Constructing and Contesting Structural Inequality

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Abstract

Many forms of economic, social, and political inequality are the product not of individual actors but rather of larger systemic and structural arrangements. How should we conceptualize and then respond to such structural inequalities? This paper highlights two areas of current debate in legal scholarship and public policy: the changing nature of work and urban inequality. Each of these areas of debate provides examples of how law and policy construct structural forms of inequality—and how such inequality can be contested. As this paper suggests, structural inequality is best understood as an aggregate, cumulative product of legal and policy decisions. Such structural inequality requires similarly structural remedies that go beyond incremental, “meliorist” approaches. Specifically, the paper suggests three strategies for redressing structural inequality: limits on private power, investments in public goods, and oversight and enforcement by administrative agencies.

I. Introduction

In the 2007 school desegregation case, Parents Involved in Community Schools v. Seattle School District No. 1,1 the Supreme Court struck down the voluntary school desegregation efforts by Louisville, Kentucky, and Seattle, Washington as employing an overly broad and aggressive mode of racial balancing in assigning students to particular schools. In his majority opinion, Chief Justice John Roberts argued that de jure segregation—of the sort that marked the Jim Crow South—had been officially eliminated as in the case of Louisville, or had never been employed as was the case in Seattle, and thus whatever racial disparities existed in the Seattle region were not the product of law. As Roberts wrote, “for schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way ‘to achieve a system of determining admission to the public schools on a nonracial basis,’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”2 The systematic racial segregation of modern metro areas, long documented by urban scholars as a result of economic inequalities,

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2 Id. at 748-49 (quoting Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300-01 (1954)).
racial wealth disparities, and deliberate policies of zoning and urban planning, did not factor into Roberts’s analysis.

The Roberts Court’s voting rights jurisprudence reflects a similar blindness to systemic forms of social and economic inequality and the disparities of political power that can result. As many critics have contended, the campaign finance ruling in *Citizens United v. FEC*, which upheld corporate campaign contributions as political speech, included in part a relative lack of concern on the part of the Court about how disparities in economic wealth could skew the workings of the otherwise free-flowing marketplace of ideas or the dynamics of political competition. In *Shelby County v. Holder*, Roberts echoed his *Parents Involved*’s analysis, suggesting that the preclearance regime established by the Voting Rights Act of 1964 to oversee voting regulations in many Southern states was no longer needed. For Roberts, the formal barriers to the vote that led to the preclearance regime’s formulation in the first place were no longer present, and thus federal oversight of these voting procedures was no longer necessary. In her dissent, Justice Ginsberg castigated Roberts’s argument as, among other things, exhibiting a blindness to more subtle “second-generation” barriers preventing minority groups from exercising their voting rights in full.

These glimpses point to a larger challenge for legal scholarship, analysis, and policymaking. The question of such systemic or structural inequalities often stump courts and lawmakers alike. What does it mean for inequality to be “systemic”? Can any single actor be held responsible for such systemic or structural disparities? If these disparities are so diffuse, so baked into the background patterns of social and economic activity, how would they even be redressed or counteracted?

And yet, structural inequalities are of increasing concern in social science and legal scholarship, as well as public policy debates. Today, we can see the concern with systemic and structural inequality manifesting in many different literatures from the renewed interest in law, inequality, and political economy, to scholars working in fields as diverse as labor law, financial regulation, racial and gender discrimination, law and technology, local government law, and more. This scholarship indicates how inequality has much deeper roots in the way our political economy channels flows of income and resources, and how it allocates opportunities, wealth, and access. Inequality, on this view, emerges as a product of systemic transformations in the background rules and dynamics of the modern economy. Thus, empirical measures of widening income or wealth inequality

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reflect the results of the accumulation of legal rules operating in the background; it is through law that these seemingly natural “market forces” are constructed. These inequities are manifest not only on economic dimensions, but also on racial and gendered lines, intersecting, exacerbating, and further codifying these disparities. As scholars of racial discrimination and inequality have suggested, racial disparities in wealth and opportunity persist even when controlling for education levels or income. These literatures have helped diagnose the many ways in which background legal rules and systems creates economic, racial, gendered, and other forms of disparities in economic wealth, opportunity, and inclusion, and many suggest systemic policy changes that could remedy these systemic disparities.

This paper draws on several areas of contemporary and historical legal scholarship to draw out some common methodological elements to clarify, first, the ways in which we might conceptualize and diagnose structural inequalities, and second, how we might counteract these inequalities. Law features prominently in both parts of this framework. As this paper will suggest below, structural inequality operates in large part by concentrating economic, social, and political power through softened legal constraints on the one hand, and imbalanced background legal rules on the other. Furthermore, legal rules often operate to fragment and diminish the capacity of affected constituencies—such as workers, consumers, urban residents, and minority groups, to name a few—from effectively wielding the kinds of countervailing political and economic power needed to counteract such disparities of power. Historically, there is a long tradition going back through scholarship in law and public policy, critical race and gender studies, critical legal studies, and more, back to the rise of legal realism and political economy critiques during the Progressive Era around the turn of the twentieth century. This paper returns to this early history of Progressive-Era political economy to draw out a theory of systemic and structural inequality, how to diagnose it, and how to remedy it. The paper then helps develop and refine this approach with reference to contemporary legal scholarship. The goal, I hope, is to provide some greater clarity on these questions of methodology: how we should define, identify, and then seek to remedy structural inequalities—and the role of law in shaping both analysis and response.

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7 See, e.g., David Grewal, The Laws of Capitalism, 128 Harv. L. Rev. 626, 655 (2014). As Grewal argues, “A detailed study of these legal foundations is essential to understanding the institutional structure of capitalism.” Id. at 656.

8 There is a rich growing literature on the dynamics of racial capitalism. Part of this literature is historical excavation, documenting the interconnection between the rise of commercial and later industrial capitalism and slavery. See, e.g., Sven Beckert, Empire of Cotton (2014); see also Slavery’s Capitalism: A New History of Economic Development (Sven Beckert & Seth Rockman eds., 2016).

II. Theorizing Structural Inequality and its Remedies

A. “Natural” versus Human-Made Structures

The challenge of conceptualization structural inequality reveals a central philosophical and conceptual divide, one that often goes beyond conventional accounts of left and right. The central question is not so much the role of government; rather, it is about the degree to which we view background systems and structures as “natural” or human-made. This divide also manifests in the ways in which different thinkers seek to address such structural inequalities.

Consider for example the thought of Friedrich Hayek, one of the intellectual leaders of twentieth century libertarianism and a key figure in the revival of the emphasis on self-correcting markets and skepticism of governmental action that characterizes “neoliberal” political economic thought. The term “neoliberalism” is often contested and can at times imply a higher degree of hegemony or ideological coherence and coordination than is often the case. For our present purposes, we can use the term “neoliberalism” to refer to a configuration of conceptual approaches that include three elements in particular: a view of markets as self-correcting and epistemically superior; a skepticism about governmental action as prone to capture; and a disposition towards more classic liberal views of negative liberty as freedom from governmental interference.10

Hayek’s central dispute with thinkers advocating for more expansive approaches to social and economic justice did not necessarily turn on a rejection of the moral aspiration for greater equality of economic opportunity. Indeed, Hayek (and other libertarians following in his mold, like Milton Freidman) at times articulated a surprisingly expansive view of economic opportunity with support for extensive social insurance programs or even a basic income in the form of negative earned income tax credits. But what is especially telling is that Hayek framed his philosophical disagreement in terms of a vastly different view of structure and political possibility.

In a classic 1976 essay, Hayek argued that individual income shares in a market economy were the outcome of the market’s “spontaneous ordering,” rather than being the product of a singular will or intention. As a result, claims of social justice amounted, in his view, to a “naïve” “anthropomorphism,” attributing intentionality and responsibility for outcomes to a system that could not have any intention or will to begin with.11 “Those shares are the outcome of a process the effect of which was neither intended nor foreseen by anyone,” Hayek continues. “To demand justice from such a process is clearly

10 For a discussion of these elements of neoliberal thought and their role in pre- and post-New Deal politics, see, e.g., K. Sabeel Rahman, Democracy Against Domination 39-43, 58-64 (2017). For an excellent history of Hayek and neoliberalism and its many contradictions and historical contingencies, see Angus Burgin, The Great Persuasion (2012).

The market was not an individual entity with a will, and thus conventional notions of moral obligation, responsibility, or redress “has no application” to an “impersonal” and self-ordering system such as a market economy. Moreover, imposing distributive outcomes on market-ordering would destroy the critical social value of markets as efficient, decentralized systems for synthesizing information and optimally ordering the allocation of goods and services through the price mechanism.

Hayek’s critique of social justice was largely motivated by a desire to avoid the specter of totalitarian control of the economy associated with statist communism and socialism. But it is also revealing about a central conceptual shift required to diagnose—and remedy—inequality. Hayek writes off much of social justice because economic systems—diffuse, mindless, unintentional—cannot be the subjects of concepts like justice. This unease with treating “natural” market orderings as if they were blameworthy opened up the door to omnipresent regulatory and redistributive efforts that would inevitably escalate until all domains of economic and social activity were subject to public control. This view of the dangers and ineffectiveness of systemic regulation, and the view that systemic patterns of inequality are themselves more like forces of nature than they are like intentional, human-produced discrimination, echoes the asystemic view of markets and politics articulated by Roberts in Parents Involved and Shelby County.

Yet, while Hayek is correct that economic systems are indeed diffuse and lack a single coherent will, they are not “natural” systems beyond human agency, or neutral systems operating in intrinsically fair and equitable ways. Markets are themselves products of law and politics, and the aggregate dynamics of market systems are similarly the result of background legal and political choices that structure markets in one way or another. Indeed, a key conceptual shift in understanding the broader dynamics of inequality and subordination in the modern economy requires an appreciation for the very inequitable and human-made nature of economic systems as a whole. As Iris Young argues, economic and social structures while often creating constraints that are experienced by individuals as objective and exogenous are in fact the product of hidden and accumulated decisions, policies, and actions. These accumulated human choices congeal into a larger structure, which places individuals in subordinate positions. Thus racial minorities, women, and poorer individuals might lack for meaningful opportunities to experience upward mobility not because of their merit, not because of luck, and not even because of the nefarious intent on the part of their employer, their landlord, or another individual actor. Rather, their social and economic subordination arises as a result of their position in a larger socioeconomic structure in which they lack the power, resources, and opportunities to better their condition.

\[12\] Id. at 65.
\[13\] Id. at 70.
\[14\] For a classic account of this alternative view, see Karl Polanyi, The Great Transformation (1944).
\[15\] Iris Marion Young, Responsibility for Justice 52-59 (2011).
The structures that in the aggregate create these uneven landscapes of social and economic position can be themselves viewed as a systemic form of unequal power and domination. Where conventionally we might view power disparities and domination in terms of specific actors that can act arbitrarily, asserting his or her will against another, diffuse systems in the aggregate can create similar disparities, even without a single consolidated intentionality, arising instead from the aggregation of many individual decisions and background policies, each of which operates within the bounds of conventional legal rules and norms. As Young argues, structural domination arises “when social processes put large groups of persons under systemic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capacities available to them.”16 The structure of, say, the labor market, or the physical geography of the city, thus can seem voluntary and natural, and can be the product of many independent policies and decisions, and still be a causal driver of inequality, and a legitimate target of public policy.17

B. Meliorist Versus Structural Remedies

Economic equity then is not just a result of securing an equitable distribution of income. Rather it fundamentally turns on a deeper construction and reform of what Joseph Fishkin calls the “opportunity structure.”18 But even if the structural dimensions of inequality are taken as given, there is a further fault line that arises in how to conceptualize the appropriate remedy to structural inequality. Some policies would in fact help individuals facing structural inequalities, but they would do so by helping an individual move within a given structure to a higher social or economic position. But they would not alter the structure that creates the hierarchies of subordination, of position, in the first place. Thus, in a given labor market, increased education and individual skill-building might help some individuals secure higher employment. But such policies, even at scale, are unlikely to alter the background rules and disparities that make, for example, low-skill and low-wage work so precarious and insecure and unrewarding. Similarly, individual-level enforcement of anti-discrimination provisions might make it easier for some individuals to gain redress for instances of racial or gender discrimination, but more would need to be done to systematically uproot systemic patterns racial and gender discrimination. Fishkin makes a similar distinction in his account, using the metaphor of the bottleneck. There are social and economic gateways that can help launch an individual from a lower socioeconomic position to a higher one: for example, admission to college, or moving to a high-growth and high-opportunity neighborhood. Some interventions can

16 Id. at 52.
improve an individual” condition by moving her through the bottleneck, such as affirmative action admissions procedures or targeted educational interventions, or housing voucher programs. But these are distinct from interventions that would dismantle or at least loosen the bottleneck itself. Think of this as the distinction between meliorist approaches to tackling structural inequality, and structural approaches.

This distinction is not always a sharp one, but rather it sketches out a spectrum of policy responses to structural inequality. Consider for example, the conventional meritocratic and competitive view of “equal opportunity.” On this view, the central question for social policy is to ensure a fair competition for (scarce) goods and opportunities such that the most meritorious can secure access regardless of their starting point in life. But this standard approach narrows our focus too much by zeroing in on making competitive entry to key opportunities fairer—such as through access to quality schools and college admissions. This narrow focus leaves out broader questions such as what “merit” means, or why such opportunities are structurally so scarce and critical for success in the first place. It also means implicitly prioritizing a single pathway for economic well-being rather than looking to make possible a plurality of life plans and pathways.\footnote{Id. at 5-6.} Furthermore, this “fair competition” view of equal opportunity implicitly codifies a distinction between the “deserving” and the “undeserving” poor: only those poor individuals who have “merit” can and should benefit from social policies meant to expand economic opportunity. This may seem unobjectionable, but the notion of an undeserving poor has long played a pernicious role in making our social contract and welfare systems unduly punitive and restrictive.\footnote{See Michael Katz, The Undeserving Poor (2013).} The focus on merit thus leaves in place an underclass, rather than seeking to remedy the problem of poverty and insecurity for all in the first place.\footnote{See Dylan Mathews, The Case Against Equality of Opportunity, Vox, Sept. 21, 2015 (http://www.vox.com/2015/9/21/9334215/equality-of-opportunity).} To put it another way, this bifurcation of those who benefit and those who do not may at best diversify the economic elite, but leaves the disparity between elite and non-elite in place; it is effectively the “equal opportunity to be unequal.”\footnote{Alex Gourevitch & Aziz Rana, America’s Failed Promise of Equal Opportunity, Salon, Feb. 12, 2012 (http://www.salon.com/2012/02/12/americas_failed_promise_of_equal_opportunity/).}

Another common way of thinking about equal opportunity and the role of social policy focuses not on fair competition but on the problem of risk mitigation. Much of the American social policy regime can be understood as mechanisms to insure individuals, families, and communities against various kinds of risks and economic shocks.\footnote{See David Moss, When All Else Fails: Government as the Ultimate Risk Manager (2004).} This view of opportunity and social policy fares better than the fair competition view, in that it lacks the implicit value judgments about deservingness, and suggests a more universalized approach to policy. We are all vulnerable to risks, and social policy should serve to protect
each of us from the most severe social and economic repercussions of such risks. The language of risk highlights the important shift that social policy is not about identifying the most deserving of impoverished or insecure individuals to grant them more opportunities; rather it is about enabling all of us to live more secure and stable lives—a security and stability which in turn can make it possible for each of us to pursue our own social, economic, and personal aspirations. But many of the inequalities we face in today’s economy are not just a product of increased risk faced by poor families, contingent workers, and the like; rather they are products of deeper structural disparities in access to opportunities.

But equal opportunity, in the end, is not about fair competition or risk mitigation; rather, it is fundamentally about freedom—the freedom “to do and become things we otherwise could not.”24 The risks, vulnerabilities, and insecurities that families and individuals face in the market economy are not the product of forces of nature; rather, they arise from the ways in which we structure the market economy through policy—and represent the aggregation of disparities of bargaining power and positional power between, for example, landlords and tenants, managers and workers.25 Equality of opportunity, then, must also be understood as a project of expanding freedom from relations of domination, exploitation, exclusion—particularly the kinds of domination that can arise from diffuse systems and structures as described above.26 Achieving equality understood as economic freedom thus requires something more than a narrow focus on opportunity, desert, risk, or even raw redistribution. Instead, it requires asking hard—and empirically-rich—questions about the ways in which our current economic structures work to include or exclude, to empower or subordinate. It requires responding to these structural inequities by, on the one hand, better protecting vulnerable communities and constituencies from such structural subordination, and on the other, affirmatively expanding their capabilities and functionings, expanding their agency and ability to live lives they value.27 Mitigating risk and investing in the education and capabilities of individuals are of course potential elements of a larger freedom-enhancing, structural inequality-reducing policy framework. But by themselves they can often be approached in an overly narrow way.

Indeed, it is this structural quality of economic freedom and justice that is often so difficult to identify and pursue. For libertarian and conservative thinkers like Hayek, structure is actively rejected as a cause of inequality. Instead, inequalities are cast as the product of poor individual decisions taking place in an otherwise naturally-occurring and

24 Fishkin, supra note 18, at 2.


26 Gourevitch & Rana, supra note 22; Anderson, supra note 25, at 312.

27 See Anderson, supra note 25; see also Amartya Sen, Development as Freedom (1999).
neutral background structure. For meliorist policy thinkers, structure may be part of the diagnosis, but *changing* structure is under-emphasized as part of the solution. By contrast, contesting structural inequality is a central theme in the many social movements today. The attempt to first politicize, and second transform, these political economic structures is a key focal point for feminist critiques of capitalism, revived literatures on racial capitalism, and the labor movement’s historical and more recent attention to how background structures produce worker precarity and lack of power. This is also a central concern in the history of legal political economic thought—a history that is worth remembering and recovering, for it can help provide a framework through which contemporary scholarship and policy debates can address modern-day questions of structural inequality.

**C. Progressive Political Economy and the Contestation of Structure**

This conceptual discussion of structural inequality suggests that neither the neoliberal acceptance of structural inequities nor meliorist solutions are adequate. But what would a more granular approach to diagnosing and remediying structural inequalities look like? The move to structure is one of the central developments of Progressive era political economy, including (and perhaps especially in) legal thought. Recovering this intellectual history and method can help provide greater clarity to conceptualizing and addressing structural inequalities today.

The social and economic upheaval of the industrial revolution generated tremendous anxiety, inequality, and intellectual ferment, leading to what some scholars have rightly described as the “first law and economics movement.” A wave of legal scholars and thinkers began to explore these questions of power, economic structure, and inequality. A central thread among these thinkers was a common focus on the problem of economic structure—and in particular, a focus on the ways in which economic structure magnified disparities of power. Thus, the legal realist movement argued that the state, through the operation of background legal rules of property, contract, and tort law, constructed the realities of economic markets, including their disparities of outcomes, opportunities, and bargaining power. This reality suggested that these background rules should be subjected to the same standards of public welfare and public justification that accompanied the exercise of state power. Similarly, this legal realist critique helped inform a wider movement of legal scholars and reformers who focused not just on the systemic background rules of industrial capitalism, but also on the ways in which these rules enabled the concentration of private power among newly powerful firms:

28 See, e.g., Hayek, supra note 11.


monopolists like Standard Oil and employers and managers governing industrial labor. Thus, the antitrust movement emerged during this time and labor organizers took on greater importance in addressing the needs of workers in the new power dynamics of the economy.

As I have suggested elsewhere,\textsuperscript{31} theorists of Progressive Era political economy saw the problem of economic power as a particular threat to ideas of democracy. The challenge of private power and structural inequality required substantively different social and economic policies. But more importantly perhaps was that they required new forms of democratic action that would enable the public at large to contest, constrain, and respond to these forms of power. Thus, it should be no surprise that thinkers of this period were also emphatically interested in new forms of civil society organizing such as through the labor movement. They were also interested in institutional reforms that would enhance democratic governance, from creating new administrative agencies to establishing the direct election of senators and ballot referenda procedures. For Progressive Era thinkers like Louis Brandeis, these institutions of democracy were needed to counteract systemic inequalities. Policies like antitrust law would restrain concentrations of private power and create more fair background rules of economic competition and opportunity. Public policy would be made more responsive and adaptive to the modern economy through the creation of new expert-based regulatory bodies, and through greater policymaking by local-level democratic institutions like states and cities. Labor organizers saw the problem of industrial capitalism as one of concentrated private power, enabled by skewed background rules of market ordering and the workplace itself. The remedy required new forms of movement organizing and action aimed at creating a different system of workplace relations. These efforts to enable democratic agency exemplify what John Dewey theorized as the central problem of democracy in industrial capitalism. For Dewey the modern economy created forms of inequality and upheaval so diffuse and systemic that it would appear outside the scope of human agency. Only by creating new forms of democratic communication, action, and institutional structures, could Americans gain the ability to restructure these background rules to create a more equitable—and more free—economic order.\textsuperscript{32}

So what happened to this progressive political economic vision? Over the course of the twentieth century, two key changes defused this approach to contesting structural inequalities.\textsuperscript{33} First, the more substantive accounts of economic freedom envisioned by thinkers like Brandeis and Dewey gradually eroded into a thinner vision of economic policy that emphasized the optimization of growth and markets with the mitigation of the most extreme forms of inequality. Second, the resurgence of Hayekian critiques of progressive political economy prompted a further change. On the one hand, these

\textsuperscript{31} Rahman, supra note 10, at 68-96.


\textsuperscript{33} For a longer version of this argument, see Rahman, supra note 10, at 33-43.
critiques defused the sense of threat that Progressive Era thinkers saw from private power and economic systems, by presenting markets as self-correcting, and welfare-optimizing. At the same time, the corporations that so threatened early labor organizers and antitrusters came to be viewed as themselves checked by the expansion of financial markets that created more shareholder ownership and power over firms, and the checks and balances of market competition itself. On the other hand, these thinkers also viewed governmental regulation as increasingly likely to give way to interest group capture, corruption, and inefficiency.

Yet this earlier approach to political economy offers an important set of methodological and policy implications for contemporary debates over structural inequality. First, it suggests the value of using law as a way to map and diagnose new concentrations of power lying beneath a changing economic system. Second, it suggests the importance of law in shaping the capacity (or lack of capacity) to hold such economic power accountable. The rest of the paper will explore each of these implications in the context of contemporary inequality debates.

III. Inequality as a Product of Power and Structure

A structural lens on inequality helps uncover the ways in which background legal rules facilitate disparities in economic income, opportunity, and wealth. Furthermore, this approach helps diagnose the ways in which law helps concentrate economic power, which is often obscured behind, and operating through, layers of background legal regimes. Law facilitates these dynamics, and makes regulation difficult because new forms of twenty-first-century private power operate by exploiting legal structures and forms effectively. Thus, much of today’s inequality crisis is not just the product of technological change or natural evolution of modern-day capitalism; rather, it is the product of legal systems that are themselves subject to change and potential reform. Furthermore, diagnosing these structural inequalities highlights the degree to which reform efforts will have to take a structural, rather than meliorist, orientation.

A. Law, Inequality, and the Changing Nature of Work

There is a growing economic literature documenting the problem of low wages, precarious and insecure work, and declining upward economic mobility, despite years of growing corporate profits. These inequalities are largely the product of background structures around how law constructs the nature of the firm and of modern work—and how private actors, such as investors, financiers, and managers, are able to exploit these structural rules to capture a larger share of economic gains.

Before we can appreciate the ways in which law and legal change construct contemporary structural inequities, it is worth recalling the basic structure of mid-century capitalism. The archetype of work for much of the twentieth century was, at least on paper, the large employer, like General Motors or Ford. These companies were vast, employed tens of thousands of (mostly unionized) people at all levels, and offered a range
of jobs, wages, and pathways for upward mobility. A central feature of New Deal-era reform politics was to deputize these vertically-integrated firms to serve broader social goals such as labor protections, wages, benefits, upward-mobility, and more.\textsuperscript{34} The firm thus became the conduit for social contract provisions, tying the provision of healthcare and Social Security to individual workplaces and employment status. These firms also operated in context of a set of background rules—financial regulations on banks; antitrust regulations limiting excess concentration in the economy—which prevented concentrated economic wealth and power, and helped assure that the fruits of economic growth flowed to a wide range of workers and constituencies.

This arrangement was also deeply (but implicitly) exclusionary, which was a product of the underlying legal structure of this social contract. It was the white male worker who had pride of place in this system; the New Deal itself excluded migrant workers, frameworks, and other sectors predominantly made of up workers of color from these arrangements. Women were similarly excluded from this system, in large part on gendered presumptions of uncompensated labor in the household.\textsuperscript{35} Indeed, the civil rights and women’s rights movements of the later twentieth century were in part framed in terms of extending the New Deal’s social contract to previously excluded constituencies.\textsuperscript{36}

Nevertheless, this “mixed economy” vision of capitalism worked remarkably well in generating sustained and inclusive economic growth.\textsuperscript{37} Despite the frequent castigations of the weakness of the American social contract relative to its counterparts in Western Europe and Scandinavia, these “in-kind” protections offered up in exchange for full-time work and other transfers made for a welfare state on par with more social democratic systems. The only problem was that many of these benefits were provided through the vehicle of private employers—a politically-useful expedient that would result in catastrophic problems in by the turn of the twenty-first century.\textsuperscript{38}

Thus, the corporate form is a key linchpin in American political economy, which depends on corporations to channel investment and new economic innovation on the one


\textsuperscript{36} See, e.g., Frederickson, supra note 35; Forbath, supra note 35, at 1841-43.


\textsuperscript{38} This expediency in the mid-century social contract is a good example of what historian Gary Gerstle has termed the “improvisational” nature of the modern American state. See, e.g., Gary Gerstle, Liberty and Coercion: The Paradox of American Government from the Founding to the Present (2015).
hand, and as a vehicle for providing the basic safety net protections of healthcare, pensions and the like on the other. Yet the modern corporation bears little resemblance to the archetypical large, well-regulated, publicly-traded, and unionized firms of New Deal liberalism. These changes to the dynamics of work and the rise of inequality are a product of how economic power operates through an array of background laws. Furthermore, those laws themselves have been changed over time to facilitate this concentration of power.

First, consider the question of corporate ownership. A key dynamic in twenty-first-century capitalism is the rise of shareholder influence on the business decisions of the firm. The “shareholder revolution” in corporate governance and securities law expanded the power of shareholders to demand such short-term returns. In 1976, for example, Michael Jensen and William Meckling helped catalyze a revolution in corporate governance, arguing that this diffusion of shareholders meant that they were unable to coordinate effectively, leaving managers free to pursue their own interests at the expense of the firm and of the economy as a whole. On this view, corporate power would be held accountable through the accountability assured by expanded shareholder activism through the channels of internal corporate governance, and mergers or takeovers enabled by modern financial markets. Indeed, the rise of modern finance theories of portfolio management, capital structure irrelevance and efficient markets, coupled with new practices in the private sector of hostile takeover attempts and defenses combined to radically transform corporate law. These changes led to a shift from a default hostility to takeovers and preference for managerial discretion within firms, to a greater openness to takeovers, mergers, and preference for expanded power among shareholders as a way to discipline managers and hold them accountable. By the end of the twentieth century, this model of “shareholder primacy” was the prevailing and dominant framework, leading Henry Hansmann and Reiner Kraakman to famously declare an “end of history” to corporate law. The model of shareholder primacy became “internalized as the dominant norms of a rising generation of business leaders, investors, academics, journalists, and lawmakers,” an “omnipresent belief system.”

But where much of this was initially viewed by law and economics scholars as a way to assure greater accountability of the firm and more efficient allocation of capital, in

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41 Romano, supra note 39, at 343-48.


more recent years it has instead become a vehicle for further concentrating power among particular investors over others. With the rise of large institutional investors like pension funds and private equity and the broader rise of financial interests and the finance sector writ large, these actors have asserted greater influence on firms through the vehicle of shareholder primacy.

Second, the workplace itself is increasingly “fissured,” moving from single workplaces to networks of franchised, outsourced, and platform-based labor.\(^{44}\) This fragmentation of the corporate structure is a product of an interaction between changing technology, background legal rules, and the assertiveness of private power, especially those investor interests noted above. Thus, advances in computer and information technologies dramatically reduce the cost for the primary corporation to monitor and oversee its various subcontractors and franchisees. As search, information, and transaction costs decrease, following the logic of Ronald Coase’s famous article on the size of firms, it becomes more efficient for firms to procure goods and services over the open market rather than internally.\(^{45}\) But as David Weil documents, part of the story is also a fiscal one: investors and financiers increasingly play a large role in shaping corporate strategy by demanding ever-increasing returns, creating intense pressures on firms to raise profits and cut costs. One of the most effective ways to cut costs is to move workers (and their Social Security and healthcare benefits) off the company balance sheet and, in the process, remove them from the umbrella of regulatory oversight. Furthermore, the outdated nature of labor regulations, absolving companies of their pension, wage, and other labor standard obligations over outsourced, franchised, or independent contractor workers provided the legal gap that firms could exploit in this fissuring strategy. The “regulatory drift” of labor law and its failure to adapt to the changing economy further enabled these changes, while the persisting limits of labor organizing under the Wagner Act hobbled the ability of organized labor to respond to these structural changes in work and the safety net.\(^{46}\)

These trends explain the proliferation of low-wage, contingent, and precarious work in industries like apparel, food, and restaurants and the dynamics of the on-demand economy dominated by platforms like Uber, TaskRabbit, and more. Furthermore, it seems likely that the continued shift toward a fissured workplace and technological displacement of workers will work its way up the value chain, affecting increasingly skilled middle-income workers.\(^{47}\) In this new economy, only a select few will benefit from these


technological changes: the owners of capital, and those with highly placed, technology-complementing skills.48

Thus, increasingly, corporate power is diffused and networked. Upstream, the “corporation” is now often owned by a murky network of financial investor organizations from hedge funds to private equity. Downstream, the workplace is now more properly understood as a network of legally-distinct corporations linked together by a web of contract and franchise arrangements.

The result of this transformation is two-fold: economic elites are increasingly able to co-opt and capture gains, while curtailing the degree to which corporate activity channels work, income, and investment into low- and middle-income communities. The fissured workplace and the dominance of the imperative for shareholder return severed the crucial link that the New Deal political economy forged between work and welfare, thus breaking a key channel through which income and wealth would flow from capital to labor. This severing of the link was itself a product of law, much as the forging of the link was in the first place.

B. Law and Urban Inequality

Just as the work and corporations are exacerbating inequality through the exploitation of background legal structures, the same can be said about the ways in which geography structures access to economic opportunity and basic needs. In recent years, a growing literature has documented the massive effects of economic and racial segregation in the modern city. Where someone is born can have decades- and generation-long impact on wages, mobility, health, and well-being.49 The chances of being born in high-poverty, low-opportunity neighborhoods is not equally distributed: racial minorities and poorer families are both dramatically more likely to live in such neighborhoods—and thus the geography of opportunity plays a large role in sustaining racial and economic hierarchies. These disparities are produced by the interaction of law, urban planning, and architecture itself.

First, the physical architecture of our urban spaces represents a form of regulation, literally constructing inequality and exclusion that is felt on both economic and racial lines.50 Such racial and economic segregation has been actively furthered by urban planning and housing policy. This discriminatory housing policy stretches back decades, starting from the legacy of redlining and discrimination in New Deal era federal supports


for homebuyers, running through the ways in which cities tend to zone neighborhoods, concentrating economic exclusion and even environmental harms in minority neighborhoods. Historically, housing and economic segregation—which had its origins in New Deal-era housing policy that took root at the same time that this otherwise inclusive economic structure was being built—helped codify the racial gap in wealth and opportunity.

These geographic inequities operate through legal structures at multiple scales. At the regional level, as scholars of local government law have long noted, the relative ease of municipal secession and incorporation facilitates the fragmentation of regions into competing municipalities. This in turn creates vicious cycles of competition as municipalities struggle to attract capital investment by offering ever greater incentives to businesses. This idea of cities as commodities for global investors, businesses, and (often wealthier) potential residents skews urban development and economic policy decisions. At the municipal level, decades of racially exclusive zoning and property covenants continue to have a lagged effect on contemporary cities, concentrating poverty and enforcing racial segregation through the persistence of a built environment largely constructed in many cities during the decades of de jure racial segregation. Redlining and racial disparities in lending, not to mention formal New Deal-era patterns of Federal support for mostly white and middle-class homeowners, further exacerbated these patterns. These exclusions and inequities persist through more subtle, nominally race- and class-neutral ways. Exclusionary zoning, where municipalities can make some areas cost-prohibitive for poor and racial minority communities through lot sizes, occupancy restrictions, and the like, persists despite extensive criticism among urban planning and legal scholars. Urban renewal and development projects continue to pattern investment in ways that exacerbate and reify these divisions. The continued use of the home mortgage interest deduction expands the racial wealth gap and the disparity in the ability of minority communities to move to higher-income neighborhoods. On a more micro level, even the design of streetscapes, the placement of mass transit lines, and orientation

52 See, e.g., Frug, supra note 51.
54 See Rothstein, supra note 53.
55 See Schindler, supra note 50; Rothstein, supra note 53.
of pedestrian walkways can operate in subtle ways to direct flows of people and traffic in ways that further entrench such “architectural exclusion.”

These background legal rules shape the dynamics of urban economic development in ways that accelerate the concentration of wealth and disparities of power. Crucially, such physical and geographic inequality is not just about the persistence of exclusion and the codifying of inequality. It is also another way in which law helps sever potential linkages that would otherwise enable resources, wealth, and opportunity to flow more equitably across different constituencies. Just as the large vertically-integrated firm created pathways for upward mobility and forced some measure of equitable opportunity, income, and wealth flowing from investors and capital to workers at different income levels, so too does the ideal of a mixed-income, racially-integrated city enable a wider spread of opportunity and wealth. Indeed, this is the upshot of the critiques developed by scholars like Sharkey and Chetty: if economic segregation is a key driver of intergenerational inequity, economic inclusion through a restructuring of our physical cities offers a critical driver of equity.

IV. Contesting Structural Inequality

If the background legal structures around the corporate form, finance, work, and cities are all crucial contributors to structural inequality, how then can these inequalities be contested? As noted in Part I, there is a limit to the impact that can be generated by meliorist policy strategies. Thus efforts at up-skilling labor, or at moving individual families to more economically vibrant neighborhoods or cities can help at the individual level. In Part I, we saw some starting points for imagining how law, policy, and social change could contest structural inequalities. From contemporary theorists of structural inequality to historical thinkers in the law and political economy and Progressive tradition, there is a common focus on counteracting private power through institutions and practices that expand the capacities of the public—through movements as well as through policymaking institutions—to limit private power and restructure the background rules of the market economy. This orientation helps highlight some patterns in current legal scholarship and reform debates.

A. Contesting Private Power

First, an inclusive opportunity structure requires “rewiring” those systems of work, firms, geography, and markets that have shifted to produce the bifurcation of opportunity. For example, a more inclusive opportunity structure would require undoing economic and geographic segregation, deconcentrating privilege, and knitting more communities more directly to these engines of economic activity. This would require a different approach to everything from urban planning and zoning to the governance of

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57 Schindler, supra note 50, at 1952-73.
58 See supra note 49.
transit and telecom networks to connect rather than leave behind communities. Recent experiments with federal regulations such as HUD’s “Affirmatively Furthering Fair Housing” program or local-level experiments with mandatory inclusionary zoning are instructive examples of structural interventions of this sort.\textsuperscript{59}

This rewiring of our physical terrain parallels a similar rewiring needed in our markets overall. Where wealth, power, and opportunity are increasingly concentrated in key firms and sectors like finance, a renewed attention to antitrust laws, competition policy, financial regulation, and the like would help deconcentrate these dynamics, creating more open and inclusive markets. This would require a revamped legal regime for antitrust; more robust financial regulations that limit the influence of investors and financial interests in skewing the dynamics of firms or cities. It might also require a critical look at the digital and algorithmic systems that are increasingly operating as the ‘wiring’ of the new economy: algorithms that screen potential job candidates, or which enable racial or economic discrimination in retail pricing, to name a few.\textsuperscript{60}

Second, structural equality would require greater legal constraints on concentrated private power in the form of mega-corporations, monopolies, and particularly private actors that have accumulated outsized influence over and control of vital necessities. This is what is at stake in debates over net neutrality requirements on Internet service providers, or the regulatory restraints on health insurance companies, or growing concerns about tech platforms from Google to Amazon.\textsuperscript{61} There are some infrastructural goods and services where private actors’ control creates a risk of exploitation, exclusion, or subordination. Think of broadband Internet access, or access to finance. Both Internet service and finance are critical in accessing economic opportunity. Yet both are provided by private actors, who have every incentive to leverage their control of such a vital good into high prices and high returns. We can see this in the concerns about Internet service provider fees and quality, or in the ways in which financial services can be extractive and predatory, particularly for low-income and vulnerable communities. This suggests that economic freedom depends in part on rules and regulations aimed at holding this particular form of private power accountable.

To achieve both of these restraints on private power would require a recovery of the emphasis on power and structure emblematic of earlier Progressive Era legal and

\textsuperscript{59} On the importance of the HUD regulations in addressing structural inequality through economic desegregation, see Olatunde Johnson, Beyond the Private Attorney General: Equality Directives in American Law, 87 N.Y.U. L. Rev. 1339 (2012).


political-economic thought. As noted earlier, late nineteenth- and early twentieth-century political economy in particular involved a high-stakes and highly sophisticated discussion about how mega-corporations, including financial firms, concentrated economic and political influence, and how law would be needed to undo and prevent these effects. But they also saw these economic goals in moral and political terms: concentrated arbitrary power among private hands in the form of monopolies or private control of infrastructure represented a threat to economic and political liberty more broadly.\(^6\)

Out of this ferment emerged antitrust laws and regulatory bodies like the Sherman Act and the FTC covering trade and the FCC covering telecommunications firms. These legal systems sought to prevent the rise of concentrated economic power, as in the case of antitrust laws, and to ensure that where concentration was necessary and inevitable, such as for the provision of infrastructural goods and services like telecommunications, these firms would be subject to tight restrictions on their ability to set extractive prices, discriminate, or exclude among users, and to ensure they served the common good. Progressive Era reformers pushing for these legal transformations saw these measures as vital to promote innovation, economic dynamism, and to prevent undue inequity.

This ferment also produced a powerful critique of financial power and the need to restrain modern finance to prevent extractive, exploitative, and inequality-increasing concentrations of economic wealth and power. These ideas also informed Progressive Era critiques of finance and financial power: J.P. Morgan and Wall Street firms were, for many Progressive reformers, the most extreme example of concentrated, unchecked, and exploitative private power. Thus many of the financial regulatory reforms of the New Deal period, such as the separation of commercial and investment banking, strict limits on discretion and powers of banks, expanded regulatory oversight and the like, effectively made banking a kind of public utility, tightly regulated and structured to ensure that finance served the public good. These restrictions did not eliminate banking, nor did they mean finance sacrificed the relatively high pay and economic wealth afforded by the industry. But they did help drive several decades of growth- and equity-enhancing “boring banking.”\(^6\)

Today these concerns about financial power, market concentration, and antitrust law are once again at the forefront. In recent years, a growing number of economists,\(^6\)

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\(^6\) There is a vast literature on financial regulation highlighting these important legacies of the Progressive Era and the New Deal in financial regulation, see, e.g., Greta Krippner, Capitalizing on Crisis (2012). On banking as a public utility, see also Morgan Ricks, The Money Problem: Rethinking Financial Regulations (2015); Robert Hockett & Saule Omarova, The Finance Franchise, 102 Cornell L. Rev. 1143 (2017).
lawyers, and scholars have documented the problem of increasing market concentration in industries as widespread as agriculture, pharmaceuticals, finance, and technology. With increased mergers and fewer competitors, the result has been a consolidation of industry control. There is preliminary evidence to suggest that this concentration is channeling more and more resources to leading firms in the form of rents—resulting in a related reduction in new business formation, entrepreneurship, and even wages. Despite the financial crisis of 2008, financialization has continued to accelerate, skewing patterns of investment, fueling greater concentration, higher inequality, and the kinds of workplace and geographic dynamics noted in Part II above. As a number of recent studies have suggested, the growth of the financial sector has absorbed a disproportionate share of wealth, income, and investment, diverting these flows away from the “real” economy.

These transformations are only partly economic; rather, they are fundamentally products of legal change. As antitrust scholars have argued, the robust protections against corporate concentration that emerged from Progressive Era battles over the Sherman Act and New Deal-era enforcement of antitrust limits have been gradually displaced. The first shift took place in the mid-twentieth century, as a more technocratic mode of merger review and antitrust enforcement. In the later twentieth century, even technocratic enforcement had weakened to a more permissive stance towards free markets, shaped by an under-counting of the potential benefits of rigorous antitrust enforcement. In financial regulation, this period was marked by a similar shift in focus from restraining

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67 Hofstadter, supra note 66. For a defense of the move towards a technocratic antitrust regime, see, e.g., Dan Crane, Technocracy and Antitrust, 86 Tex. L. Rev. 1159 (2007).

financial power to a more generic attempt to optimize economic growth and financial markets. The second key shift took place in the 1970s and 1980s, towards a more permissive stance towards concentration and mergers in antitrust, and towards financial deregulation. This latter shift in particular has been motivated by the rise of Chicago-school law and economics theories which afforded more leniency to antitrust enforcement, sanctioning concentration so long as industries maintain low prices. The same pattern took place in context of financial regulation, as the law shifted to a greater deference to theories of self-correcting financial markets.

B. (Re)Investing in Public Goods and the Safety Net

Even in a rewired economy where private actors are sufficiently regulated, we still face the challenge of assuring affirmative, equal access to basic necessities and the social safety net in a world of diffused and precarious work. Thus, a third key frontier for constructing an equitable and inclusive opportunity structure lies in the regulation and provision of basic necessities, from healthcare to housing to welfare services.

This is a critical domain in which to redress structural inequalities, in large part because the dismantling of public goods and social contract backstopping has been a major way in which legal structure and disparities of economic and political power have combined to further tilt the playing field against many working and minority communities. Think of the debates over privatized and for-profit education. This privatization creates more differential access to a good that is meant to broaden economic opportunity—and in theory, offset some of the patterns of widening inequality. Instead, privatized education exacerbates these inequality-creating tendencies. Furthermore, the widening gap between elite educational institutions and public institutions makes educational access a “bottleneck,” as those who can access more elite forms of the good can experience higher mobility, while others are unable to access this key gateway to opportunity. At the same time, the fact that education is so vital opens individuals—particularly poor and minority students—to extractive and predatory forms of education in the form of for-profit programs. A similar dynamic exacerbates inequality even through the ways in which cities like Flint or Detroit in Michigan have faced a severe crisis of water access and quality with the growing awareness of lead contamination. This tainting of a basic public good is a joint product of municipal budget crises, fiscal austerity, and the resultant privatization and financialization of the water system itself. This loss of access to free, quality public goods is a central way that inequality is constructed and exacerbated.

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70 See, e.g., Fishkin, supra note 18.


72 On the fiscal limits on cities spurring a dismantling of core public functions, see, e.g., Michelle Anderson, The New Minimal Cities, 123 Yale L.J. 1118 (2014). On the broader pattern of privatized and financialized
Furthermore, many seemingly well-established backstop social services are in fact provided by an opaque web of private service providers operating under government contracts, with skewed incentives to provide cheaper, less robust services in order to maximize profits. Indeed, much of the lived experience of safety net programs, from housing protections to food stamps, is less empowering and insulating against the inequities of the economic structure. Instead, by making it harder rather than easier to access critical services needed to overcome the worst excesses of poverty and low income, welfare bureaucracies often act as yet another vector through which individuals and families are subjected to extractive policies, administrative systems that emphasize subordination. Similarly, other goods and services which are not conventionally seen as public, but which nevertheless are critical necessities for social and economic life, are provided by a range of private actors who can leverage this dependency to extract, exploit, and subordinate. This is the case for many minority communities seeking access to financial services, for example. Usurious payday lenders, extractive debt servicing, and other toxic financial products mark many Americans’ experience of the financial system, particularly the under- and un-banked.

As suggested in Part I, if the goal is to provide greater economic freedom for each of us to develop the lives and experiences we have reason to value, then the purpose of social policies must be understood in terms of enabling access to those goods, services, and opportunities whose presence in turn enables that freedom—and whose absence narrows it. We can think of these as public goods in which our policies must invest. These public goods are not physical infrastructure like roads or bridges; they are a kind of “social infrastructure of equality,” that make possible a wider array of stable, secure life pathways. In contrast to conventional views of public goods in economistic terms highlighting efficiencies of production, this approach emphasizes public goods as moral and social categories, goods whose fair and equal provision help insulate individuals and communities from the worst kinds of structural inequalities described in Part II above. Thus, by investing in, for example, universal social insurance programs, transit infrastructure, housing or access to critical services like healthcare, finance, Internet, and more, public policy can help enhance equality.

water systems, see, e.g., Jen Kinney, Examples of How City Services Privatization Leads to Inequality Are Piling Up, Next City (Sept. 29, 2016); Elizabeth Douglass, Towns Sell Their Public Water Systems—and Come to Regret It, Wash. Post (July 8, 2017).


75 See Kathryn Edin & H. Luke Shaefer, $2.00 a Day: Living on Almost Nothing in America (2016); Mike Konczal, The Violence of Eviction, Dissent (Spring 2016) [https://www.dissentmagazine.org/article/the-violence-of-eviction-housing-market-foreclosure-gentrification-finance-capital].

76 See, e.g., Mehrsa Baradaran, How the Other Half Banks (2014).

77 See Rahman, supra note 73; Rahman, supra note 61.
C. Regulation as a Site for Constructing Structural Equality

As both of these areas of intervention—constraining private power, and expanding equity in public goods—suggest, law and regulatory policy are critical tools in addressing structural inequality. The regulatory state more broadly is an equally crucial arena in which these debates and issues can be engaged. Indeed, it is not a coincidence that the ferment around structural inequality and political economy in the early twentieth century referenced throughout this essay also helped fuel the rise of the modern administrative state. Nor is it a coincidence that the legal shifts that helped facilitate the rise of modern structural inequality involved in part the dismantling of regulations and the delegitimization of regulation itself through the proliferation of public choice and capture theory. In recovering an approach to contesting structural power, it will be particularly important to focus on how law and institutional design can make possible more effective and more accountable forms of regulatory policymaking aimed at these structural inequalities themselves.

First, an inequality-reducing political economy will have to pay particular attention to how law and regulation fractures the capacity of stakeholders to exercise countervailing power. As labor law scholars have argued recently, current labor law has not only failed to keep up with the changing nature of work and inequality; it has in some ways helped maintain the fragmentation and political disempowerment of labor through the rigid restrictions imposed on trade unions, and the ways in which it is increasingly difficult to form a union in the first place. Thus, scholars and activists in the labor arena have begun exploring alternative forms of labor and worker organizing outside of the Wagner Act model, seeking more dynamic forms of worker mobilization and policy advocacy.\(^78\)

Second, regulatory bodies themselves need to be restructured to have greater capacities that would enable the tackling of modern-day forms of inequality and private power. David Weil, whose research into the fissured workplace has become a central feature of our current understanding of inequality and work, advocated for a shift to more dynamic and strategic forms of enforcement by the Department of Labor, targeting the legal entities that would have the most power and influence on the larger network of workplace firms.\(^79\) Thus instead of bringing enforcement actions against contracted-out firms or franchises, equality-enhancing regulations could achieve more by targeting the brand name firms that are the “nodes” of contemporary supply chain networks. Similarly, scholars in financial regulation have suggested a shift away from formalistic boundaries to traditional enforcement actions where individual regulators focus on particular types of financial firms, to instead a focus on the most powerful financial firms. The effort to create dynamic, systemic-risk regulation, for example, represents a tentative step towards this kind of approach, where regulators are empowered to impose tougher restraints on any kind of financial entity that poses a systemic risk, regardless of whether the firm is

\(^78\) See, e.g., Rogers, supra note 46; Andrias, supra note 46.

\(^79\) Weil, supra note 44.
formally a bank, or a broker-dealer, or an insurance entity, each of which is conventionally treated under a different body of regulation. These are examples of functional regulation, targeting enforcement efforts on the nodes and centers of economic power, rather than through conventional formalistic enforcement actions and traditional allocations of regulatory responsibility.

Finally, regulators themselves need to be made more responsive and accountable. While the deregulatory prescriptions of public choice theory are overblown, it is nevertheless the case that economic power is able to magnify inequality in large part through the influence that private actors exercise on the regulatory arena. Regulations can achieve greater structural equity in the ways described above, but these regulations need to be backed by constituencies that can defend these efforts, and advocate for them on equal footing with industry voices. Thus, regulatory agencies themselves need to be reformulated to create more institutionalized forms of stakeholder representation and participation, enabling such countervailing power.  

This juxtaposition between the high moral stakes of these structural questions and the often hidden, granular way in which law creates these structures in the first place poses a problem for advocates of reform: how then can these structural drivers of inequality be counteracted? Our economic structures of work, place, markets, and public goods are already governed by a mix of state actors (administrative agencies, regulatory bodies, and the like) and private actors such as semi-sovereign monopoly service providers in sectors like telecom or finance, or firms exercising delegated powers in providing governmental services as a result of privatization and outsourcing. This suggests that our best route towards reshaping these background rules lies in contesting the decisions and governance that take place in these administrative and quasi-public entities.

This institutional focus represents an important departure from many conventional accounts of inequality and public policy, which tend to focus on more visible and explicit policy tools, from constitutional rights and high court jurisprudence to legislative tax-and-transfer policies. Yet it is in the more technical and hidden arenas of regulation, administration, and private governance that the day-to-day governance of our economy takes place. Indeed, historically, social movements that sought to remedy structural inequalities from the Progressive and Populist movements responding to industrialization to the civil rights movement have often seen their moral victories codified through the creation of new administrative bodies and practices, from the creation of antitrust law to the development of civil rights and voting rights enforcement regimes. The modern administrative state is arguably rooted in precisely this effort to create new tools through which the public at large could reshape economic inequities that

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80 For a discussion of how such reforms and institutional designs might operate, see, e.g., K. Sabeel Rahman, Policymaking as Power-Building, 27 S. Cal. Interdisciplinary L.J. __ (forthcoming 2018).

were otherwise difficult to contest. More recently, legal historians have highlighted how social movements have fought within the administrative arena to attempt to consolidate, expand, or defend broader constitutional and normative claims of equality, liberty, and nondiscrimination.

V. Conclusion: Law, Political Economy, and Transformational Social Change

The policy implications sketched above are not meant to be comprehensive; rather, they are illustrative of how law can illuminate and help redress structural inequalities of various kinds. In outlining this role of law in understanding modern capitalism and political economy, the essay also raises some broader conceptual points.

First, this focus on the structural, rather than individual level, is deliberate, and indicative of how law can contribute to broader social science and historical understandings of political economy. As the discussion in Parts I and II suggests, legal rules need to figure into any attempt at addressing such structural inequalities. Indeed, structural inequalities of these types are difficult to spot and even more difficult to counteract, precisely because of their status as the products of diffuse, hidden, background rules. Law, then, emerges as a central feature not just of the diagnoses of structural inequalities and their origins, but also in developing the kinds of institutions and organizations critical to responding to such structural inequities: administrative bodies, labor unions, and the interfaces between social movements and policymaking institutions more generally constitute the key levers through which individuals and constituencies alike can contest and reshape these diffuse structures.

Second, this approach to legal analysis resonates with traditions in the history of legal scholarship itself, from the legal realist movement of the late nineteenth century, to the contemporary revival of scholarship in “constitutional political economy” and “law and inequality.” This orientation towards diagnosing and contesting structural inequalities—in particular by working to transform background systems of legal rules and regulatory regimes—suggests an important arena in which to make concrete these renewed concerns about law, political economy, and inequality.

Third, this analysis is not just descriptive, but also normative: the central stakes of these critiques involve nothing less than the realization of foundational moral values of equality, inclusion, and freedom. And they are at the heart not just of legal debates but also of historical and contemporary social movements struggling to transform these background structures.

The structural diagnosis of inequality, exclusion, and subordination—and the concurrent need to radically reshape those structures—is not a new realization among either scholars or social change activists. Indeed, this structural lens is at the heart of some

82 See, e.g., Rahman, supra note 10; Novak, supra note 62.

of the most ambitious, transformative, and egalitarian movements in American politics. Radical Reconstructionists following the Civil War sought to dramatically reshape the economic, racial, and social fabric of the South, understanding that to eradicate the vestiges of slavery would require a dramatic transformation of society. The Populist and Progressive movements of the late nineteenth century saw the economic upheavals and dislocations of industrialization, and the new forms of domination and subordination it generated, from the private power of monopolies and financiers to the more systemic forms of economic insecurity and immiseration. They also built a broad-based movement that fundamentally transformed the economic structure of the country, building new movements and new administrative institutions aimed exactly at the diagnosis and transformation of deeper economic and social structures. And while far too much of these movements understood the beneficiaries of this vision of economic freedom to exclude racial minorities, immigrants, and to a lesser degree, women, this critique of economic power and this attempt to mobilize a new movement for modern economic freedom characterized not just the Populists, but also other movements of the period, from radical labor republicanism to progressive anti-monopolists and the architects of the early regulatory state itself.

Decades later, near the end of his famous march to Selma in 1965, Martin Luther King, Jr. evoked the Reconstruction and Populist legacies, as a threat to the established economic order of the South. “To meet this threat,” King declared, “the Southern aristocracy began immediately to engineer this development of a segregated society.” Jim Crow, in King’s telling, was a strategy to preclude the potential cross-racial coalition pushing for a radically egalitarian economic restructuring—which ultimately worked to keep both African Americans and poor whites in a form of subjugation, radically different to be sure, but subjugation nevertheless. King concluded:

That’s what happened when the Negro and White masses of the South threatened to unite and build a great society: a society of justice where none would prey upon the weakness of others; a society of plenty where greed and poverty would be done away; a society of brotherhood where every man would respect the dignity and worth of human personality.

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86 See, e.g., Postel, supra note 85; Pope, supra note 84.

87 See Rahman, supra note 10.

88 Martin Luther King, Address at the Conclusion of the Selma to Montgomery March, Mar. 25, 1965.

89 Id.
Indeed, the civil rights movement was not just a battle for social inclusion; it was also marked and succeeded by a radical attempt to restructure the American economy on more egalitarian terms, featuring calls for everything from a universal basic income to targeted investment in minority neighborhoods to radically democratized control over economic actors.⁹⁰

The aspirations of these movements were, of course, only partially realized. Many of the economic policy proposals from Populist and Progressive advocates formed the core of the New Deal order emerging from the Great Depression, yet also gave way to racial exclusion in the explicit form of Jim Crow, and the subtler forms of limits baked into the New Deal itself. The civil rights and welfare rights movements also transformed American politics and economics, but fell short of its most radical aspirations. But the common thread across these movements is instructive: first, an aspiration for a thicker, more inclusive form of liberty; and second, a focus on achieving that freedom through a deep critique of economic, social, and political structures, and how they concentrated power and allocated opportunity. These were not merely movements focusing on either income or anti-discrimination; they evinced something much deeper and more far-ranging: a structural critique of economic and social subordination, and an effort to radically transform those structures.

Today, structural inequality, law, and the demands for social change are again at the forefront of politics and public policy debates. From the “alt-labor” movement’s organizing around the Fight For 15 and other efforts for securing worker power and dignity in context of precarious and on-demand work,⁹¹ to the rise of the Movement for Black Lives tackling the encoding of deep structural racial hierarchy in our economy, society, and criminal justice systems,⁹² there is a growing shift in economic policy to a focus not just on surface level disputes but to a deeper grappling with economic structures and systems—the often hidden rules and mechanisms by which inequality is constructed and opportunity constrained. These movements suggest the nascent beginnings of a radical conception of emancipatory freedom that exists in opposition to both the racial and gender exclusions of previous socioeconomic systems, and the privatization and market-fundamentalist ethos at the heart of inequality-increasing changes to law and policy in recent decades. What these social movements share is a common shift in focus to deep structures producing inequalities, and an increasingly intersectional approach to solidarity and organizing that attempts to knit together constituencies across racial, gender, and class lines. As such, these movements find themselves following in the historical legacy of radical emancipatory movements from century Radical Reconstructionists and labor republicans; to early twentieth century


⁹² See Movement for Black Lives Platform (https://policy.m4bl.org/platform/).
Progressive and Populist battles with corporate power and market structure in the face of industrialization; and mid-century movements for civil and welfare rights.\footnote{On this historical legacy of the “constitution of opportunity,” see Joseph Fishkin & Willy Forbath, Wealth, Commonwealth, and the Constitution of Opportunity, in Wealth: NOMOS LVII 45 (Jack Knight & Melissa Schwartzberg eds., 2016).

See Fried, supra note 29; Rahman, supra note 10; Grewal, supra note 7.}

Law plays a central role in these diagnoses and transformations. Legal scholarship was central to diagnosing and theorizing the hidden structures and systems of economic inequality and power in the face of industrialization. For example, the influential legal realism movement is best understood as part of a broader “progressive law and economics movement” of the late nineteenth century, deeply concerned with disparities of opportunity and power, and bound up in the broader reform politics of the era.\footnote{See Fried, supra note 29; Rahman, supra note 10; Grewal, supra note 7.} The richness and depth of contemporary legal scholarship focused on questions of political economy represents the latest iteration of this legacy. Law is central to the construction of these structural inequities—and to redressing them. Legal scholarship, then, faces a similarly vital calling: to diagnose these structures and to offer a normative and institutional vision that can help contest and restructure them, at long last.