELY SUCCESS OF THE WAR ON POVERTY COMMUNITY ACTION PROGRAMS (2007); PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES (2004); RAHMAN, *supra* note 101, at 64-79; DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998); Fishkin & Forbath, *supra* note 105.

149. See, e.g., KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

150. See RAHMAN & RUSSON GILMAN, *supra* note 134, at 11-12, 116-20 (2019); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1107-11 (2017).

151. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

152. RAHMAN, *supra* note 101, at 41-42; see also Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 666-67, 671-72 (1998) (describing the rise of a second “Chicago School” that focused on optimizing regulations through emphasis on data and cost-benefit analysis); Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 680 (2012) (analyzing the shifts in regulatory policy and theory in response to pervasive but perhaps overwrought concerns about regulatory capture and failure).

power.” Lost too were visions of politics that saw it as a domain where transformative moral claims could be forged.

What would it mean to reorient legal institutions and thought toward an explicit pursuit of democracy, with an emphasis on rebuilding a democratic power significant and durable enough to overcome the contemporary crises? While a comprehensive answer is beyond the scope of this Feature, we can identify a number of critical questions and already-emerging frontiers of debate where scholars, activists, and policymakers alike are returning their attention to questions of power, equality, and specifically a revival of *democratic* politics.

First, a shift from the antipolitics of markets and technocrats to a deeply inclusive and empowering democracy requires strengthening existing institutions of electoral democracy. This requires renewed commitment to voting rights, overcoming gerrymandering, defending campaign-finance laws, and ultimately challenging the antimajoritarian features of the American constitutional scheme, notably the Electoral College and the Senate. More fundamentally, however, it requires a direct challenge to the ways that antipolitics constrains even the most seamlessly majoritarian of politics. Although courts play an important role in a system of constitutional rights, the Supreme Court, by inserting its highly formal and ideologically charged doctrines of neutrality into campaign finance and economic governance,<sup>153</sup> has earned the charge of “juristocracy.”<sup>154</sup> For many decades, the default tendency of public-law scholars has been to ask what the courts, as a matter of principle, should do. Taking democratic action more seriously than this court-centric view would reorient legal scholarship to less familiar fields of institutional reform and democratic action.<sup>155</sup>

Second, a commitment to building democratic politics requires attention to deeper infrastructures of political power and the ways political power can be hoarded or neutered. For example, recent First Amendment scholarship has increasingly identified how claims of free speech and association are deployed to

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153. See *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

154. For a summary of the charge, see Samuel Moyn, *Resisting the Juristocracy*, *BOSTON REV.*, Oct. 5, 2018. See also RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (providing the seminal analysis of the style of judicially constrained politics).

155. Consider, for example, the democratic potential of reforming antitrust law or finding new forms of popular participation in the work of administrative agencies. Normatively, a place to start is in defending what Jeremy Waldron terms the “dignity of legislation.” See Jeremy Waldron, *The Dignity of Legislation*, 54 *MD. L. REV.* 633 (1995).

accentuate the economic and political power of wealthy constituencies and corporations.<sup>156</sup> At the same time, the associative rights of workers and grassroots communities are under attack through both formal legal constraints and informal modes of intimidation and pressure.<sup>157</sup> Even as public-law doctrine has skewed political influence toward corporations and the wealthy, the “private” economy has yielded a public sphere dominated by monopolies, from “old media” regional newspaper and television markets to Facebook, Twitter, and the other dominant digital platforms.<sup>158</sup> Ironically, these developments have produced both concentration of ultimate control and fragmentation of political argument into ideologically homogeneous segments, whether in a city with only one newspaper or in the echo chambers of online argument. By contrast, a democratic political economy requires public investment and political regulation aimed at supporting a media infrastructure that enables open and equal contestation.<sup>159</sup> Just as important are durable civil-society institutions that enable non-elites to engage in mutual political education and to build power. Although American civil society has often been imagined in contrast to law and politics, labor unions have played a central role in the empowerment of ordinary people, and their fragility and decline over the last fifty years are thoroughly a function of the structure and operation of the law.<sup>160</sup> In keeping with our earlier call for a patterned analysis of who benefits and who loses from economy-structuring lawmaking (as opposed to putatively neutral forms of aggregation), law should shape the economy to support the institutions and capacities that uphold the equality and efficacy of democratic citizens.<sup>161</sup>

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156. See, e.g., Purdy, *supra* note 96, at 2164-66; Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 199-200.

157. See, e.g., *Janus*, 138 S. Ct. at 2463-65 (holding unconstitutional a state statute that authorized unions to collect “agency fees” from nonmembers for collective-bargaining activities on the nonmembers’ behalf); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 680-85 (2010) (discussing obstacles to unionization under current law, including the many tools employers have to deter organizing efforts).

158. On technology-platform monopolies, see Khan, *supra* note 62; and Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL’Y REV. 309 (2016). See also TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

159. See, e.g., RAHMAN & GILMAN, *supra* note 150, at 49-52, 76-79.

160. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 38-40 (2016); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 318-21 (1978).

161. See RAHMAN, *supra* note 101; MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1998); Fishkin & Forbath, *supra* note 105.

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

Third, a commitment to democracy demands that we experiment with alternatives to the prevailing technologies of elite governance, particularly in the regulatory state itself. Instead of viewing state bureaucracy as a domain of apolitical expertise (or of malevolent capture and corruption), we might reconceive regulatory bodies as sites of democratic contestation.<sup>162</sup> If purportedly neutral and technocratic visions for rationalizing governance are neither neutral nor, in practice, rationalizing, we need new conceptions of how to democratically discipline administrative decisions. What would processes of administrative accountability look like if they were wise to dynamics of power and animated by a commitment to more genuine equality? There is a dynamic scholarly agenda here, already under construction. We might explore, for example, means to bring representatives of affected communities to participate in administrative decision-making, aiming at modalities of democratic voice that could meet our needs for both (a broadened conception) of expertise and for institutionalized forms of countervailing power.<sup>163</sup> There is a rich history of social movements engaging and seeking to remake the regulatory state in a more inclusive, but still effective, way.<sup>164</sup> A democratic political economy compels us to revisit and build on this tradition.

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162. See generally Rahman, *supra* note 134, at 321 (advocating for power-building regulatory reform that “engag[es] and empower[s] traditionally diffused, underresourced, and marginalized stakeholders”).

163. We have in mind here processes, for example, that invite workers to help staff and run wage boards setting wages and labor standards, residents to run zoning and community benefits boards, and the like. See, e.g., Andrias, *supra* note 160. Similar trends are apparent in efforts to radically democratize the criminal-justice system. See Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017). We might similarly increase the role of grassroots participation in monitoring and enforcing regulatory standards, empowering communities to hold governments and corporations accountable. See RAHMAN & GILMAN, *supra* note 150, at 169-202 (on participatory engagement through governance and monitoring).

164. See, e.g., LEE, *supra* note 105; TANI, *supra* note 105; Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).



Like many of the cases we have advanced here, the substance of these arguments lies in political morality. A democratic political economy is a moral project, aimed at taking with full seriousness the equality of persons and our capacity to set for ourselves the terms of our collective lives, to decide how to deal out power and vulnerability, to figure out how to live together – and to defend these decisions to one another. When we follow Karl Polanyi in speaking of an economy “embedded” in society,<sup>165</sup> we mean not just that economic ordering is always derived from legal ordering but also that an economy’s ordering of power and vulnerability always bespeaks a moral vision of persons, whether egalitarian and generous or hierarchical and cramped.

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

## CONCLUSION

The Twentieth-Century Synthesis was a successful remaking of the legal imagination, creating a neoliberal political economy premised on concepts of efficiency, neutrality, and antipolitics. But even as this was a successful intellectual shift, manifesting in a wide range of scholarly discourses, doctrinal areas, and policy changes, it has always been a fragile configuration. As the contradictions of an increasingly unequal political economy have become painfully visible and exacerbated, the veneer of consensus around this Synthesis has fallen away.

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165. See KARL POLANYI, *THE GREAT TRANSFORMATION* (1944); see also FRED BLOCK & MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM* (2014) (analyzing Polanyi’s ideas and extending them to contemporary economic debates).

166. On social reproduction, see KATE BEZANSON, *GENDER, THE STATE, AND SOCIAL REPRODUCTION: HOUSEHOLD INSECURITY IN NEO-LIBERAL TIMES* 22-37, 63-64 (2006); FRASER, *supra* note 32, at 5-15, 228; and ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (2012).

Thus, we find ourselves in a moment of political crisis and accompanying intellectual upheaval: an old order of political economy and its legitimating concepts are crumbling, but a new order has yet to emerge. The outlines of the battle for a new order have come into focus. The populisms of the far right, resurgent across the globe, point to one dark path coming out of this moment: the resurgence of reactionary political economy that marries anger at economic and political corruption with exclusionary attachment to racialized and gendered hierarchy. At the same time, centrist calls for a restoration of an imagined pre-2016 consensus on norms of good governance ignore the deeper causes of neoliberalism's crisis. But in contrast to both of these visions, the account offered here points to the beginnings of a very different, more deeply democratic and progressive political economy.

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

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

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167. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 914 (2016).

168. See Grewal & Purdy, *supra* note 21, at 7-8, 16-18.

169. See *id.* at 6-9; see also SLOBODIAN, *supra* note 48; Werner Bonefeld, *Freedom and the Strong State: On German Ordoliberalism*, 17 NEW POL. ECON. 633, 635-36 (2012).

to see this, precisely because the Synthesis makes it so hard to see (or at least so easy to overlook).

If it is to succeed, law and political economy will also require something beyond mere critique. It will require a positive agenda. Many new and energized voices, from the legal academy to political candidates to movement activists, are already building in this direction,<sup>170</sup> calling for and giving shape to programs for more genuine democracy that also takes seriously questions of economic power and racial subordination;<sup>171</sup> more equal distribution of resources and life chances;<sup>172</sup> more public and shared resources and infrastructures;<sup>173</sup> the displacement of concentrated corporate power and rooting of new forms of worker power;<sup>174</sup> the end of mass incarceration and broader contestation of the long history of the criminalization and control of poor people and people of color in

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170. For an example that works across these domains, see Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018), which describes the radical reimagining of legal relations stemming from grassroots racial- and economic-justice movements and how it might impact scholarship and legal imaginaries.

171. See Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369 (2018) (exploring the possibilities of constitutional transformation to tackle problems of economic power); Fishkin & Forbath, *supra* note 105; Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); Kessler & Pozen, *supra* note 95; Bertrall L. Ross II, *A Constitutional Path to Fair Representation for the Poor*, 66 KAN. L. REV. 921 (2018).

172. See BARADARAN, *supra* note 14; Laura Sullivan et al., *The Racial Wealth Gap: Why Policy Matters*, DEMOS (2015), [https://www.demos.org/sites/default/files/publications/RacialWealthGap\\_1.pdf](https://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf) [<https://perma.cc/H44D-7QQA>].

173. See, e.g., GANESH SITARAMAN & ANNE L. ALSTOTT, *PUBLIC OPTIONS: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY* (2019) (calling for a greater investment in shared public provision of various goods); Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 YALE J. HEALTH POL'Y L. & ETHICS 147 (2016).

174. On labor power, see, for example, AI-JEN POO & ARIANE CONRAD, *THE AGE OF DIGNITY: PREPARING FOR THE ELDER BOOM IN A CHANGING AMERICA* (2009); DAVID ROLF, *THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA* 235-58 (2016); and Andrias, *supra* note 160, at 57-63. On corporate power and antimonopoly, see BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2011); WU, *supra* note 158; Paul, *supra* note 60; and Khan, *Amazon's Antitrust Paradox*, *supra* note 60, at 716-18.

building capitalism;<sup>175</sup> the recognition of finance and money as public infrastructures;<sup>176</sup> the challenges posed by emerging forms of power and control arising from new technologies;<sup>177</sup> and the need for a radical new emphasis on ecology.<sup>178</sup> These are the materials from which a positive agenda, over time, will be built.

Political fights interact generatively with scholarly and policy debates in pointing the way toward a more democratic political economy. The emergence of new grassroots movements, campaigns, and proposals seeking to deepen our democracy is no guarantee of success. But their prevalence and influence make clear the dangers and opportunities of this moment of upheaval – and highlight the stakes of building a new legal imaginary.<sup>179</sup> Neoliberal political economy, with its underlying commitments to efficiency, neutrality, and antipolitics, helped animate, shape, and legitimate a twentieth-century consensus that erased power, encased the market, and reinscribed racialized, economic, and gendered inequities. By contrast, a legal imaginary of democratic political economy, that takes seriously underlying concepts of power, equality, and democracy, can inform a wave of legal thought whose critique and policy imagination can amplify and accelerate these movements for structural reform – and, if we are lucky, help remake our polity in more deeply democratic ways.

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175. See ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 95-96 (2005); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019).

176. See, e.g., CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* (2015); Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143 (2017); Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757.

177. See, e.g., FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2016); Yochai Benkler, *A Political Economy of Utopia*, 18 DUKE L. & TECH. REV. 78 (2018); Kapczynski, *supra* note 68.

178. See ARONOFF ET AL., *supra* note 16; Purdy, *supra* note 17.

179. On the idea of a “social imaginary,” which we are adapting here to the idea of a legal imaginary (a social imaginary of law), see CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 23-26 (2003).