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Eleven Things They Don't Tell You About Law & Economics: An Informal Introduction to Political Economy and Law

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Eleven Things They Don't Tell You About Law & Economics: An Informal Introduction to Political Economy and Law[†]

Abstract

Many legal scholars have critiqued the dominant law and economics paradigm. However, important work is all too often neglected because it is not popularized in an accessible form. This Article features experts who synthesize their key insights into memorable and concise vignettes. Our *11 Things* project is inspired by the work of the Cambridge economist Ha-Joon Chang, who distilled many facets of his work into a book called *23 Things They Don't Tell You About Capitalism*. That book was a runaway success, translated for markets around the globe, because it challenged conventional economic reasoning with a series of short and memorable analyses and narratives that translated academic research into accessible language.

A project like Chang's can also inform economic analysis of law. We believe that law and economics pedagogy would benefit from a shift in focus. Scholars are developing increasingly data-driven and empirical research, while too many casebooks and teaching approaches covering the first-year U.S. law school curriculum remain mired in toy models and simplistic accounts of

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economic life. This Article features critical insights that “they” (politicians, bureaucrats, and, all too frequently, first-year professors and casebook authors) tend to neglect in their understanding of commercial life. Each piece critically explores a facet of the theoretical foundations of law and economics. They connect contemporary developments in policy research to classical economic analysis of law. They bridge the gap between scholarship and pedagogy, introducing students, practitioners, and policymakers to political economy as a vital alternative in policy analysis.

Introduction

Cambridge University economist Ha-Joon Chang has devoted decades of an illustrious career to challenging orthodoxy in his field. For example, in academic journals, he has repeatedly criticized the manner in which the International Monetary Fund (IMF) handled the Asian financial crisis of the late 1990s.¹ The IMF’s approach was focused on austerity: raising taxes and cutting government spending.² The results were often disastrous. Chang proposed an alternative approach, part of a more general political economy of regulation countering usual stories of state incapacity.³ He has also undermined simplistic narratives of intellectual property’s role in promoting innovation.⁴

Despite Chang’s rigorous work (and that of many other economists) in standard academic articles, technocratic policymakers have tended to ignore such messages.⁵ Given the mathematization of economics, it is easy for policymakers to retreat into formal models rather than grapple with the real-world

1. See Ha-Joon Chang, *Korea: The Misunderstood Crisis*, 26 *WORLD DEV.* 1555, 1560 (1998); Ha-Joon Chang, *Institutions and Economic Development: Theory, Policy and History*, 7 *J. INST. ECON.* 473, 473 (2011).

2. See *id.*

3. See Ha-Joon Chang, *The Economics and Politics of Regulation*, 21 *CAMBRIDGE J. ECON.* 703 (1997); Ha-Joon Chang, *Breaking the Mould: An Institutional Political Economy Alternative to the Neo-Liberal Theory of the Market and the State*, 26 *CAMBRIDGE J. ECON.* 539 (2002).

4. See generally Ha-Joon Chang, *Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues*, 2 *J. HUM. DEV.* 287 (2001) (examining the desirability of the currently dominant form of intellectual property rights regime).

5. Cf. Frank Pasquale, *When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy*, *COMPETITION POL’Y INT’L ANTITRUST CHRON.*, May 2017, at 46, 51 (critiquing technocratic antitrust policymakers for their failure to adequately address real-world issues through their modeling).

limitations of those models.⁶ Austerity-oriented managers at international organizations like the IMF and World Trade Organization (WTO) have another mode of deflection. They peddle just-so stories to justify policy decisions to the public, relying on a mix of math and narrative, modeling and common sense. In their view, a deficit-ridden country in the midst of a currency crisis has to tighten its belt and structurally adjust to new market realities by abandoning many labor protections and social welfare programs.

To counter the common sense of neoliberalism, Chang sought attention well beyond traditional academic venues. He distilled many facets of his research into a series of clarifying concepts in his book titled *23 Things They Don't Tell You About Capitalism*.⁷ This book was a runaway success, translated into many languages around the globe, because it questioned conventional wisdom in compelling and accessible prose.⁸ Companies should not be run only in the interest of their owners, Chang insists, but rather should be accountable to a range of stakeholders, including their workers, local communities, and anyone affected by their externalities.⁹ In a chapter entitled “The US does not have the highest living standard in the world,” Chang denies that average (or even median) GDP rankings settle the question of quality of life.¹⁰ The “things” Chang alludes to in the title, patiently backed with references to empirical work, are a bracing reminder that many examples of “received wisdom” are not that wise after all.

Inspired by Chang, I asked attendees at a 2017 meeting of law and political economy scholars, sponsored by the Association for the Promotion of Political Economy and Law (APPEAL),¹¹ to think about what a *23 Things They Don't Tell You* project would look like in law and economics. Ten responded, and the result is the collection you are now reading. To fully grasp our purpose and message, it is helpful to have an overview of the state of law and economics and to better understand the missions of scholars and advocates who believe that economic and political life are inextricably intertwined.

The field of law and economics has featured a strange dualism in the past decade: increasingly data-driven and empirical research is presented at conferences, while key policy advocates (as well as

6. *See id.*

7. *See* HA-JOON CHANG, *23 THINGS THEY DON'T TELL YOU ABOUT CAPITALISM* (2011).

8. *See id.*

9. *Id.* at 11.

10. *Id.* at 102.

11. *See* APPEAL, politicaleconomylaw.org (last visited Nov. 16, 2018).

some casebooks on property, torts, and contracts) present overly schematic and ideologically biased accounts of the nature of economic exchange.¹² APPEAL seeks to right that balance, enriching law and economics instruction by promoting more complex and realistic perspectives on regulation, litigation, and legislation.¹³

The short contributions that appear below echo Chang's method, encapsulating (as their titles) a sentence-length challenge to the types of economic orthodoxy common at both the highest levels of policymaking and the most basic levels of instruction. Jamee Moudud frames the discussion by remarking on the fundamental nature of *law* in shaping markets. Just as Chang opened *23 Things* by insisting "[t]here is no such thing as a free market,"¹⁴ Moudud questions any project that strictly distinguishes the political, legal, and economic spheres.

Martha T. McCluskey's contribution, intriguingly titled "All Costs Have a Right," inverts the usual law and economics objection to expansive human rights (the weary reminder to idealists, "all rights have a cost"). Recalling the interventions of early twentieth-century legal realists, McCluskey shows how the concept of "cost" itself is contingent on notions of rights (e.g., to property, or against confiscation). This transvaluation of the role of cost and money also motivates Rohan Grey's contribution, which explains the project of Modern Monetary Theory (MMT). MMT, in turn, supports Raúl Carrillo's advocacy for a jobs guarantee in the twenty-first century to update and expand Keynesian New Deal programs like the Works Progress Administration and the Civilian Conservation Corps.

Several contributors encapsulate fundamental challenges to how value is determined in late capitalist societies. I recapitulate a long literature on the shortcomings of public accounting to criticize the blandly neutral valuation of arms dealing and extractive finance in calculations of Gross Domestic Product. John Haskell draws on Bourdieusian sociology to question the degree to which education enhances productivity (or advances other social ends). Reza Dibadj underlines the importance of transaction costs in economic exchange. Lenore Palladino takes on doctrinaire managerialism by demonstrating the dark side of financialization.

12. See JAMES KWAK, *ECONOMISM: BAD ECONOMICS AND THE RISE OF INEQUALITY* (1st ed. 2017).

13. See Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 *YALE L. & POL'Y REV.* 297, 303 n.17 (2016).

14. CHANG, *supra* note 7, at 1.

It is hard to read her contribution without coming away with a strong sense of the shortcomings of shareholder maximization as a theory of corporate governance.

Three other essays iconoclastically advance the value of cooperation as against competition. Sandeep Vaheesan shows how competition, the watchword of contemporary United States antitrust, may actually be undermining productivity and living standards, rather than improving them. James J. Varellos takes this perspective to an international level, defending human rights and labor protections in trade agreements. And Jedidiah J. Kroncke prescribes a “high road” approach to economic development, promoting a vision of high-quality jobs encouraging more security, spending, and investment.

The essays below are intended as provocations—ways of shaking up received ideas about legal economic matters. But we do not intend them as mere popularization. Like blogging or tweeting, new forms of analysis and advocacy can fundamentally reshape a field.¹⁵ As Tyler Cowen recently observed about economics blogs:

[O]n-line education, as a broad concept, is much further along than many people realize . . . I love it when people describe writing a blog, or writing on the internet, as “popularizing” economics or something similar. That is a sign they don’t understand what is going on, that they don’t understand there is such a thing as “internet economics,” and also a sign they will not be effective competition. It’s really about “the internet way of writing and communicating” vs. non-internet methods. The internet methods may or may not be popular, and may or may not be geared toward a wide audience, so they are not the same as popularizing. One point of the internet is to find an outlet for super-*unpopular* material. What’s important right now is to develop internet methods of thinking and communicating, and not to obsess over reaching the largest possible numbers of people.¹⁶

We are rarely in agreement with Cowen on the particulars of economic policy,¹⁷ but he is dead-on with respect to the need to develop new forms of understanding in an era of rapidly changing

15. See, e.g., LEE BADGETT, *THE PUBLIC PROFESSOR* (2016) (explaining the importance of dissemination to scholarly engagement, and how the communicative imperative in turn can reshape and deepen scholarly understanding); MARK CARRIGAN, *SOCIAL MEDIA FOR ACADEMICS* (James Clark et al. eds., 1st ed. 2017).

16. See Tyler Cowen, *My Personal Moonshot*, MERCATUS CENTER: THE BRIDGE (Jan. 30, 2018), <https://www.mercatus.org/commentary/my-personal-moonshot> (emphasis in original).

17. See, e.g., Frank Pasquale, *The Hidden Costs of Health Care Cost-Cutting*, 77 L. & CONTEMP. PROBS. 171, 190 (describing some of Cowen’s statements about inequality).

communication. We hope that our Article can provide a quick, shorthand, but still academically rigorous, way of challenging legal economic orthodoxy. We welcome kindred spirits to further explore with us a new law and economics—one that is more empirically accurate and normatively compelling than the vision of the field now animating many private law discussions in law school classrooms and economic discussions among bureaucratic and political decision-makers.

1. Corporate Financialization Hurts Jobs and Wages

Lenore Palladino

Despite energetic conversations around stagnant wages and job creation, few consider that the *financialization* of the United States' public corporations has contributed just as much to economic inequality as more commonly cited factors. The debate seems well-settled: scholars point to globalization,¹⁸ skill-biased technical change,¹⁹ and the decline of union density.²⁰ Others point to the 'rise of the robots,'²¹ claiming that automation and technology are driving us towards a jobless future.²²

I define *corporate financialization* as the shift within public companies from making money off of selling goods and services to making a higher proportion of their profits off of financial activity and sending those profits back to shareholders rather than investing them in the firm or its workers. Corporate America has shifted its behavior dramatically across industries—the ratio of financial profits out of overall corporate profits has increased markedly in the last few decades, and trillions have been spent by corporations purchasing back their own stock simply to increase their share price since such maneuvers became covered by a regulatory safe harbor in 1982.²³

18. See BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* (1st ed. 2016).

19. See David H. Autor et al., *Computing Inequality: Have Computers Changed the Labor Market?*, 113 Q.J. ECON. 1169, 1169 (1998).

20. See JAKE ROSENFELD ET AL., ECON. POL. INST., *UNION DECLINE LOWERS WAGES OF NONUNION WORKERS 1* (Aug. 30, 2016), <http://www.epi.org/files/pdf/112811.pdf>.

21. See Daron Acemoglu & Pascual Restrepo, *Robots and Jobs: Evidence from US Labor Markets* (Nat'l Bureau of Econ. Research, Working Paper No. 23285, Mar. 2017), <http://www.nber.org/papers/w23285>.

22. See LAWRENCE MISHEL & JOSH BIVENS, *THE ZOMBIE ROBOT ARGUMENT LURCHES ON 4* (Econ. Pol. Inst., 2017), <http://www.epi.org/files/pdf/126750.pdf>.

23. See William Lazonick, *The Financialization of the U.S. Corporation: What Has Been Lost, and How It Can Be Regained*, 36 SEATTLE U. L. REV. 857, 880–82 (2017).

Some think that the United States' largest businesses function as they did in the post-World War II era: they earn profits, use those profits in part to enrich their top CEOs, but also to invest in their workforce, innovation, and in better prices for all of us. But somewhere along the way, starting in the Reagan administration, this productive cycle was broken due to government regulations and reforms in corporate governance, and corporate America started making more money by moving money around than they did by selling us actual goods and services.²⁴ The shift to shareholder primacy—in which profits are increasingly devoted to rewarding shareholders—was led by our industrial mainstays.

Once corporate profit-making became dependent on super-fast computers and top executives with MBAs, investing in a stable and productive workforce was not essential, and as a result wages and jobs declined.²⁵ The last few decades have seen the rise of the fissured workplace, as firms increasingly outsource once-core functions, making jobs increasingly precarious.²⁶ Firms made these choices in direct response to rising pressure from capital markets to move money out of the firm to shareholders and keep share prices steadily rising—choices that were sweetened by the fact that CEOs were increasingly paid in company stock.²⁷ “Before the 1970s, American nonfinancial corporations consistently paid out about 50% of profits to shareholders, while retaining the rest for investment.”²⁸ Now, shareholder payouts may exceed 100% of reported profits, because firms borrow in order to lift payouts even higher.²⁹

24. See Greta R. Krippner, *The Financialization of the American Economy*, 3 SOC. ECON. REV. 173, 175 (2005); WALLACE C. TURBEVILLE, FINANCIALIZATION & EQUAL OPPORTUNITY 3 (Feb. 10, 2015), <http://www.demos.org/publication/financialization-equal-opportunity>.

25. See TURBEVILLE, *supra* note 24, at 14.

26. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

27. See William Lazonick, *Profits Without Prosperity*, HARV. BUS. REV. Sept. 2014, at 10, <https://hbr.org/2014/09/profits-without-prosperity>.

28. MIKE KONCZAL ET AL., ENDING SHORT-TERMISM: AN INVESTMENT AGENDA FOR GROWTH (Roosevelt Inst., Nov. 6, 2015), <http://rooseveltinstitute.org/wp-content/uploads/2015/11/Ending-Short-Termism.pdf>.

29. *Id.* (“[O]ver the past 30 years, shareholder payouts have averaged 90 percent of reported profits. In several years, including 2014, total payouts have actually been greater than total profits. Almost all the increase is due to buybacks—corporations’ purchases of their own shares—which were practically nonexistent before the 1980s but now account for nearly half of corporations’ payouts to shareholders.”); see also J.W. MASON, DISGORGE THE CASH: THE DISCONNECT BETWEEN CORPORATE BORROWING AND INVESTMENT 14 (Roosevelt Inst., Feb. 25, 2015), <http://rooseveltinstitute.org/wp-content/uploads/2015/09/Disgorge-the-Cash.pdf>.

Thus the changing nature of work—the rise of the fissured workplace and the gig economy—is driven not just by a generic drive for profit or the attributes of the “knowledge economy,” but a structural shift within corporations from *productive* to *financialized* profit-making. The relentless search for short-term profits expresses itself through squeezing employees’ pay, transforming employees into independent contractors to avoid paying benefits or having responsibility for pensions, and outsourcing work to contracting firms that compete to pay lower and lower wages.³⁰ If firms do not count on their employees to come up with the next big productivity improvement or exciting product idea, because they make their money from secondary market trading and collecting interest payments, there is no reason to invest in employee longevity with the firm.

One example of rising financialization has been the dramatic increase in stock buybacks and the concurrent decrease in productive investment—buybacks being a practice that serves no productive purpose, but are conducted simply to boost share price.³¹ Pressures on firms increased with the rise of “activist investors,” formerly known as corporate raiders.³² As institutional investors became large shareholders of major corporations, they pressured firms to maximize short-term profits to push up share prices.³³ Since such institutional investors could move their investments around easily, firms grew more and more responsive to capital markets rather than to their customers.³⁴ The rise of private equity and the increase in leveraged buyouts has led to extractive financial strategies in which firms cut jobs and reduce wages in order to extract maximum wealth for the holders of equity.³⁵ Key regulatory and legislative changes allowed for this shift. In 1982, Congress passed the safe-harbor provision for buybacks, which would formerly have left companies open to charges of market manipulation.³⁶ Another regulatory shift allowed CEO “performance pay” to be deducted from corporate tax and incentivized corporations to pay CEOs in stock.³⁷

30. See WEIL, *supra* note 26.

31. See MASON, *supra* note 29, at 14.

32. See WEIL, *supra* note 26.

33. *Id.*

34. See *id.*

35. See EILEEN APPELBAUM, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 193–200 (2014).

36. See SEC Safe Harbor Rule, 17 C.F.R. § 240.10b-18.

37. See *id.*

Though the literature is still nascent, several scholars have examined the direct negative impact of corporate financialization on income inequality. One study found that financialization, net of other factors, could account for more than half of the decline in labor's share of income in the nonfinancial sector of the economy, and is comparable to the effect of de-unionization, globalization, and technological shifts.³⁸ Others look directly at the impact of financialization on declining corporate investment, finding that the financial profit rate is correlated with a significant decline in investment, especially for large firms.³⁹ Less investment can mean less to spend on improving the skills and productivity of one's workforce.

To be sure, financialization is not the only driver of labor market challenges, but it has become increasingly impossible to think about how to solve problems in the labor market without taking on corporate financialization. It is not simply that firms want to spend less money on workers—it is that they actually *need* them less and so the incentive to invest in a high-quality workforce is much reduced. In order to have a stable and productive workforce, the incentives that drive corporations to financialize must be reformed.

2. All Costs Have a Right.††

Martha T. McCluskey

To solve problems of inequality and insecurity, we need to advance universal human economic rights, not just increase discretionary targeted redistributive spending. This is the opposite of the conventional law and economic wisdom.

Orthodox law and economics tells us: *all rights have a cost*.⁴⁰ Law can allocate economic gain, but not generate it. Any new

38. See Ken-Hou Lin & Donald Tomaskovic-Devey, *Financialization and U.S. Income Inequality, 1970–2008*, 118 AM. J. SOC. 1284, 1313 (2013).

39. See Leila E. Davis, *Financialization and the Non-Financial Corporation: An Investigation of Firm-Level Investment Behavior in the United States*, 69 METROECONOMICA 270, 270 (2018).

††. Thanks to Emily Villano of the LPEblog for helpful editorial suggestions on another version of this paper, which was published as a blog post at <https://lpeblog.org/2018/04/05/economic-human-rights-not-tough-policy-tradeoffs/>. A version of this essay was also produced in 2017 as part of a short audiovideo collection. APPEAL, Five Things They Don't Tell You About Law and Economics (Oct. 18, 2017), <https://www.youtube.com/watch?v=qoak05emri4&feature=youtu.be>.

40. See, e.g., Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1771 (2008) (arguing that governance always requires tradeoffs, so a right to education will come at the expense of health care or police protection); Richard A. Epstein, *Living Dangerously: A Defense of "Mortal Peril"*, 1998 U. ILL. L. REV. 909,

economic rights aimed at alleviating socioeconomic disadvantages will thus require an inevitable tradeoff in public or private spending—that new right *must* come at the expense of some other economic benefit. Under this logic, a new legal right to affordable health care would mean fewer resources are available for education or jobs. In addition, this theory warns that an entitlement to economic support would replace market discipline with incentives for waste and abuse, further draining available resources.

What orthodox law and economics does not tell us: *all costs have a right*. That is, any costs associated with new economic rights arise not from essential economics, but from contingent legal and political arrangements. Particular legal and political regimes produce, organize, and limit access to human needs like education or health care.⁴¹ Law itself shapes the market forces that appear to be disrupted when law re-allocates rights to advance general human needs.

On the question of health care, for example, a complex system of legal rights and legal institutions already depends on government power to advance economic gain for some at the expense of health and economic security for others.⁴² Legal protections and privileges that distribute risks and rewards in health care include patent rights, insurance regulation, corporate governance rules, antitrust law, criminal law, and tax policy.⁴³

These legal rights are not firmly settled, natural, or necessary features of impartial economics. Instead, they are continually questioned and modified under the influence of specific contested interests and ideologies. Powerful industries regularly engage in extensive lobbying, litigation, and advocacy to re-design laws in their favor.⁴⁴ The United States health industry, for example, spent half a billion dollars in 2016 on lobbying, and pharmaceutical

914–16 (arguing that a categorical right to health care based on moral resistance to “letting people die” ignores that spending to keep one person alive could instead be directed toward providing medical care for many poor people).

41. See e.g., International Health Care System Profiles, What Is the Role of Government?, https://international.commonwealthfund.org/features/government_role/ (describing the role of different governments in health care).

42. *Id.*

43. See, e.g., 8 IMPORTANT REGULATIONS IN UNITED STATES HEALTH CARE, REGIS COLLEGE, <https://online.regiscollege.edu/blog/8-important-regulations-united-states-health-care/> (last visited Feb. 14, 2019).

44. Dhruv Khullar, *The Unhealthy Politics of Pork: How It Increases Your Medical Costs*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/ups-hot/the-unhealthy-politics-of-pork-how-it-increases-your-medical-costs.html> (discussing the implications of health care spending data).

companies, hospitals, and health professionals were among the largest contributors⁴⁵ to this “market” for legal power.

New human rights to egalitarian economic support can similarly work to re-arrange economic gain and loss as a legitimate and beneficial function of democracy. As Sabeel Rahman explains, basic human economic needs like health care, housing, food, and water are often provided, produced, and governed through intertwined public and private structures operating to create and entrench systemic disadvantages and exclusions.⁴⁶ Solutions to inequality will only be meaningful if they go beyond redistributing income to changing the background legal rules and governance systems that control vital goods and services.⁴⁷

We should not presume that new human economic rights are zero sum transfers or costly distortions of optimal economic conditions. That conventional “law and economics” thinking rests on a simplistic assumption of an essential market order that transcends law and politics, thereby closing off analysis of how restructuring that market could generate far better economic and social outcomes. In contrast, the more complete and realistic perspective of political economy recognizes that legal entitlements do not intervene in naturally productive market activity. Instead, legal entitlements generate and govern market production. New legal rights can give people new power to resist existing market constraints, and that transformative power can lead the economy to new levels of prosperity and stability.

Like traditional property rights or the right to incorporate businesses, economic human rights can enhance security and liquidity by encouraging investments that improve productivity both for those who hold the particular rights and society overall.⁴⁸ The existing market operates through legal rights designed to structure economic incentives to protect against certain forms of market pressure. This enables firms and individuals to make different, and potentially better, economic choices than would exist

45. Ctr. for Responsive Politics, *Annual Lobbying on Health*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/indus.php?id=H&year=2016> (last visited Feb. 15, 2019); *see also id.*

46. K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2448–51 (2018).

47. *See id.* at 11 (explaining that inequality is a problem of how background legal rules operate).

48. For a discussion of the contested idea that society overall benefits from an entitlement to incorporate, *see* Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1469–73, 1479–81 (2006).

without those particular rights. In standard law and economics theory, economic rights like limited liability for corporate investors offer protection against risks of large scale coordination and planning, so that firms and investors have opportunities for higher gains with lower costs that may (in theory) lead to general economic growth.⁴⁹ A broad legal right to free health care similarly can insulate people from existing costs that limit their opportunities for productive activity likely to benefit society overall.

For example, at the microeconomic level, that protection can create the flexibility and opportunity that encourages greater individual achievement. If people can count on access to good health care, insulated from the risk of losing their homes, their credit, or their retirement savings, they are better able to think about their financial futures. Without medical debt and costly insurance, or without depending on an insurance-providing job or spouse, individuals may be freer to invest in advanced education, new business ventures, or in moving to better jobs or communities. Businesses may be freer to compete and invest in developing high quality products and personnel without unpredictable and burdensome employee health care costs.

Similarly, at the macroeconomic level, encouraging societal investment in access to health care may lead to overall economic growth.⁵⁰ Healthier and happier children, workers, and citizens are better able to perform at school and on the job and to contribute to the well-being of their families and communities. More generally, a universal right to health care may produce indirect economic benefits by supporting social and political solidarity, trust, and confidence. A society that presses individuals and families to make tough choices between the risk of losing life-saving health care and the risk of financial devastation undermines those intangible qualities. This is especially true if individuals perceive their own choices as even tougher because the protections are reserved for a select group of seemingly less deserving others.

Economic human rights can not only induce greater productivity, but also reduce wasteful administrative costs and controls involved in systems that distribute basic human needs as

49. For a discussion of the historical debate about the right to corporate limited liability, see *id.* at 1481–82.

50. See, e.g., Cathy Schoen, *The Affordable Care Act and the U.S. Economy*, THE COMMONWEALTH FUND (Feb. 2, 2016), <https://www.commonwealthfund.org/publications/fund-reports/2016/feb/affordable-care-act-and-us-economy> (last visited Feb. 13, 2019) (detailing evidence that “the [Affordable Care Act] has likely acted as an economic stimulus.”).

market commodities supplemented by targeted redistributive subsidies. Health law scholar Allison Hoffman describes the current market approach to U.S. health care as propped up by a massive and costly regulatory structure.⁵¹ A universal individual right to health care, in contrast, could streamline and simplify delivery of U.S. health services. This would encourage economies of scope and scale and equalizing bargaining power, while also giving patients increased flexibility, freedom, and predictability to enhance their individual control over care.

Even though human economic rights can lead to transformative improvements in overall economic and social well-being, it is nonetheless true that the immediate political economic context includes costly barriers to such beneficial transformation. But those costly barriers are fundamentally a matter of legal and political design and ideology, not natural or necessary economics.⁵² For example, in the United States, a candidate campaigning to expand the Medicare program's right to health care will confront not only simplistic economic thinking, but also an electoral system skewed by lavish campaign spending aimed at preserving the existing unequal and destructive system of rights to profit from scarce and costly health care. That campaign finance system is not natural or inevitable but rather results from particular recent judicial rulings, such as the Supreme Court's creation of a First Amendment right to electoral spending.⁵³

To resist the existing structures that make broad economic security scarce and unequal, efforts to expand substantive economic human rights will depend on concurrent efforts to support and improve other general and procedural rights and institutions that uphold principles of democracy, fairness, and expansive well-being. In the United States, for example, a broad human right to free health care need not come at the price of federal funding for education or jobs, if we also confront limits on democratic government designed to enforce unequal tough tradeoffs.⁵⁴ A wide

51. Allison Hoffman, *Market Forces and Health Insurance*, PENN LDI VIDEO (Mar. 6, 2018), <https://www.youtube.com/watch?v=43lwZcwt0O8>.

52. See Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191, 1265–77 (2007) (explaining how both right and left critiques of legal rights obscure and reify the legal rights behind the economic and political power to make certain rights costly).

53. For a political economic analysis of this right, see generally Jedediah Purdy, *Beyond the Bosses' Constitution: Toward a Democratic First Amendment*, 118 COLUM. L. REV. 2161 (2019).

54. See NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017) (tracing the influential movement, based on rational choice theories, to change constitutional doctrine to

range of legal reforms could contribute to undoing the barriers to democratic economic rights, such as: changing monetary policy and deficit spending rules designed to keep public capital scarce; defending expansive Congressional spending powers⁵⁵; lifting constitutional constraints on political campaign spending; re-districting gerrymandered electoral districts; or prohibiting state suppression of voting rights.

As long as health care is viewed as a costly and confusing tradeoff due to natural scarcity, individuals, businesses, medical providers, and governments will be forced into destructive competition driven by arbitrary and risky bets on human lives. But if there were a universal right to high quality health care, competitive expertise and societal resources could be re-routed toward improving health and prosperity instead. To solve problems of inequality and insecurity, we need to advance universal human economic rights as not only fundamental for democracy and social justice, but also as a necessary element of a sound and successful economy.

3. Education Is Not an Unqualified Good.

John D. Haskell

Across the contemporary social imaginary, education enjoys a cherished mystique. It is a symbol of virtue to argue for its expansion, for deeper investment, for embracing it as a public good. But what I want to propose is that there are dark sides and unintended dangers to this virtue.

To set the stage, consider just how encompassing is the modern fidelity to education. Historically and politically, education is viewed as a pivotal landmark in the long march from status-driven aristocratic systems to merit-based democratic societies. Perhaps more romantically, it is the embodiment of the Enlightenment spirit to dispel superstition and intellectual stagnation through the light of reason and progress. In just about any national storyline, education never fails to show up heroically. Within the United States, for instance, the left-wing scholar Wendy Brown celebrates post-war education policy as “the first time in human history [that] higher education policy and practice were oriented toward the many, tacitly destining them for intelligent engagement with the

block democratic institutions and processes).

55. See *Nat'l Fed'n Indep. Bus. v. Sebelius*, 648 S.Ct. 1235 (2012) (invalidating federal legislation expanding Medicaid as a violation of constitutional limits on Congressional spending powers).

world, rather than economic servitude or mere survival.”⁵⁶ Likewise, the social welfare regimes established over the course of the twentieth century throughout Western European states are viewed as concrete manifestations of robust democracy, of which education is an essential characteristic. As John Keane, a politics professor at the University of Sydney, puts it, “social democracy [is] defined by its distinctively radical commitment to reducing social inequality . . . battl[ing] to empower middle-class and poor citizens . . . with better education.”⁵⁷ And it is a common trope in state and nongovernmental bureaus engaged in all aspects of governance to blame all kinds of human rights violations and desperate social conditions in the formerly colonized world, at least in part, on a lack of education which subsequently, it is argued, should be remedied post-haste (just think of the most recent poster child, Malala Yousafzai).⁵⁸

These sentiments are repeated by leading intellectuals and politicians irrespective of political orientation. For instance, the year 2001 saw the administrations of President George W. Bush of the Republican Party in the United States and Prime Minister Tony Blair of the Labour Party in the United Kingdom roll out high-profile educational reforms, with both leaders speaking about their reasons and ambitions. Under the tagline “education, education, education,” Blair would tell audiences that “there is no greater ambition for Britain than to see a steadily rising proportion gain the huge benefits of a university education.”⁵⁹ Across the Atlantic, standing at a podium with the left-of-center senator Ted Kennedy smiling from behind in support, Bush would begin his keynote education speech: “There’s no greater challenge than to make sure that every child . . . regardless of where they live, how they’re raised, the income level of their family, every child receive a first-class education in [the United States].”⁶⁰ A consensus that

56. Leigh Claire La Berge & Quinn Slobodian, *Reading for Neoliberalism, Reading like Neoliberals*, 29 AM. LITERARY HIST. 602, 607 (2017) (quoting WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 185 (2015)).

57. John Keane, *Money, Capitalism and the Slow Death of Social Democracy*, THE CONVERSATION (May 14, 2016), <https://theconversation.com/money-capitalism-and-the-slow-death-of-social-democracy-58703>.

58. *Profile: Malala Yousafzai*, BBC (Aug. 17, 2017), <http://www.bbc.com/news/world-asia-23241937>.

59. Tony Blair, Address at the University of Southampton (May 23, 2017), in Full Text of Tony Blair’s Speech on Education, THE GUARDIAN (May 23, 2017), <https://www.theguardian.com/politics/2001/may/23/labour.tonyblair>.

60. George W. Bush, Remarks on Signing the No Child Left Behind Act of 2001 in Hamilton, Ohio, in 1 PUB. PAPERS OF GEORGE W. BUSH 2002, at 23 (Jan. 8, 2002).

transcends political boundaries: education, education, education—and more of it.

And yet, without necessarily dampening its credentials, there is also disillusionment with the education system. A conservative populism (at least within the United States), symbolized by the election of Donald Trump, is downright fed up with governance cultures of experts and, by extension, wary of the education system that transforms its children into vassals of an unprincipled liberal elite world order.⁶¹ Meanwhile, progressives and left-wing demographics throughout the industrialized West decry the state of higher education as a now “commodified” product in the ever-widening reach of neoliberalism. To name only a few of education’s casualties for most concerned: standardized testing, grade inflation, increased bureaucratic auditing practices, and escalating tuition fees and corresponding private household debt.

Whatever one’s position, it seems relatively safe to say (at least behind closed doors) that higher education is getting worse, not better. Especially for those with more progressive sensibilities (conservatives already seem ready to jump ship on the public university), the immediate reaction is to propose reforms geared specifically toward each perceived crisis. Escalating student debt? Make higher education free.⁶² Charter schools and general outsourcing? Reinstate federal and state funding to the public education sector.⁶³ Increased administrative burdens on faculty and proliferation of management personnel? Decrease the amount of management and paperwork, and centralize authority back in the hands of faculty.⁶⁴ All of these proposals can be valuable, but it seems to me that in championing education as an essential aspect of a robust society, progressives have ended up overselling education—and in doing so, inadvertently jeopardized their

61. See JAMES A. SMITH, *THE IDEA BROKERS: THINK TANKS AND THE RISE OF THE NEW POLICY ELITE* (1993).

62. Shawn M. Carter, *Bernie Sanders: One Thing Needs to Change in Order to Make America ‘Great’*, CNBC (Oct. 10, 2017, 9:39 AM), <https://www.cnbc.com/2017/10/10/bernie-sanders-we-need-to-make-college-free-to-make-america-great.html>.

63. Diane Ravitch, *Charter Schools Damage Public Education*, WASH. POST (June 22, 2016), https://www.washingtonpost.com/opinions/charter-schools-are-leading-to-an-unhealthy-divide-in-american-education/2018/06/22/73430df8-7016-11e8-afd5-778aca903bbe_story.html?noredirect=on&utm_term=.5bf7fe05649f.

64. See, e.g., Sue Shepherd, *There’s a Gulf Between Academics and University Management—And It’s Growing*, THE GUARDIAN (July 27, 2017, 2:30 PM), <https://www.theguardian.com/higher-education-network/2017/jul/27/theres-a-gulf-between-academics-and-university-management-and-its-growing> (noting that while the academic community is worse off, the academic managers—i.e. vice-chancellors and top administrators—are increasing in quantity and influence).

ultimate goal of an informed, participatory, and more egalitarian citizenry.⁶⁵ In short, the very push for universal higher education undermines the perceived goals of universal higher education.

Here are three vignettes to support this suspicion about the promise of higher education.

A. The Black Box of Indoctrination

It really was not all that long ago ‘the left’ looked more critically at education. The French radical intellectual Louis Althusser, for instance, categorized the institution as part of the ideological state apparatus, indoctrinating the young into a life of servitude.⁶⁶ What gets taught is as important as access to education, and if learning is not only about ideas but routines, there is no reason to think that a liberal arts education—to a significant extent accustoming students to the vagaries of management and paperwork—is an essential component of training generations into a more egalitarian and less routinized world. This is not to say that higher education is not valuable, but that it is just one of many options in the toolkit. Too often advocates push for free, universal education without adequately addressing the content of that education. Education becomes a black box of progress, obfuscating its ideological character.

B. Daycare and Diversion

There should be something disconcerting when progressives find themselves walking in step with Blair and Bush on higher education reform. Of course, the contrast here is usually over the cost of education and the extent that schools and teacher survival should be pegged to “outcomes”—but this talk colors over the fact that what unites most advocates is the call for wider participation in higher education, especially from traditionally excluded communities.⁶⁷ This sentiment feels right, but its origins and

65. See CHARLES W. CALOMIRIS & STEPHEN H. HABER, *FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES AND SCARCE CREDIT* 207–48 (2014) (arguing that the alliance of progressive social activist organizations mirrors that of the large United States banks that provided first-time home mortgages to disadvantaged minority demographics).

66. See LOUIS ALTHUSSER, *IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES* (1970), reprinted in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127 (Ben Brewster trans., 1971).

67. See, e.g., Isabel V. Sawhill, *Higher Education and the Opportunity Gap*, BROOKINGS INST. at 1 (Oct. 8, 2013), <https://www.brookings.edu/research/higher-education-and-the-opportunity-gap/> (calling for wider participation in higher education by lower-income children).

outcome may be part of the very problem that the feeling seeks to ameliorate. First, it is not by chance that the argument for universities to increase their student numbers and diversity arises simultaneously with the retreat of social services and opportunities to the working class. Otherwise disaffected youth prone to rebellion and strikes are offered the promise of the golden ticket of upward mobility—no longer the western frontier, but the college campus.⁶⁸ Here, they can be inculcated into the possibilities of a more aesthetic and luxurious life, all the while being monitored, surveilled, and vetted for the new governance models they will be subject to in adulthood. Second, the push for wider participation in higher education diverts attention from the reality that many candidates come unprepared for university, already failed by the K–12 system.⁶⁹ Calls for higher student university numbers fragments our energy from potentially more beneficial targeted reform at earlier institutional stages of education, with the university again being turned into a daycare.⁷⁰ And daycares are for children, which means discipline and supervision—not worldly creativity. If the modernist era invested in the belief that the young would transform the old, the postmodern era of today holds youth in a permanent state of homeostasis: unequipped to understand what or how to change the present, and thereby fearful of the future, prone to docile or reactionary adulthoods.⁷¹

C. *A New Tragedy of the Commons*

Of course, universities can and should invest in programs for nontraditional and less privileged students, and universities are not a ‘limited’ resource per se (as might be suggested by the subheading here). After all, higher education is traditionally geared toward reproduction of the institutional conditions of the current social order, which by its unequal character means it is only open to the elite and certain sectors of the working class.⁷² But increasing student numbers in university does not transform unequal social relations, it further entrenches them. The prestigious jobs will

68. See David Graeber, *Army of Altruists: On the Alienated Right to Do Good*, HARPER’S MAG., 31 (Jan. 2007).

69. See e.g., Sawhill, *supra* note 67, at 5 (arguing that the solution to increasing success rates in higher education institutions is the improvement of the K-12 system).

70. *Id.*

71. See William Deresiewicz, *William Deresiewicz: What Is College for? A Defense of the Liberal Arts*, YOUTUBE (May 20, 2015), <https://www.youtube.com/watch?v=MEEIuU6G-Ic>.

72. See Sawhill, *supra* note 67, at 1.

simply come to require higher degree requirements or internships that require connections and wealth. And if social participation and influence requires more and more certifications, it is again the traditionally dispossessed that will bear the brunt of this education-induced gauntlet. The elite will mobilize new forms of distinction, and the older undergraduate university models will come increasingly into disrepute, in need of audits and managerial oversight, with diminishing returns for students and faculty.

An assault is unquestionably underway to transform the public higher education system to meet systemic imperatives of contemporary capitalist governance.⁷³ This is often spoken of generally under the moniker neoliberalism, but perhaps more accurately could be described according to a set of interlocking tendencies: overproduction and fall in the rate of profit resulting in recourse to financialization and debt-backed wealth, a fastidious reverence to market-based solutions doubling down on bureaucratic processes, and breakdown in public collective trust leading to a culture of audit, risk-obsession, and standardization.⁷⁴ But to fight this onslaught will take revised consideration of what is to be done. A part of that struggle means letting go of this education mantra.

4. Reducing Job Security Does Not Lead to Growth.

Jedidiah J. Kroncke

Among neoclassical economists it is an article of faith that job security protections, specifically those that deviate from at-will employment, only hurt the workers they are meant to protect.⁷⁵ This argument presumes that hiring protections raise the rate of unemployment by increasing the relative cost of labor—much like any regulatory intervention in labor markets.⁷⁶ In a similar vein, job tenure protections are criticized as degrading general productivity by limiting the efficient reallocation of labor within firms and by stultifying the churn of Schumpeterian creative

73. See STEPHEN J. BALL, *GLOBAL EDUCATION INC.: NEW POLICY NETWORKS AND THE NEO-LIBERAL IMAGINARY* (2012).

74. See, e.g., ROBERT BRENNER, *THE ECONOMICS OF GLOBAL TURBULENCE* (2006). See also MAURIZIO LAZZARATO, *GOVERNING BY DEBT* (Joshua David Jordan trans., 2015); PHILIP MIROWSKI, *NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN* (2013); MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* (1997).

75. John Pencavel, *The Legal Framework for Collective Bargaining in Developing Economies*, in *LABOR MARKETS IN LATIN AMERICA* 27, 45–46 (Sebastian Edwards & Nora C. Lustig eds., 1997).

76. Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 49–50 (2009).

destruction in the economy at large.⁷⁷ The popularity of this perspective was at its apex when the World Bank set interest-rate penalties based on the strength of a country's job tenure protections.⁷⁸ While the Bank ultimately abandoned this practice, today's calls for reducing employment protections, generally couched as "labor flexibilization," have been again cited as a predictable "lever" to help solve the economic ills of high- and low-income nations alike.⁷⁹

As of yet, no clear policy case study shows an economy revitalized after reducing job security protections.⁸⁰ Even as recent scholarship increasingly points to heavy endogeneity restraints on labor market reforms, the empirical basis of these anti-employment security claims is constructed by correlating extant labor law regimes with levels of unemployment, and then attributing causality to levels of job security protections.⁸¹ Most critically, these analyses rarely, if ever, interrogate or account for the legal mechanisms or financial expenditures that impact the translation of these differences of formal law into practical effects.⁸²

Not surprisingly, the empirics on the relationship between job tenure protections and both firm productivity and general economic growth have only grown murkier as the methods and data of labor market economics have improved.⁸³ The traditional rejoinder to the neoclassic model has been that of institutional economists who

77. *Id.*

78. *Id.* at 65.

79. See Jedidiah J. Kroncke, *Precariousness as Growth: Meritocracy, Human Capital Formation, and Workplace Regulation in Brazil, China and India*, 9 *LAW & DEV. REV.* 321, 323 (2016).

80. *Id.*

81. See Salo Coslovsky et al., *Resilience and Renewal: The Enforcement of Labor Laws in Brazil*, 59 *LATIN AM. POL. & SOC'Y* 77, 78 (2017). See also Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 *N.C. L. REV.* 343 (2014) (comparing how laws from various countries protect employees from wrongful termination).

82. See Coslovsky, *supra* note 81, at 78. See also Estreicher & Hirsch, *supra* note 81 (studying whether differences in normative laws have practical effects on protection against wrongful termination).

83. See Richard B. Freeman, *Labour Market Institutions Without Blinders: The Debate over Flexibility and Labour Market Performance*, 19 *INT'L ECON. J.* 129, 130 (2005). See also Nauro F. Campos & Jeffrey B. Nugent, *The Dynamics of the Regulation of Labor in Developing and Developed Countries Since 1960* (Forschungsinstitut zur Zukunft der Arbeit [IZA], Discussion Paper No. 6881, 2012) (creating an index measuring the rigidity of employment laws in 145 countries and finding that "changes in rigidity do not systematically affect economic growth but do lower income inequality."); Kim Van Eyck, *Flexibilizing Employment* (Int'l Lab. Off. Small Enterprise Dev., Working Paper No. 41, 2003) (arguing that flexibilization alone is not the key to decent work).

argue that such protections, in fact, enhance productivity at the firm and social level.⁸⁴ They contest their neoclassical colleagues on parallel quantitative methodological terrain, arguing that job turnover is an inherently short-sighted business practice that degrades the development of specific human capital and should be regulated precisely to incentivize firms to engage in more long-term productivity adaptations.⁸⁵

Yet, both of these arguments take the citizen as laborer as the central frame from which their analyses proceed. If we move to consider employment as part of a continuous relationship that individuals and social groups have with labor markets over time, we can see more clearly not only why labor flexibilization does not increase aggregate economic growth, but also why it invariably leads to social breakdown and backlash.

Consider the hypothetical where an individual will know both the prospective length of their life and the total income they will earn therein. From this position they could plot out their consumption perfectly, even with the usual future discounting issues. Secondly, an individual could predict the future returns on any investment in human capital, specific or general. Such full information would lead to perfectly calibrated allocations of time toward current labor and skills training. Yet, most individuals who derive their income from modern wage labor enjoy increasingly little predictability about future income fluctuations.⁸⁶ Moreover, the general findings of a wide range of academic fields increasingly validate, even at the neurological level, that future uncertainty is the cognitive condition humans are generally least able to manage effectively while maintaining any level of personal satisfaction.⁸⁷ Even successful, high-wage earners, including the once idealized independent contractor working in creative industries,⁸⁸ often have terrible subjective evaluations of their own well-being when facing job insecurity.⁸⁹

84. Freeman, *supra* note 83, at 131.

85. *See id.*

86. *See* Ulla Kinnunen et al., *Job Insecurity and Self-Esteem*, 35 PERSONALITY & INDIVIDUAL DIFFERENCES 617, 617–18 (2003).

87. *See* Lara B. Aknin et al., *From Wealth to Well-Being? Money Matters, but Less than People Think*, 4 J. POSITIVE PSYCHOL. 523, 526 (2009).

88. *See* MYCREATIVITY READER: A CRITIQUE OF CREATIVE INDUSTRIES (Geert Lovink & Ned Rossiter eds., 2007).

89. CAROL GRAHAM, *THE PURSUIT OF HAPPINESS: AN ECONOMY OF WELL-BEING* 109 (2011).

These subjective evaluations are rooted in the individual and collective dislocations attributed to job insecurity.⁹⁰ Fundamentally, the greater the level of wage unpredictability a worker faces, the more suboptimal their job performance and human capital investments become.⁹¹ And, in turn, the more suboptimal their investments in the social groups they participate in become.⁹² At the same time, the financialization of the modern economy places greater and greater expectations on citizens to adhere to debt obligations, sanctioning those that do not conform to absolute regularity in repayment.⁹³

The specific list of these dislocations leading from job insecurity is only growing. Empirical sociology has an expanding range of studies establishing the mental health damage that job insecurity inflicts.⁹⁴ Moreover, it is not the onset of episodic job loss that is most harmful, but operating, even when employed, under conditions of job insecurity.⁹⁵ Beyond the known destabilizing impact of mental health on a wide-range of life outcomes, studies have traced job insecurity to tangible physical health degradations,⁹⁶ such as rates of heart disease.⁹⁷ And the further one goes down the socio-economic ladder, the less social and

90. See Kinnunen et al., *supra* note 86, at 627.

91. See generally Giorgio Cutuli & Raffaele Guetto, *Fixed-Term Contracts, Economic Conjuncture, and Training Opportunities*, 29 EUR. SOC. REV. 616 (2012) (comparing permanent workers with temporary workers). See also Martin Gervais et al., *Uncertainty and the Specificity of Human Capital*, 143 J. ECON. THEORY 469, 469–70 (2008) (arguing that economies with less uncertainty are more productive).

92. See Jane P. Nolan et al., *Job Insecurity, Psychological Well-Being and Family Life*, in THE INSECURE WORKFORCE 181 (Edmund Heery & John Salmon eds., 2000).

93. See Esperanza Vera-Toscano et al., *Building Financial Satisfaction*, 77 SOC. INDICATORS RES. 211, 226–30 (2006). See also Peter Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007) (looking at the role of contracts in the increasingly complex economic system).

94. See Robert A. Karasek, Jr., *Job Demands, Job Decision Latitude, and Mental Strain*, 24 ADMIN. SCI. Q. 285, 291 (1979). See also Kinnunen et al., *supra* note 86, at 629 (“[T]here is a relationship of mutual dependence between job insecurity and self-esteem.”).

95. See Johnny Hellgren et al., *A Two-Dimensional Approach to Job Insecurity*, 8 EUR. J. WORK & ORG. PSYCHOL. 179, 180 (1999).

96. See ROBERT KARASEK & TÖRES THEORELL, *HEALTHY WORK: STRESS, PRODUCTIVITY, AND THE RECONSTRUCTION OF WORKING LIFE* (1990). See also Töres Theorell, *Working Conditions and Health*, in SOC. EPIDEMIOLOGY 95 (Lisa F. Berkman & Ichiro Kawachi eds., 2000) (showcasing the effects job insecurity has on one’s physical health).

97. See Sarah A. Burgard et al., *Perceived Job Insecurity and Worker Health in the United States*, 69 SOC. SCI. & MED. 777, 778 (2009). See also Natalie Slopen et al., *Job Strain, Job Insecurity, and Incident Cardiovascular Disease in the Women’s Health Study*, 7 PLOS ONE 1 (2012) (showing the link between job insecurity and heart disease).

psychological reserves workers have to cope with this stress.⁹⁸ As a result, workers become highly risk-averse towards any form of workplace investment,⁹⁹ leading to job underperformance and poor long-term human capital investment strategies.¹⁰⁰ Here we can see how even a hypothetical increase in total lifetime wages could lead to lower levels of productivity and satisfaction when earned under conditions of even marginally greater uncertainty.

This pattern of individual ill-effects from job insecurity is then translated to the social level.¹⁰¹ Individual and systemic job insecurity has been linked to greater drawdowns on family financial resources,¹⁰² lower rates of marriage,¹⁰³ depressed levels of home ownership,¹⁰⁴ and other forms of community investment. The more longitudinal the frame of analysis becomes, the easier it is to imagine all the social capital mechanisms which are short-circuited not just by specific job insecurity,¹⁰⁵ but also by the geographic dislocation that can accompany serial job switching.

In certain high-income countries, attempts to ameliorate these impacts have been described as regimes of “flexicurity” to ease

98. Magnus Sverke et al., *No Security: A Meta-Analysis and Review of Job Insecurity and Its Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 242, 247 (2002).

99. Michiel Kompier, *Job Design and Well-Being*, in THE HANDBOOK OF WORK AND HEALTH PSYCHOLOGY 429, 437–38 (Marc J. Schabracq et al. eds., 2d ed. 2003).

100. See Michael Quinlan et al., *The Global Expansion of Precarious Employment, Work Disorganization, and Consequences for Occupational Health*, 31 INT’L J. HEALTH SERVS. 335 (2001) (examining the relationship between precarious employment and occupational health and safety). See also Govert E. Bijwaard & Justus Veenman, *Unequal Chances on a Flexible Labor Market* at 3–4 (Tinbergen Inst., Discussion Paper No. 4, 2008).

101. See Nolan et al., *supra* note 92.

102. See Sascha O. Becker et al., *Job Insecurity and Children’s Emancipation*, 23 J. Population Eco. 1175, 1177 (2010) (exploring the connection between job insecurity and higher likelihood of changing residence).

103. E.g., Daniele Vignoli et al., *Uncertain Lives: Insights into the Role of Job Precariousness on Family Formation Practices in Italy*, 35 DEMOGRAPHIC RES. 253, 254 (May 1, 2014) (arguing that job insecurity correlates with increased cohabitation rates, while job security correlates with higher marriage rates).

104. E.g., Luis Diaz-Serrano, *On the Negative Relationship Between Labor Income Uncertainty and Homeownership*, 14 J. HOUSING ECON. 109, 109 (2005) (“[T]he negative relationship between labor income uncertainty and homeownership is driven by households’ risk-aversion.”). See also Gwilym Pryce & Margaret Keoghan, *Unemployment Insurance for Mortgage Borrowers*, 2 EUR. J. HOUSING POL’Y 87, 87 (2002) (“[N]either those in the riskiest categories of employment, nor those with the least financial resources, have the highest rates of MPPI [(Mortgage Payment Protection Insurance)] take-up.”).

105. See generally ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) (discussing the importance of civic community in developing successful institutions).

specific job loss transitions.¹⁰⁶ But even here difficulties have emerged in the face of more precarious work,¹⁰⁷ and such regimes are only available to those countries that can afford them and maintain strong social compacts.¹⁰⁸ One notable common thread among the recent global rise of neo-nationalist movements in even high-income countries has been their idealization of a more predictable and socially coherent past.¹⁰⁹

Summarily, job insecurity, whatever hypothetical short-term efficiencies it may allow, tears at the very social fabric on which any economy depends. The ever-alluring promise of labor flexibilization's impact on aggregate growth is never realized for this reason and, concurrently, this is why no systemic depression—even those that proceed calls for flexibilization—has ever been linked to job security itself. By contrast, direct social investments in human capital have a much more robust and empirically verified impact across the full spectrum of economic and social indicators.¹¹⁰

While it may seem that the productive energies of a revitalized labor market are ever-waiting to materialize for potential reformers, the truth is that work across the globe is becoming precarious enough without proactive deconstructions of existing employment law protections.¹¹¹ We are already witnessing the dislocations of this secular trend in any number of social contexts, and the more serious question should be how to create a global legal

106. Accord Sandra Buchholz & Kathrin Kolb, *Selective Flexibilization and Deregulation of the Labour Market*, in GLOBALIZED LABOUR MARKETS AND SOCIAL INEQUALITY IN EUROPE 25 (Hans-Peter Blossfeld et al. eds., 2011) (discussing the importance of stable and continuous employment as source of social coverage, participation, and acceptance). *E.g.*, Dirk Hofäcker, *A Recipe for Coping with the Challenge of Globalization? Trends in Labour Market Flexibilization and Life Course Inequality in Denmark*, in GLOBALIZED LABOUR MARKETS AND SOCIAL INEQUALITY IN EUROPE at 149 (explaining the term “flexicurity”). Accord Rudi Wielers & Melinda Mills, *The Flexibilization of the Dutch Labour Market*, in GLOBALIZED LABOUR MARKETS AND SOCIAL INEQUALITY IN EUROPE 46 (2011).

107. See Luc Sels & Geert Van Hoetegem, *Seeking the Balance Between Flexibility and Security*, 15 WORK, EMP. & SOC'Y 327, 337–43 (2001).

108. See Christina Fong, *Social Preferences, Self-Interest, and the Demand for Redistribution*, 82 J. PUB. ECON. 225, 239–43 (2001). See also Woojin Lee & John E. Roemer, *Racism and Redistribution in the United States*, 90 J. PUB. ECON. 1027, 1028–29 (2006) (arguing that racism decreases the size of the public sector).

109. See Anthony Mughan et al., *Economic Globalization, Job Insecurity, and the Populist Reaction*, 22 ELECTORAL STUD. 617, 619–20 (2003).

110. See WORLD ECON. FORUM, THE HUMAN CAPITAL REPORT (2013).

111. See Cutuli & Guetto, *supra* note 91, at 617–18. See also Marcela Eslava et al., *The Effects of Regulations and Business Cycles on Temporary Contracts, the Organization of Firms and Productivity* (Centro de Estudios Distributivos, Laborales y Sociales [C.E.D.L.A.S.], Working Paper No. 154, 2014) (looking at the effects of contractual flexibility on workplace efficiency).

equilibrium that matches the organic realities of human capital formation rather than digital velocity of financial capital.

5. Distributional Struggles Always Operate Under the Background Laws That Determine Property, Contracts, and Torts.

Jamee K. Moudud

This Essay provides insights from the Law and Political Economy perspective and critiques the World Bank and neoclassical economics more generally. At the heart of this conventional perspective is the claim that government involvement is necessary to deal with “market failures” and promote both business development and social justice. I want to emphasize here that markets are neither “perfect” nor “imperfect,” but are the outcomes of a complex bundle of entitlements that determine the nature of power struggles.¹¹² I draw on the perspectives of the Legal Realists (especially Wesley Hohfeld and Robert Hale) in my own approach.

In contrast to the mainstream Law and Economics (“L & E”) approach, my position has three features. First, property is fundamentally a bundle of rights and thus property ownership at its core entails coercive power struggles between rivals and between owners and non-owners. Second, law and power relations are interrelated.¹¹³ These power struggles over economic outcomes occur within the context of background laws that determine property, contracts, and torts. Third, I pose the following question: if the goal is to understand how legal structures shape power struggles, then how are the laws themselves to be determined? Here, I would argue that the policy goals that determine the laws are themselves the consequences of political and ideational factors as authors in the Realist and Critical Legal Studies (“CLS”) traditions have emphasized.

I want to next focus on the question of property that lies at the heart of the L & E framework. Drawing on a long intellectual tradition, pioneered by the Legal Realists, I counter the standard Robinson Crusoe-esque approach to property. In the conventional

112. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 106 (1984) (“[P]eople can struggle to improve their position vis-à-vis others by *changing* the rules that define their entitlements, but that does not alter the fact that the bundle of legal endowments they start out with positions them for the struggle. . .”).

113. *Id.* at 109 (“If the program of Realists was to lift the veil of legal Form to reveal living essences of power and need, the program of the Critics is to lift the veil of power and need to expose the legal elements in their composition.”).

view, property is seen as a person's relationship to an object (say a piece of land or a car) based on the doctrine of first possession.¹¹⁴ This *in rem* view of property—involving your vertical relationship to an object—is basically in Blackstone's description of property as a person's "despotic dominion" over external things.¹¹⁵ In contrast, Legal Realists and the CLS view—known as the progressive view of property—conceptualized property in social and relational terms.¹¹⁶ The use of one's property invariably has impacts on other people's property—in the Realist view, property was treated as a "bundle of rights or entitlements" which determine the damage or costs that use of one's property can inflict on others within the given structure of laws.¹¹⁷ Thus: "[A] property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things"¹¹⁸; it is a bundle of rights determined by the legal framework that is in place.

Such a bundle of rights view of property automatically implies that economic relations in capitalism are fundamentally coercive, involving adversarial relations between rival property owners and between property-owners and non-owners.¹¹⁹ Robert Lee Hale is famously associated with the idea that the economy is a network of coercive power relations.¹²⁰ Hale's framework drew on the theoretical framework established by Wesley Hohfeld who in a landmark 1913 article¹²¹ established a set of fundamental jural relations of property holders relative to others such that, as Warren Samuels summarized it:

there is an underlying or implicit structure of advantage and disadvantage, of power and of exposure to power, with a consequent structure of mutual coercive capacity depending upon who has what *right*, what *privilege*, what *power*, and what *immunity* and, therefore, who (else) has what *duty*, what *no-*

114. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 15 (1927) ("The oldest and up to recently the most influential defense of private property was based on the assumed right of the original discoverer and occupant to dispose of that which thus became his.").

115. *Id.* at 8 (describing property as "the rule over things by the individual.").

116. See Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, WISC. L. REV. 975 (1982).

117. *Id.*

118. See Cohen, *supra* note 114, at 12.

119. *Id.* at 12–13.

120. Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 267–68 (1973).

121. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (creating a model of fundamental legal concepts).

*right, what liability, and what disability.*¹²²

The “free market” is thus very much a regulatory system—because laws are by definition regulations—except that it reduces a society’s coercive power on owners of capital.

A. Some Implications

First, distributional struggles always operate under the background laws that determine property, contracts, and torts. Consider, in *Lochner v. New York*, where the Court struck down a New York statute that restricted the working hours of bakery workers on the grounds that it interfered with the freely arrived at contracts of employers and employees.¹²³ In response to the *Lochner* decision, Realists would argue that the more “deregulated” labor relations which followed increased employers’ coercive powers over employees. From the Realist standpoint, neoliberalism thus increases employers’ coercive power over workers.

Second, the very notion of property in the Legal Realist framework implies that private actions involving one’s own property will inevitably have social consequences. This is clear from Wesley Hohfeld’s legal taxonomy, which is bipolar: no one is an island unto himself.¹²⁴ This is why, as Warren Samuels argues, externalities are ubiquitous in Hale’s analysis and thus: “Every exercise of volitional freedom tends to restrict or change the volitional freedom of others, through the coercive impact on the alternatives open to others.”¹²⁵ But if externalities are ubiquitous then they are the inevitable outcomes of normal market behavior. However, if “market failures” are ubiquitous then they are not “market failures” anymore! Quite logically, therefore, there can be no such thing as a “perfect” market, which of course implies that there is no such thing as an “imperfect” market. In short, the Legal Realist notion of property removes a core conceptual plank of the global policy framework, such as those promoted by the World Bank.

Third, the fundamentally coercive nature of property relations implies that competition between owners is always a legalized form of injury. In this view of property, there is no place for perfect competition—or its opposite in neoclassical theory, some type of imperfect competition. Incidentally, those who claim that early

122. Samuels, *supra* note 120, at 275 (emphasis in original).

123. *Lochner v. New York*, 198 U.S. 45 (1905).

124. See generally Hohfeld, *supra* note 121.

125. Samuels, *supra* note 120, at 286.

capitalism consisted of perfect competition should note the following. In his classic *The Transformation of American Law, 1780–1860*, Morton Horwitz argued that the shifts in legal thought and policy over the course of the nineteenth century revolved around cognizance of the fact that business development by its nature involved injurious rivalry amongst competitors.¹²⁶ As Horwitz discusses,¹²⁷ while the beneficial impacts of business competition came to be seen as the key to industrialization, the debates about the appropriate legal framework revolved around the consequences of the destructive effects of cheaper and/or newer technologies adopted by rival firms.¹²⁸ Thus it came to be recognized that “the essential attribute of property ownership was the power to develop one’s property regardless of the injurious consequences to others.”¹²⁹ In short, “[p]ermissions to injure play an enormously important role in economic life, since all competition is legalized injury”¹³⁰ Clearly these major debates regarding the legal foundations of business competition would not have taken place if perfect competition had prevailed!

It does not follow that the bundle of rights underpinning property can be “anything.” In writing about progressive policies (such as job programs, wage increases via strong unions, and progressive taxes), Hale wrote that such policies raised workers’ bargaining power and increased coercive pressures on capitalists, thereby possibly undermining the incentive to invest.¹³¹ The following quote from Hale is significant in this regard: “A union may have power, for instance, to force an immediate advance in wages; yet if the wages are pushed beyond a certain limit, the impairment of the incentive of the capitalists may before very long react unfavorably on the laborers themselves.”¹³² Thus, a key challenge that Hale was implicitly pointing to was how to organize the bundle of rights to both provide the incentive to invest and create the framework for social and economic rights. It must be noted that the bundle of rights underpinning a firm, for example, determines both

126. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

127. *Id.* at 133.

128. *Id.*

129. *Id.* at 99.

130. Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *LEGAL STUD. F.* 327, 333 (1991).

131. See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *COLUM. L. REV.* 603 (1943).

132. Robert L. Hale, *Current Political and Economic Review*, 9 *A.B.A. J.* 179, 179 (1923).

the *level* and the *composition* of its cost. For example, the background rules would determine the level of wages and how “hard” employers can pump out productivity increases from workers (given the technology). Both of these factors determine the structure of unit labor costs and thus prices. As such, the background laws are central to structure of prices in an economy; the latter is not a natural phenomenon! As also emphasized by Karl Polanyi, the market is deeply political; it is neither pre-legal nor pre-political as in the neoclassical tradition.¹³³

6. Entrepreneurship Can Be Unproductive or Destructive.

Frank Pasquale

In the contemporary American law school, few figures are as lionized as the “entrepreneur.”¹³⁴ Business law courses tend to offer a narrative of wise incremental development of doctrine toward enabling disruption, easy entry into markets, and ultra-flexible corporate forms.¹³⁵ The lawyer is ideally, in this view, a fixer capable of profit-maximizing distributions of responsibility and liability.¹³⁶ Some even dream of automating this role via smart contracts, to ensure even more rapid entrepreneurial activity.¹³⁷ Professional responsibility courses also tend to adopt a similarly reverential attitude toward the business client, instilling an ethic of “zealous advocacy” in generations of students.¹³⁸

This emphasis on the disruptive and new is jarring in law, because legal systems’ internal values so often prize stability, regularity, precedent, and tradition. Pressed to justify it, partisans of disruptive innovation often turn to economics—a discipline all too happy to oblige with just-so stories of creative destruction.¹³⁹ As William Baumol has observed, where economic growth has slowed, it is often “implied that a decline in entrepreneurship was partly to blame (perhaps because the culture’s ‘need for achievement’ has

133. See KARL POLANYI, *THE GREAT TRANSFORMATION* 139 (1944).

134. J. Mark Phillips, *Entrepreneurial Esquires in the New Economy: Why All Attorneys Should Learn About Entrepreneurship in Law School*, 8 J. BUS. ENTREPRENEURSHIP & L. 59, 67–68 (2014).

135. *Id.* at 71–72.

136. *Id.*

137. See David Petersson, *How Smart Contracts Started and Where They Are Heading*, FORBES (Oct. 24, 2018), <https://www.forbes.com/sites/davidpetersson/2018/10/24/how-smart-contracts-started-and-where-they-are-heading/#796eb24137b6>.

138. See Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. ST. U. L. REV. 251, 254–57 (discussing the “zealous advocacy mantra” found in law schools).

139. See William Baumol, *Entrepreneurship: Productive, Unproductive, and Destructive*, 98 J. POL. ECON. 893 (1990) (discussing the history of entrepreneurship).

atrophied). At another time and place, it is said, the flowering of entrepreneurship accounts for unprecedented expansion.¹⁴⁰ Both policymakers and mainstream legal scholars tiptoe through the tulips of entrepreneurship, wary of disrupting the business plans of the disruptive innovators they admire.

However, as Baumol went on to wisely observe, there is no obvious connection between entrepreneurship and genuine productivity.¹⁴¹ Productivity, defined from a properly politico-economic perspective, reflects society's ability to meet real needs and to promote human flourishing.¹⁴² Some entrepreneurs contribute to it, but others do not. As Baumol observes, there are unproductive entrepreneurial activities, and "at times the entrepreneur may even lead a parasitical existence that is actually damaging to the economy."¹⁴³ Baumol also argues that the relative balance of productive, unproductive, and destructive entrepreneurs is not dictated by technology or culture.¹⁴⁴ "Changes in the rules and other attendant circumstances can, of course, modify the composition of the class of entrepreneurs," he reminds us, insisting on the intertwining of political and economic reality.¹⁴⁵

Law students tend to hear little to nothing about Baumol's distinctions here, despite his status as one of the greatest economists of the twentieth century. That is because the epistemological appeal of many dominant law and economics approaches is grounded in an ostensibly value-free and scientific assessment of the costs and benefits of different sets of legal rules.¹⁴⁶ Describing certain economic activity as useless or parasitical is a value judgment. Better instead, in the eyes of the simplistic law and economics that animates all too much of legal pedagogy, to stick to more quantitative assessments of monetary value, or abstract descriptions of optimal legal rules that "neutrally" apply trans-substantively, without respect to the nature of the business they are affecting.

The problems with such an approach are readily apparent. First, there are obvious instances of entrepreneurship that leave everyone (except the entrepreneur) worse off. Trade in illicit drugs

140. *Id.* at 894.

141. *Id.* at 915–16.

142. See MARTHA NUSSBAUM, *CREATING CAPABILITIES* x–xi (2012).

143. See Baumol, *supra* note 139, at 894. See also WILLIAM K. BLACK, *THE BEST WAY TO ROB A BANK IS TO OWN ONE* (1991).

144. See Baumol, *supra* note 139, at 893.

145. *Id.* at 894.

146. *Id.*

has devastated communities in North, Central, and South America. In later work, Baumol described the international arms trade as another example: rapidly cheapening implements of destruction, and making them more readily available, is not a form of efficiency to be celebrated without further analysis of their role in particular conflicts.¹⁴⁷ There may be cases where this arms trade enables a scrappy band of rebels to overcome an oppressive tyranny. But far more common are other dynamics: consolidation of power by tyrannical regimes; arms races among factions within a nation, and nations themselves; or out-of-control armaments easily snapped up by terrorist forces.¹⁴⁸

Similarly, in banking, all too often legislators and regulators rush to promote “financial innovation” without fully understanding its consequences. For example the Office of the Comptroller of the Currency (via its proposed “fintech charters”) and the Consumer Financial Protection Bureau (via its Project Catalyst) are promoting financial technology (fintech) firms.¹⁴⁹ Fintech may promote competition and create new options for consumers. But we should ensure that it is fair competition, and that these options don’t have hidden pitfalls. In my research on the finance and internet sectors, I have explored patterns of regulatory arbitrage and opaque business practices that sparked the mortgage crisis of 2008.¹⁵⁰ I see similar themes emerging today.

In the run-up to the crisis, federal authorities preempted state law meant to protect consumer borrowers.¹⁵¹ Their stated aim was to ensure financial inclusion and innovation, but the unintended consequences were disastrous.¹⁵² Federal authorities were not adequately staffed to monitor, let alone deter or punish, widespread

147. WILLIAM J. BAUMOL, *THE COST DISEASE* 55–56 (2012).

148. *See id.* Moreover, even innovation in information provision can reflect such dynamics. For example, entities competing to be the top Google result on a given search page are often tempted to engage in black hat search engine optimization to manipulate results. *See, e.g.*, Frank Pasquale, *Dominant Search Engines: An Essential Cultural and Political Facility*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* (B. Szoka & A. Marcus, eds., 2010).

149. *See* Officer of the Comptroller of the Currency, *Policy Statement on Financial Technology Companies’ Eligibility to Apply for National Bank Charters* (July 31, 2018); Genevieve Melford & Dan Quan, *Project Catalyst Collaboration to Improve Understanding of Financial Well-being*, CONSUMER FIN. PROT. BUREAU (Sept. 18, 2017), <https://www.consumerfinance.gov/about-us/blog/project-catalyst-collaboration-improve-understanding-financial-well-being/>.

150. *See generally* FRANK PASQUALE, *THE BLACK BOX SOCIETY* 5 (2015) (exposing how powerful interests abuse secrecy for profit).

151. *See* JENNIFER TAUB, *OTHER PEOPLE’S HOUSES* 223–24 (2015).

152. *Id.*

fraudulent practices.¹⁵³ They also flattened diverse state policies into a one-size-fits-all, cookie-cutter approach.¹⁵⁴ We all know the results. Millions of families lost their homes to foreclosure, and the economy suffered a permanent output gap that undermines our nation's strength to this day.¹⁵⁵

In short: entrepreneurship and innovation are not good in themselves. The toxic assets at the core of the financial crisis were innovative in many ways, but ultimately posed unacceptable risks.¹⁵⁶ Entrepreneurial arms dealers could easily provide massively destructive weapons to terrorists. Drug dealers externalize the harms their products generate, while enjoying massive profits. Many less troubling products and services have shadow sides that outweigh their ostensible benefits.¹⁵⁷ Until law and economics places such concerns at the core of its inquiry—rather than relegating them to backwater arenas of externality correction and transfers—it will fail to account for core economic dynamics. Law and political economy addresses these issues directly, as an intersecting realm of monetary value and social values.

7. Unemployment Isn't Natural, It's a Creature of Legal Design.

Raúl Carrillo

Frank Pasquale recently highlighted a fundamental flaw in standard Law & Economics thinking.¹⁵⁸ The old paradigm holds that mandates for higher quality jobs necessarily reduce aggregate jobs available to workers. This crude and shallow “economism” argues the state must either compel firms to maintain better paid, better trained, or better cared-for workers, or allow firms to hire more workers overall.¹⁵⁹

Pasquale deftly dispenses with this false dichotomy. The argument is empirically deficient: no evidence supports the existence of the supposed trade-off.¹⁶⁰ Furthermore, the framing is

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.* at 222–46 (describing each link of the financial crisis).

157. Frank Pasquale, *Technology, Competition, and Values*, 8 MINN. J.L. SCI. & TECH. 607, 609 (2007).

158. *See* Frank Pasquale, *There Is No Necessary Trade-Off Between Good Work and More Work*, LPE BLOG (Feb. 22, 2018), <https://lpeblog.org/2018/02/22/there-is-no-necessary-trade-off-between-good-work-and-more-work/>.

159. *Id.*

160. *Id.*

conceptually unsound: as Pasquale notes, workplaces are government creatures, so resetting permissions and prohibitions within them is not so much state intervention, as an adjustment with an impact dependent upon the broader system the government controls.¹⁶¹

In general, standard Law and Economics fails to account for the state's design of the labor system. Borrowing from Neoclassical economists, most subscribers suggest some level of unemployment is natural: a tendency of the labor market anterior to the state. From this perspective, workers seek to freely match with employers and concretize their pairings via labor contracts. Although the state may regulate the quality of these contracts, regulation tends to reduce the total quantity of contracts and thus employment, as well as infringing upon freedom.

Heterodox economists have argued against this vision for decades. Noting that labor is fundamentally distinct from other commodities, they argue there is no market for labor *in the aggregate*.¹⁶² While firms hire and fire based on profit expectations, most laborers work where they can to survive.¹⁶³ Because workers do not truly have a choice to sell their labor or not, it does not make sense to think of a comprehensive market.¹⁶⁴ Even if it did, "intervention" would still be an incoherent concept. Because the state creates and administers the "background rules" of the labor system, which coerce people to work, the laws of the state 'constitute' rather than merely 'govern' the labor system, rendering the idea of intervention nonsensical.¹⁶⁵

The United States government did not invent "employment" and "unemployment," of course. Rather, it inherited a legal architecture of work from the British Empire.¹⁶⁶ Throughout the 18th century, Parliament stripped peasants of their rights to land, compelling them to work for landowners to survive.¹⁶⁷ As Robert Lee Hale argued, this process of legal coercion continued in the United

161. *Id.*

162. See, e.g., Robert Prasch, *How Is Labor Distinct from Broccoli? Some Unique Characteristics of Labor and Their Importance for Economic Analysis and Policy*, in *THE INSTITUTIONALIST TRADITION IN LABOR ECONOMICS* 146–58 (Dell P. Champlin & Janet T. Knoedler eds., 2003).

163. *Id.* at 148–49.

164. *Id.* at 148.

165. *Id.*

166. See generally SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (2014) (discussing the history of cotton and how it impacted modern capitalism).

167. See *id.*

States.¹⁶⁸ Over time, the U.S. government spread the wage labor system, enclosing the lands of indigenous peoples,¹⁶⁹ allowing women to perform wage work for men, welcoming poor migrant workers, and, monumentally, turning slaves into “freedmen” without land or other capital.¹⁷⁰ As governments legally eliminated the material preconditions for self-sufficiency, they birthed the modern concepts of “unemployment” and “employment.”¹⁷¹

In the contemporary United States, workers face a specific challenge. We cannot work for mere biophysical resources. Rather, we must work for money, specifically U.S. legal tender, which can settle private debts, and must satisfy public debts to the state (most notably, taxes). As Duncan Kennedy has noted, people may now receive income outside of labor compensation, but broadly speaking, even with the welfare state, people must sell their labor for money.¹⁷² Property, contract, and tort law, along with the criminal laws that protect and reinforce them, set the stage for a struggle for currency. If we do not find a way to produce money on our own, we must toil.

Leftists often argue that the “reserve army of the unemployed”¹⁷³ is a feature of the system, necessary to maintain a monetary production economy. U.S. legal history supports this contention. Beyond merely upholding the “background rules,” the U.S. government has explicitly committed to a labor system that relies on some level of involuntary unemployment.

Twice during the 20th century, progressive and radical legislators attempted to codify an explicit commitment to true full employment. After World War II, and again in the 1970s, Congress considered creating a duty for the federal government to serve as an employer of last resort, providing a job to any job seeker.¹⁷⁴

168. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (discussing the relationship between coercion and distribution).

169. See, e.g., Park, K-Sue, *Money, Mortgages, and the Conquest of America*, 41 Law & Soc. Inquiry 1006 (2016).

170. See, e.g., BECKERT, *supra* note 166, at 284 (explaining how “[o]ne of the first things these ‘reconstructed’ state governments did was to try to enforce labor discipline and keep workers on plantations.”).

171. *Id.*

172. See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 351 (1991).

173. J.W. Mason, *The Fed Doesn't Work for You*, JACOBIN MAGAZINE (Jan. 6, 2016), <https://www.jacobinmag.com/2016/01/federal-reserve-interest-rate-increase-j-anet-yellen-inflation-unemployment/>.

174. See, e.g., William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139, 153–61 (1998).

Although both attempts resulted in legislation that improved the system, they failed to guarantee jobs.¹⁷⁵ Arguably, the second effort reified the systemic necessity of involuntary unemployment. Although the Full Employment and Balanced Growth Act of 1978 nominally commits the Federal Reserve System to strive toward full employment as well as price stability, the life of the law has shown that the central bank is committed to depressing wages and prohibiting true full employment in the name of price stability.¹⁷⁶ Despite the absence of inflation accompanying recent low unemployment rates, Federal Reserve System officials insist tens of millions of people, mostly people of color, must be held in idleness.¹⁷⁷ They do this despite even right-wing criticism that a buffer stock of unemployed people is neither an effective nor necessary means of inflation control.¹⁷⁸

Even the courts play a role in cementing the unjust labor system, beyond enforcing the background rules. On two occasions, federal courts have defended the executive branch from class action lawsuits alleging the President failed to fulfill his part of the 1978 full employment mandate.¹⁷⁹ Relatedly, courts have refused to recognize a right to dignified work. Justice Thurgood Marshall once argued “[E]very citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment.”¹⁸⁰ His associates did not agree even with this statement.¹⁸¹ Constitutional law scholars have argued that Reconstruction Amendment doctrine implicates a right to a job.¹⁸² Courts, again, have disagreed.¹⁸³

175. See Full Employment and Balanced Growth Act of 1978, 15 U.S.C. ch. 58 (1978).

176. Mason, *supra* note 173. See also 15 U.S.C. § 3101.

177. See Mason, *supra* note 173 (describing the Fed’s policies of deliberately raising unemployment as looking like “naked class warfare”). See also William Darity, Jr. & Arthur H. Goldsmith, *Unemployment, Social Psychology, and Unemployment Hysteresis*, 16 J. POST KEYNESIAN ECON. 55 (1993).

178. See, e.g., John Sindreu, *Everything the Market Thinks About Inflation Might Be Wrong*, WALL ST. J. (Mar. 6, 2017), <https://www.wsj.com/articles/everything-the-market-thinks-about-inflation-might-be-wrong-1488796206>.

179. See *Medina v. Clinton*, 86 F.3d 155, 156–58 (9th Cir. 1996); *Dist. 65, Wholesale, Retail, Office & Processing Union v. Nixon*, 341 F. Supp. 1193, 1197–98 (S.D.N.Y. 1972).

180. *Regents of St. Colleges v. Roth*, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting).

181. *Id.*

182. See, e.g., Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1080–81 (1977).

183. See, e.g., *Roth*, 408 U.S. at 573; *Donato v. Plainview-Old Bethpage Cent. School Dist.*, 96 F.3d 623, 629 (2d Cir. 1996); *Beitzell v. Jeffrey*, 643 F.2d 870, 876

Overall, the major U.S. government organs have perpetuated an unfair labor system rooted in false scarcity. To contest constraints on firms as labor market interventions is to miss the legal and economic reality. Nothing about current employment policy is “natural” or “free.” No ironclad rules prevent us from transforming the system, from ensuring public employment just as we ensure public education and other programmatic rights. In a better future, we can confidently design a Job Guarantee program whereby we provide work for everyone who wants it.¹⁸⁴ This program would be no more or no less of an “intervention” than maintaining the status quo.

8. Money Isn’t Scarce—It’s Infinite.

Rohan Grey

The founders of the Chicago School of Law & Economics set out to improve legal decision-making by incorporating economic ‘principles’ into the law.¹⁸⁵ From the outset, they envisaged this interdisciplinary flow of ideas to be mostly unidirectional, on the grounds that the discipline of ‘economics,’ defined narrowly around contemporary neoclassical microeconomics, had far greater insights to offer the law than vice-versa.¹⁸⁶ However, notwithstanding Law & Economics’ success in transforming much of contemporary jurisprudence in its image, it remains premised on foundational assumptions that on close inspection, are revealed to be legally incoherent.

Perhaps the most egregious premise of contemporary neoclassical microeconomics, and thus Law & Economics, is that of capital scarcity. One of the first lessons economics programs impart to their students is that “there’s no such thing as a free lunch.”¹⁸⁷ Indeed, for many, the study of “economics” is defined entirely as the study of the allocation of scarce resources.¹⁸⁸ Under such a view, the

(1st Cir. 1981).

184. See, e.g., L. Randall Wray, et al., *Public Service Employment: A Path to Full Employment*, Levy Economics Institute of Bard College, Research Project Report, (Apr. 2018), http://www.levyinstitute.org/pubs/rpr_4_18.pdf.

185. See, e.g., Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, in CHICAGO LECTURES IN LAW AND ECONOMICS 189 (Eric Posner ed., 2000).

186. *Id.* at 194 (“Practices, institutions, bodies of law that seem wholly disparate from the standpoint of orthodox legal analysis are seen to involve the identical economic issue. Whole fields of law are interchangeable when viewed through the lens of economics Economics reveals a ‘deep structure’ of law that exhibits considerable coherence.”).

187. See, e.g., N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 4 (6th ed. 2012).

188. See WILLIAM BOYES & MICHAEL MELVIN, *FUNDAMENTALS OF ECONOMICS* 19,

baseline “equilibrium” state of the economy is one in which such scarce resources are fully utilized, and distributional questions can be reduced to zero-sum transfers. Social problems like unemployment are defined as economic “imperfections,” mere abnormalities or deviations from an otherwise optimal baseline. The paramount question becomes: which Peter should be robbed in order to pay Paul?¹⁸⁹ At the same time, money—the medium via which economic activity is primarily conducted—is treated as little more than a veil over the value of the finite real goods and services being transacted.

On first glance, the idea of economic scarcity seems reasonable, especially when applied to the realm of real, physical things like factories, humans, and the environment. However, it falls apart when we consider property interests of economic value that are not tangible or finite, including tradeable information, intellectual property rights, and, perhaps most importantly, money itself. As any corporate lawyer can attest, such forms of ‘capital’ are legally constructed, and thus their ‘supply’ is socially determined.¹⁹⁰ Accordingly, it makes no more sense to talk about a ‘scarcity’ of data, copyrights, or dollars than it does to talk about a scarcity of the human imagination.

Nevertheless, Law & Economics practitioners continue to downplay the legal and physically unbound nature of money itself, even as they strive to extract monetary value from ever more facets of social life. Indeed, Richard Posner himself admitted to not having bothered to read Keynes’s *The General Theory of Employment, Interest, and Money* until after the 2008 global financial crisis because, in his view, “it was a work of macroeconomics,” and “[l]aw, and hence the economics of law . . . did not figure largely in the regulation of those phenomena.”¹⁹¹ At the same time, the rest of the

13 (5th ed. 2012) (“The study of economics begins with *scarcity*.”) (emphasis in original).

189. David Schizer, *Fiscal Policy in an Era of Austerity*, 35 HARV. J.L. & PUB. POL’Y 453, 482 (2012) (“Politicians are less likely to accommodate one interest group if they know this means offending another. As Michael Graetz has observed, “[l]egislators behave[] quite differently when to pay Peter they ha[ve] to be explicit about how they inten[d] to rob Paul.”) (alterations in original).

190. David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 652 (“[W]hat the critics of the neo-classical position were suggesting was . . . that “capital” does not really exist in any determinate fashion. Rather, what exists is legally structured access to the variety of resources that people use to produce things, and the market value of this access cannot be determined without examining its distribution — which is necessarily given by politics and social conditions rather than by a purely technical process.”).

191. Richard A. Posner, *How I Became a Keynesian*, THE NEW REPUBLIC (Sept. 23, 2009), <https://newrepublic.com/article/69601/how-i-became-keynesian>.

legal academy has also had relatively little to say about money. As Roy Kreitner observed in 2012:

Imagine a student comes to office hours and wants to study the legal history of contract, tort, or marriage. One barely has to think to get her started in the right direction, and there may even be encyclopedia articles from which to draw initial bibliographies [. . .] Nothing of the sort exists for the legal history of money—at least, not yet.¹⁹²

Such chronic neglect is particularly befuddling given the central role of financial considerations in almost every aspect of the law and legal practice. Perhaps even more significantly, the financial system is itself legally constructed.¹⁹³ All financial instruments, including those we consider “money,” are ultimately tradeable legal obligations, or debts. Some are created privately through the formation of contracts, while others are created by the state. At the same time, different obligations have different legal properties: debts issued by private actors are typically settled by the tendering of the obligation of a third party (i.e. government currency, or bank deposits), while public monetary instruments are extinguished when the holder tenders them in order to obtain *relief* from any legal liability incurred via fees, fines, and/or taxes.¹⁹⁴

Whereas certain kinds of financial instruments such as coins or mortgage-backed securities may only be issued by specific legally approved entities, others, like promissory notes, can be issued by almost anyone. At the same time, instruments issued by more creditworthy or economically significant actors tend to have a higher degree of “moneyness” than instruments issued by less creditworthy or important actors.¹⁹⁵ Consequently, most personal IOU-like instruments are risky and rarely circulate beyond one’s own personal networks, while government obligations such as currency and treasury securities are considered to be the most safe and liquid kinds of monetary instruments.¹⁹⁶

192. Roy Kreitner, *The Legal History of Money*, 8 ANN. REV. L. & SOC. SCI. 415, 416 n.1 (2012).

193. See, e.g., Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1147 (2017).

194. Christine Desan, *Money as a Legal Institution*, in MONEY IN THE WESTERN LEGAL TRADITION 18 (David Fox & Wolfgang Ernst eds., 2016).

195. Perry Merhling, *The Inherent Hierarchy of Money*, Prepared for Duncan Foley Festschrift Conference (Apr. 20-21, 2012), http://ieor.columbia.edu/files/seasdepts/industrial-engineering-operations-research/pdf-files/Mehriling_P_FESeminar_Sp12-02.pdf. (describing how fluctuations in quality, or “moneyness,” occur for various types of credits).

196. This is true especially with respect to floating, non-convertible, government liabilities. See, e.g., Stephanie Bell, *The Role of the State and the Hierarchy of Money*, 25 CAMBRIDGE J. ECON. 149 (2001); Merhling, *supra* note 195.

This vision of a hierarchy of monies, of varying qualities, with public liabilities at the top of the hierarchy, reflects the great economist Hyman Minsky's famous dictum: anyone can create money, the challenge is to get it accepted.¹⁹⁷ Or, as Alfred Mitchell-Innes observed over a century ago, money's origins lie not in the unique physical properties of gold, or any other commodity, but in large, socially-managed credit networks.¹⁹⁸ The great invisible financial scoreboard-in-the-sky keeps track of everyone's balance sheet positions, with credits and debits coming in and out of existence as new relationships are formed, and old ones extinguished. In such a world, there is no inherent scarcity of purchasing power. Rather, limits on the growth of financial activity are determined by the availability of borrowing opportunities, the perceived profitability of investments, and/or the degree of acceptance of different types of financial instruments.¹⁹⁹ In other words, in advanced economies with sophisticated legal and financial systems, monetary and financial capital is not scarce, but abundant.

The notion of 'capital abundance' has profound implications for how lawyers, economists, and policymakers view the economy. For example, it is commonplace among Law & Economics scholars to assert that governments require taxation or borrowing (paid with future taxes) in order to fund their ongoing fiscal spending commitments. Contrary to this view, however, governments in fact have access to a range of instruments they can and do issue to finance new spending *ex nihilo*, ranging from coins and physical notes, to treasury and central bank notes and securities. The fact that such instruments must definitionally be first spent into circulation before they can be taxed back out subverts the commonly held view that taxes are necessary to provide revenue for government spending. Indeed, as Federal Reserve Bank of New York President Beardsley Ruml observed in a speech to the American Bar Association in 1946:

The necessity for a government to tax in order to maintain both its independence and its solvency is true for state and local governments, but it is not true for a national government [W]hose currency, for domestic purposes, is not

197. See HYMAN P. MINSKY, STABILIZING AN UNSTABLE ECONOMY 69 (2008).

198. See A. Mitchell-Innes, *What Is Money?*, 30 BANKING L.J. 377 (1913). See also A. Mitchell-Innes, *The Credit Theory of Money*, 31 BANKING L.J. 151, 154 (1914).

199. See, e.g., Marc Lavoie, *A Primer on Endogenous Credit-money*, in MODERN THEORIES OF MONEY: THE NATURE AND ROLE OF MONEY IN CAPITALIST ECONOMIES 506 (Louis-Philippe Rochon & Sergio Rossi eds., 2003). See also Michael McLeay et al., *Money Creation in the Modern Economy*, BANK OF ENG. Q. BULL. Q1 (Mar. 14, 2014), <https://www.bankofengland.co.uk/quarterly-bulletin/2014/q1/money-creation-in-the-modern-economy>.

convertible into gold or any commodity. It follows that our Federal Government has final freedom from the money market in meeting its financial requirements . . . [T]he inevitable social and economic consequences of any and all taxes have now become the prime consideration in the imposition of taxes.²⁰⁰

Thus, Ruml concludes, “[t]he public purpose which is served should never be obscured in a tax program under the mask of raising revenue.”²⁰¹

Ruml’s point about taxation can be expanded to a more general maxim: when it comes to money, the legal profession must abandon its false naturalism.²⁰² Money is not just a “thing,” it is a malleable legal technology that can be made to serve varying interests and stakeholders, depending on its design and use.

9. International Trade Does Not Have to Undermine Social Protection.

James J. Varellas III

In recent years, international trade negotiations have been at the forefront of public policy and debate in a way they have not since the collapse of World Trade Organization (WTO) talks after the protests in Seattle in 1999.²⁰³ Most significantly, the U.S. and a number of its key trading partners embarked on a new strategy of negotiating, what came to be known as “Mega-regional free trade agreements” (Mega-FTAs), after more than a decade of failed attempts to restart talks on a new round of multilateral negotiations at the WTO.²⁰⁴ The most important of these were the Trans-Pacific Partnership (TPP), a proposed twelve-country trading bloc with a combined gross domestic product (GDP) of \$27.4 trillion, comprising approximately 40% of the world economy, and the Transatlantic Trade and Investment Partnership (TTIP), a proposed agreement between the U.S. and the European Union, two regions that combined would form an even larger Mega-FTA bloc than the TPP.²⁰⁵

200. Beardsley Ruml, *Taxes for Revenue Are Obsolete*, 8 AM. AFFAIRS 35, 35–36 (1946).

201. *Id.* at 36.

202. See, e.g., Roy Kreitner, *Toward a Political Economy of Money*, in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW, 7, 8-14 (Ugo Mattei & John D. Haskell eds., 2015) (contrasting ‘naturalist’ and ‘chartalist’ approaches to understanding money).

203. Jeffery D. Wilson, *Mega-Regional Trade Deals in the Asia-Pacific: Choosing Between the TPP and RCEP?*, 45(2) J. CONTEMPORARY ASIA 345 (2015).

204. *Id.* at 346.

205. See Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/trump-abandons-trans-pacific-partnership.html>.

One of the most notable aspects of these new U.S.-led Mega-FTAs is that they intended to go far beyond tariff issues, such as the need to rationalize the so-called “noodle bowl” of bilateral trade agreements that had proliferated in the Asia-Pacific region since the WTO,²⁰⁶ to reach what are often called “behind the border” issues of domestic law and regulation. This behind-the-border agenda of liberalization, deregulation, and marketization even encompassed such critical concerns as health, the environment, safety, physical security, and banking and financial regulation.²⁰⁷ In addition, TPP and TTIP also proposed investor-state dispute settlement (ISDS) mechanisms that would enable foreign investors to bring challenges to a state’s domestic regulations before an international arbitration tribunal.²⁰⁸ As a result of the threat that these agreements would empower multinational corporations and foreign investors at the expense of the ability of sovereign states to protect their citizens, civil society groups in both the U.S. and other nations mobilized against TPP and TTIP.

This agenda for ever-deeper liberalization was more or less consistent with the sensibilities of Washington’s elite consensus on international trade, a consensus with strong intellectual roots in neoclassical economics and law and economics, and most of the initial civil society criticism and mobilization against TPP and TTIP came from groups on the left. However, in time a new generation of nationalist and nativist politicians on the right also began attacking these agreements. Perhaps the most prominent among these right-populist critics has been Donald Trump, who made opposition to TPP and the North American Free Trade Agreement (NAFTA) a centerpiece of his successful campaign for the presidency. While trade politics had featured prominently in other recent presidential elections,²⁰⁹ Trump was serious about his criticisms: he withdrew

1/23/us/politics/tpp-trump-trade-nafta.html. The eleven TPP signatories in addition to the U.S. were Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

206. See Ann Capling & John Ravenhill, *Multilateralising Regionalism: What Role for the Trans-Pacific Partnership Agreement?*, 24 PAC. REV. 553 (2011) (discussing the problem of the “noodle bowl”).

207. See Vinod K. Aggarwal & Simon J. Evenett, *The Transatlantic Trade and Investment Partnership: Limits on Negotiating Behind the Border Barriers*, 19 BUS. & POL. 549, 553–55 (2017).

208. See Andrew Reddie, *Power in International Trade Politics: Is ISDS a Solution in Search of a Problem?*, 19 BUS. & POL. 738 (2017).

209. See James J. Varellas, *The Constitutional Political Economy of Free Trade: Reexamining NAFTA-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 719 n.13 (2009) (discussing NAFTA criticisms from then-candidates Barack Obama and Hillary Clinton during the 2008 Ohio primary campaign).

the U.S. from the TPP on his first full workday in office²¹⁰ after giving an inauguration speech promising “[f]rom this this [sic] day forward, it’s going to be only America first.”²¹¹

The significance of this political shift on trade is underscored by the likelihood that the failure of TPP, which had been a centerpiece of the Obama administration’s Asia strategy, will enable Asian countries—perhaps through China’s own Regional Comprehensive Economic Partnership trade initiative—to rationalize the “noodle bowl” problem on their own with a trade bloc not dominated by the U.S. or its preferences (including not sharing the TPP’s “behind the border” ambitions),²¹² thus undermining U.S. interests in the region.²¹³ As Harley Shaiken has noted, Trump’s nationalist opposition to TPP can be contrasted with the internationalism of the opposition from progressive civil society groups on the left, who have long focused on the details of “who wins and who loses” in an international trade agreement and how new trade deals can be made and existing trade deals remade to set “rules of the game insuring that trade benefits workers, consumers, communities, and the environment” in all countries instead of further empowering corporations and investors.²¹⁴

The experience of the 1930s provides a striking historical precedent to the present moment on many issues, including trade, because then the nationalist right also purported to take up the cause of protecting society from the ravages of laissez-faire and

210. Baker, *supra* note 205.

211. Donald J. Trump, Inaugural Address, in DAILY COMP. PRES. DOC. (Jan. 20, 2017).

212. In fact, in early 2018, the remaining 11 TPP countries on their own continued to press forward on a trade deal that limited many of the controversial provisions the U.S. had been pushing, including ISDS. See Shawn Donnan, Robin Harding & Mark Odell, *Trans-Pacific Trade Deal to Go Ahead Without US*, FIN. TIMES, (Jan. 23, 2018) (“To secure the deal the remaining members agreed last year to suspend many of the most contentious rules sought by the Obama administration over years of negotiations. Among those are tough intellectual property rules and key elements of an investor-state dispute system that had been one of the TPP’s most contentious features.”).

213. See Melissa K. Griffith et al., *From Great Power Politics to a Strategic Vacuum: Origins and Consequences of the TPP and TTIP*, 19 BUS. & POL. 573, 588–90 (2017). Indeed, one might see the political backlash against TPP and its ultimate collapse at least partly as a result of an overreach in pursuit of further liberalization at all costs by the Obama White House and the agency in charge of U.S. trade negotiations, the Office of the U.S. Trade Representative. For instance, even the U.S. Department of the Treasury had to issue public warnings against the prospect of TTIP limiting domestic regulatory discretion over financial regulation. See Aggarwal & Evenett, *supra* note 207, at 560–63.

214. Harley Shaiken, *In Whose Interest? Inclusive Trade vs. Corporate Protectionism*, BERKELEY REV. LATIN AM. STUDS. 12, 13 (2016).

international trade that prioritized the interests of industry. In his 1944 classic *The Great Transformation*, the political economist Karl Polanyi argued that the political upheavals of the 1930s needed to be understood from the perspective of the failure of the liberal-utopian project of subjecting society to governance by a purportedly self-adjusting and self-regulating market.²¹⁵ By the time the last countries abandoned the classical gold standard and the international system of free trade collapsed in the 1930s, political movements aiming to remake society—all of which Polanyi saw as part of a “double movement” against market civilization—had begun taking power around the world: the New Deal in the U.S., fascism in Europe, social democracy and democratic socialism elsewhere in Europe, and Soviet state socialism all sought to limit the ravages of the market in one way or another.²¹⁶ Writing as World War II drew to a close, Polanyi warned that the collapse of nineteenth century liberalism’s project of a market civilization had made clear that the only viable and sustainable alternative to totalitarianism and fascism was a post-war society in which markets were once more embedded within society (and thus put in the service of human needs).²¹⁷

Once the character of the new international trading order built after World War II had become clear several decades later, scholars such as Fred Block and John Ruggie continued the analysis where Polanyi left off.²¹⁸ As Ruggie put it, the international monetary and trading order of the postwar decades was characterized by a “fusion of power and legitimate social purpose” in the form of what he styled the “embedded liberalism compromise: unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism” in service of policies such as full employment.²¹⁹

215. See POLANYI, *supra* note 133.

216. See *id.* at 231–68.

217. *Id.* at 256–58B (arguing that “[t]he passing of market-economy can become the beginning of an era of unprecedented freedom” if “[man] is true to his task of creating more abundant freedom for all, he need not fear that either power or planning will turn against him and destroy the freedom he is building by their instrumentality.”).

218. See FRED L. BLOCK, THE ORIGINS OF INTERNATIONAL ECONOMIC DISORDER: A STUDY OF UNITED STATES MONETARY POLICY FROM WORLD WAR II TO THE PRESENT (1977); John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982).

219. Ruggie, *supra* note 218, at 385, 393. For example, under the General Agreement on Tariffs and Trade, “quantitative restrictions were prohibited, but were deemed suitable measures for safeguarding the balance of payments—*explicitly*

From this perspective, the neoliberal trade agreements that have become familiar over the past 30 or so years, such as TPP, TTIP, and NAFTA, are radical departures from the more socially protective trading order of the initial postwar period, and the need to return to a more balanced trading system that puts human needs before the rights of multinational corporations and investors can serve as an organizing principle for formulating an international trading order, as well as a complementary and supporting international monetary system, for a post-neoliberal age.

Looking forward from the decades of economic and political catastrophe culminating in World War II, Polanyi argued the individualistic conception of economic “freedom” of the classical liberals and their economic models, for which the classical system of “free trade” was perhaps the greatest accomplishment, represented a false utopia because the scale of hardship it entailed for people and their environment rendered it socially unsustainable. As a result, the collision between the marketization of life and what Polanyi called “the reality of society” inevitably leads to political and social movements that seek to restore social protection, either through the right’s “relinquishing [of] freedom and glorifi[cation of] power” or the left’s “uphold[ing of] the claim to freedom, in spite of [the necessity of socially organized regulation].”²²⁰ While Polanyi did not foresee a revival of the project of market civilization, the rise of neoliberalism beginning in the 1970s, and the accompanying explosion in economic inequality and ecological crisis,²²¹ appears to point to another stark political choice between reaction and fascism on the one hand, or a new left project of recreating “the meaning of freedom in a complex society” by “remov[ing] all removable injustice and unfreedom.”²²² As with other domains of law and policy, the latter project entails remaking the international trading regime so

including payments difficulties that resulted from domestic policies designed to secure full employment.” According to Ruggie, “that multilateralism and the quest for domestic stability were coupled and even conditioned by one another reflected the shared legitimacy of a set of social objectives ‘as a single entity.’ Therefore, the common tendency to view the postwar regimes as liberal regimes, but with lots of cheating taking place on the domestic side, fails to capture the full complexity of the embedded liberalism compromise.” *Id.* at 397–98.

220. POLANYI, *supra* note 133, at 257–58A.

221. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014); Michael Burawoy, *Facing an Unequal World*, 63 *CURRENT SOC.* 5 (2015).

222. POLANYI, *supra* note 133, at 258B. See also G. John Ikenberry, *The End of the International Liberal Order?*, 94 *Int’l Affairs* 7, 17 (2018) (“[T]he troubles today might be seen as a ‘Polanyi crisis’—growing turmoil and instability resulting from the rapid mobilization and spread of global capitalism, market society and complex interdependence, all of which has overrun the political foundations that supported its birth and early development.”).

that it once again elevates the protection of society, human needs, and other conditions conducive to human flourishing in the broadest sense over maximizing corporate profits.²²³ Ruggie's account of the embedded liberalism compromise shows clearly that such a regime can be a viable alternative to the type of right-populist demands for protection from free trade voiced by politicians such as Trump.²²⁴ International trade does not have to undermine social protection.

10. Transaction Costs Matter.

Reza Dibadj

Neoclassical law and economics assumes that private actors, left to their own bargaining, will achieve an optimal allocation of resources. In the words of the indefatigable Richard Posner, "resources tend to gravitate toward their most valuable uses if voluntary exchange—a market—is permitted."²²⁵ This tradition claims its intellectual roots in a landmark article by Ronald Coase, *The Problem of Social Cost*,²²⁶ where he first posits that private parties can achieve an optimal distribution of resources regardless of how initial entitlements are distributed.²²⁷ However, neoclassical adherents conveniently limit their analysis to the first part of Coase's article, where he highlights a theoretical world of zero transaction costs.²²⁸ In the real world, of course, transaction costs matter and include "search and information costs, bargaining and decision costs, policing and enforcement costs."²²⁹

Unfortunately for such simplistic assumptions, transaction costs matter. As just one example, consider that the modern firm would not even exist in a world of zero transaction costs.²³⁰ After all,

223. POLANYI, *supra* note 133.

224. Ruggie, *supra* note 218, at 392.

225. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11 (5th ed. 1998).

226. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 837 (1960).

227. *See id.* at 850 ("It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.")

228. *See id.* at 843 ("But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.")

229. Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979). *See also* Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611, 615 (1989) (transaction costs are "(1) get-together costs, (2) decision and execution costs, and (3) information costs.")

230. *See, e.g.*, R. H. COASE, *THE FIRM THE MARKET AND THE LAW* 7 (1988) ("But perhaps the most important adaptation to the existence of transaction costs is the emergence of the firm.")

if business could be transacted via the price mechanism, there would be no need for organizations to have developed alongside markets.²³¹

The supervening irony in all of this is that the second part of Coase's *The Problem of Social Cost* plainly states that the "argument has proceeded up to this point on the assumption . . . that there were no costs involved in carrying out market transactions. This is, of course, a *very unrealistic assumption*."²³² In a later book, Coase points out quite clearly that the "world of zero transaction costs has often been described as a Coasian world. *Nothing could be further from the truth*. It is the world of modern economic theory, one which I was hoping to persuade economists to leave."²³³ He even postulates that:

There is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when . . . a large number of people are involved and in which therefore the costs of handling the problem through the market or the firm may be high.²³⁴

What is fascinating is that Coase's logic unwittingly leads in the same direction as that espoused by the leading twentieth century welfare economist, A.C. Pigou,²³⁵ whose work Coase initially set out to refute.²³⁶ The law and economics literature virtually ignores this point.²³⁷

231. Indeed, Coase notes that the "limit to the size of the firm is set where its costs of organizing a transaction become equal to the cost of carrying it out through the market." *Id.* at 7.

232. Coase, *supra* note 226, at 850 (emphasis added).

233. COASE, *supra* note 230, at 174 (emphasis added).

234. Coase, *supra* note 226, at 852–53. *See also id.* ("This discussion should not be taken to imply that an administrative allocation of resources is inevitably worse than an allocation by means of the price mechanism. The operation of the market is not itself costless, and, if the costs of operating the market exceeded the costs of running the agency by a sufficiently large amount, we might be willing to acquiesce in the malallocation of resources resulting from the agency's lack of knowledge, inflexibility, and exposure to political pressure.")

235. *See* A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932).

236. *See* Coase, *supra* note 226, at 837.

237. Carl Dahlman and William Fischel are the rare economists who have made a similar observation. *See* WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS* 121 (1985) ("Despite my claim that there is little fundamentally separating Pigovian from Coasian analysis, two schools of thought on this persist."); Carl J. Dahlman, *The Problem of Externality*, 22 *J.L. & ECON.* 141, 160 (1979) ("[T]he Coase analysis implies one of two corrective measures: (i) find out if there is a feasible way to decrease the costs of transacting between market agents through government action, or (ii), if that is not possible, the analysis would suggest employing taxes, legislative action, standards, prohibitions, agencies, or whatever else can be thought of that will achieve the allocation of resources we have already decided is preferred. . . . In this

Fortunately, in the ensuing decades an entire branch of economics, transaction cost economics (TCE), has developed in response to this reality.²³⁸ Most notably, recent Nobel laureate Oliver Williamson has convincingly argued that TCE “holds that alternative modes of governance differ in discrete structural ways. Incentive intensity, administrative controls, and contract law regime are the key attributes out of which private sector governance works.”²³⁹ Yet, leaving aside for the moment the impact of TCE within economics qua economics, transaction costs remain understudied in law & economics.²⁴⁰

11. Competition Can Be Socially Corrosive and Wasteful.

Sandeep Vaheesan

Competition is one of the talismanic words in law and economics, and indeed, American life. Competition is hailed as an unqualified good and often touted as a solution to what ails society today. The value of competition is endorsed across most of the ideological spectrum. Conservatives decry the lack of competition in schools and taxi cab services.²⁴¹ Progressives highlight the dearth of competition among multinational corporations and call for a revival of antitrust law.²⁴²

way, the Coase recommendations arrive at exactly the same policy implications that the correct Pigou analysis does . . .”).

238. For an overview of transaction cost economics, see Christopher S. Boerner & Jeffery T. Macher, *Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences*, 10 *BUS. & POL.* 1, 3 (2008) (“The basic insight of TCE is to recognize that in a world of positive transaction costs, exchange agreements must be governed, and that, contingent on the transactions to be organized, some forms of governance are better than others.”); Howard A. Shelanski & Peter G. Klein, *Empirical Research in Transaction Cost Economics: A Review and Assessment*, 11 *J.L. ECON. & ORG.* 335, 337 (1995) (“TCE tries to explain how trading partners choose, from the set of feasible institutional alternatives, the arrangement that offers protection for their relationship-specific investments at the lowest total cost.”).

239. Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 *J.L. ECON. & ORG.* 306, 313 (1999).

240. As Williamson himself has observed, “[E]conomic approach to law’ is characteristically deficient in microanalytic respects . . . As I have observed elsewhere, this tradition relies heavily on the fiction of frictionless and/or invokes transaction cost considerations selectively. However powerful and useful it is for classroom purposes and as a check against loose public policy prescriptions, *it easily leads to extreme and untenable ‘solutions.’*” Oliver E. Williamson, *Franchise Bidding for Natural Monopolies—In General and with Respect to CATV*, 7 *BELL J. ECON.* 73, 74 (1976) (citations omitted) (emphasis added).

241. *E.g.*, Jim Geraghty, *An Uber for Education*, *NAT. REV.* (Nov. 19, 2014), <https://www.nationalreview.com/2014/11/uber-education-jim-geraghty/> (contending that a competitive, free-market approach to education and improve failing schools).

242. *E.g.*, Ryan Cooper, *Why Dismantling Amazon Really Could Rescue ‘Trump Country’*, *THE WEEK* (Apr. 2, 2018), <https://theweek.com/articles/764069/why->

While reinvigorating competition between large corporations would transfer power and wealth from big businesses to consumers, workers, small businesses, and citizens,²⁴³ a *general* promotion of competition would not have salutary effects. On the contrary, competition can produce negative economic, political, and social impacts. Competition is desirable in certain areas but undesirable and detrimental to societal welfare in other areas. Three examples illustrate how competition is deficient as a general social organizing principle and should be promoted selectively, not categorically.

Some infrastructure services are natural monopolies and not conducive to market competition. Electricity, natural gas, and water distribution are examples of natural monopolies. Due to economies of scale, these services are generally best provided through a single entity rather than through multiple competing entities. In concrete terms, building and operating a single electric transmission line is more cost effective than building and operating five parallel competing lines. Given these cost structures, competition is not socially desirable and likely to lead to wasteful duplication and higher rates for the public. At the retail level, the success of competition in essential services requires a critical mass of users to have the time, ability, and interest to comparison shop across providers—a questionable proposition.²⁴⁴ Instead of relying on competing providers in markets, vital infrastructure is typically provided through a publicly-regulated or publicly-owned firm.

Past attempts at introducing competition into natural monopoly sectors counsel skepticism going forward. So-called “deregulatory” programs have sometimes transformed publicly-regulated monopolies into unconstrained, highly extractive, and dangerous monopolies and oligopolies. Consider the rampant

dismantling-amazon-really-could-rescue-trump-country (arguing that addressing market competition, and creating more competition, can reduce regional inequality).

243. See, e.g., José Azar et al., *Labor Market Concentration* 17-18 (NBER Working Paper No. 24147, Dec. 2017) (arguing that increased labor concentration is associated with lower posted wages); Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (NBER Working Paper No. 22750, 2016), <http://www.nber.org/papers/w22750> (finding that mergers and acquisitions are associated with increased markups); Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* 31 (NBER Working Paper No. 23687, Aug. 2017), <http://www.nber.org/papers/w23687> (arguing that rising market concentration contributes to declining labor power and labor market dynamism); see also Luigi Zingales, *Towards a Political Theory of the Firm*, J. ECON. PERSP. 113, 122–25 (2017) (explaining that increased market concentration has led to increased political power of the firms).

244. See Ali Horacsu, Seyed Ali Madanizadeh & Steven L. Puller, *Power to Choose? An Analysis of Consumer Inertia in the Residential Electricity Market*, 9 AM. ECON J. 192 (2017).

manipulation in California's wholesale electricity market in 2000²⁴⁵ and the disastrous program to inject competition into railways in the United Kingdom.²⁴⁶ These examples suggest that in infrastructure provision the imperfections of public regulation or ownership are much more tolerable than the imperfections of (nominal) competitive markets.

Labor markets are another area in which greater competition can be harmful. Specifically, unchecked competition between workers can lead to lower wages, the elimination of employment benefits, and increased precariousness. An extreme example would be to abolish child labor laws in the name of promoting labor market competition. Karl Polanyi argued that treating labor as just another "commodity" and encouraging unrestrained competition among workers corroded the foundations of society in industrializing England.²⁴⁷

Thanks to labor market restraints, a sizable fraction of the working classes in the Western world enjoyed material abundance and security in the postwar era. By unionizing and limiting competition among themselves, workers built countervailing power against employers. This was particularly true in heavy industry. Through unionization, industrial workers boosted wages and benefits for themselves and set labor market norms that helped workers in non-unionized sectors as well.²⁴⁸

The big business-led attack on the social democratic state and labor market institutions of the postwar period has reversed the broad-based prosperity of the so-called thirty glorious years. Due to the successful campaign against unions and the resulting atomization of the labor force,²⁴⁹ power in labor markets has tilted decisively in favor of employers.²⁵⁰ And developed nations have promoted a "globalization" project that favors the interests of

245. See Severin Borenstein et al., *Measuring Market Inefficiencies in California's Restructured Wholesale Electricity Market*, 92 AM. ECON. REV. 1376, 1386 (2002).

246. See CHRISTIAN WOLMAR, *ON THE WRONG LINE: HOW IDEOLOGY AND INCOMPETENCE WRECKED BRITAIN'S RAILWAYS* (2005).

247. See POLANYI, *supra* note 133, at 33–38.

248. See Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* (NBER Working Paper No. 13106, May 2007), <http://www.nber.org/papers/w13106.pdf>; Claudia Goldin & Robert Margo, *The Great Compression: The Wage Structure in the United States at Mid-Century*, 107 Q. J. ECON. 1, 32 (1992).

249. See Quoc Trung Bui, *50 Years of Shrinking Union Membership in One Map*, NPR PLANET MONEY (Feb. 23, 2015), <https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> (illustrating the significant decline of union membership by each state from 1964 to 2012).

250. See Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise of U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 533 (2011).

multinational corporations²⁵¹ and pits workers around the world, especially those in manufacturing, in direct competition with each other.²⁵² The increase in competition between workers both domestically and internationally has contributed to the diminished standing of labor. Even as labor productivity has increased, median wages in the United States have stagnated since the 1970s.²⁵³

In government, competition between political entities is likely to yield destructive races to the bottom. For instance, cities and states may compete against each other to attract highly mobile corporations to set up or expand operations in their jurisdictions.²⁵⁴ This competition may take the form of generous tax holidays and public subsidies. As they entice corporations to relocate and expand, state and local governments starve themselves of resources. Because they lack the monetary sovereignty of the federal government and do not control the supply of currency, states and cities that shrink their revenue bases and increase their expenditures through these carrots to big business may face serious budgetary constraints. They may have to cut vital public services and collect revenue through much less equitable means, such as draconian fines and penalties on the working class and poor.²⁵⁵

Competition among U.S. banking regulators was a contributor to the global economic crisis in 2007-08. To increase their budgets and expand their jurisdictions, regulators competed to persuade financial institutions to charter with them. This competition took the form of promising supervised entities more relaxed oversight of financial speculation and consumer lending than what “rival” regulators offered.²⁵⁶

The recent contest between cities and states to attract Amazon’s second headquarters is a dramatic example of this

251. See JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK 187–90* (2007).

252. See David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205 (2016); Michael W.L. Elsby, Bart Hobijn & Aysegul Sahin, *The Decline of the U.S. Labor Share*, 2013 BROOKINGS PAPERS ON ECON. ACTIVITY 1 (2013).

253. See Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL’Y INST., Jan. 6, 2015, <http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf>.

254. See Ruth Simon, *U.S. Cities Battle Each Other for Jobs with \$45 Billion in Incentives*, WALL ST. J. (Mar. 16, 2017, 10:52 AM), <https://www.wsj.com/articles/u-s-cities-battle-each-other-for-jobs-with-45-billion-in-incentives-1489675343>.

255. See Anne Stuhldreher, *How Cash-Strapped Local Governments Target the Poor*, WASH. MONTHLY (July 11, 2017), <https://washingtonmonthly.com/2017/07/11/how-cash-strapped-local-governments-target-the-poor/>.

256. See Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 156–60 (2009).

insidious political competition. By putting out a request for proposals for its second headquarters, Amazon fully exploited inter-city and inter-state rivalry. Municipalities and states pledged to shower Amazon with subsidies, infrastructure investments, and tax holidays and even transfer core functions of sovereignty to the online retail giant.²⁵⁷ For instance, Illinois offered to let Amazon collect and keep fifty percent of the income taxes that employees at the second headquarters would pay to the state.²⁵⁸ In exchange for the promise of 50,000 jobs and prestige, the winner of this contest may have deprived itself of significant tax revenues and placed itself in a fiscal straightjacket.

Due to a dearth of competition in numerous product and labor markets, monopolistic and oligopolistic corporations possess and exercise the power to prosper at the expense of consumers, workers, businesses, and citizens. The United States does need a discrete competition—or more precisely an antimonopoly—program. Yet, competition is not a sound social organizing principle and has major deficiencies. In many areas, competition is likely to have perverse effects. Injecting competition into the provision of infrastructure and increasing competition between workers and governments can deepen existing immiseration, inequality, and insecurity. Rather than help us return to a comparative golden age of social democracy, a blind promotion of competition across domains may, in actuality, accelerate the decades-long transfer of power and wealth from the many to the few.

257. Karen Weise & Spencer Soper, *Amazon Second HQ Bid Ignites 'Sadistic' Frenzy Across North America*, BLOOMBERG (Oct. 12, 2017), <https://www.bloomberg.com/news/articles/2017-10-12/amazon-second-hq-bid-ignites-sadistic-frenzy-across-north-america>.

258. Bill Ruthhart & Monique Garcia, *Illinois, Chicago Letter to Amazon: \$2 Billion in Tax Breaks, Maybe More*, CHI. TRIB. (Oct. 24, 2017), <http://www.chicagotribune.com/news/local/politics/ct-met-illinois-amazon-tax-incentives-20171023-story.html>.