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I. INTRODUCTION

Since the 1970s, the public economic discourse of the United States has often been shaped by the opposition between "government" and "the market."[1] Public policy has routinely been framed in terms of an ostensible choice between "free market" solutions and solutions that rely on government "intervention" or "interference" in the market.[2] More generally, markets have been associated with freedom, while government

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1. *See infra* Part II.A.
2. *See infra* Part II.A.

has been associated with inefficiency, or even oppression.[3] The most celebrated example of anti-government skepticism in our public discourse may be President Reagan's declaration in his first inaugural address that "government is not the solution to our problem; government is the problem."[4] But even earlier, President Carter foreshadowed the anti-government rhetoric of the Reagan era by criticizing the capacities of government in his 1978 State of the Union address: "Government cannot solve our problems . . . . Government cannot eliminate poverty or provide a bountiful economy or reduce inflation or save our cities or cure illiteracy or provide energy. . . . Only a true partnership between government and the people can ever hope to reach these goals."[5]

After Reagan, President George H. W. Bush drew the contrast between government and the market even more explicitly, declaring that "the clumsy hand of government is no match for the uplifting hand of the marketplace."[6] President Bill Clinton famously affirmed the bipartisan acceptance of skepticism toward government by announcing in 1996 that "[t]he era of big government is over."[7] The second President Bush, in the midst of the greatest economic crisis since the Great Depression, continued to caution that "any time the government intervenes in the market, it must do so with clear purpose and great care."[8] Only after the collapse of Lehman Brothers did Bush grudgingly concede that while his "natural instinct is to oppose government intervention . . . these are not normal circumstances. The market is not functioning properly."[9]

As late as August 2008, then-candidate Barack Obama could be heard declaring that "[t]he market is the best mechanism ever invented for

3. *See infra* Part II.A.

4. President Ronald Reagan, First Inaugural Address (Jan. 20, 1981).

5. President James E. Carter, Jr., State of the Union Address (Jan. 19, 1978). Many of the transformations in economic policy, politics, and debate that are conventionally associated with Reagan began in the 1970s, although for convenience I will often refer to these developments under the heading of "the Reagan era." *See* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 7 (2010) (emphasizing that the roots of the "winner-take-all economy" can be found "against common expectations, in the political transformations of the 1970s"); JAMES T. PATTERSON, RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO *BUSH V. GORE* 115 (2005) (describing "a surge of deregulatory legislation that passed in the late 1970s" in response to "a widespread feeling that the still sluggish American economy needed to be 'unshackled' from strict public restraints so that the 'liberating forces of market competition' could come into play"). *See generally* SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974-2008 (2009) (identifying Reagan as the political symbol of an era that began in the 1970s).

6. *The 1992 Campaign: Excerpts from Bush's Economic Speech in Detroit*, N.Y. TIMES, Sept. 11, 1992, at A30.

7. President William J. Clinton, 1996 State of the Union Address (Jan. 23, 1996).

8. Office of the Press Secretary, President Bush Visits the Economic Club of New York, Mar. 14, 2008.

9. *President Bush's Speech to the Nation on the Economic Crisis*, N.Y. TIMES (Sept. 24, 2008), https://www.nytimes.com/2008/09/24/business/economy/24text-bush.html.

efficiently allocating resources to maximize production."[10] Echoing the arguments of Friedrich Hayek's *Road to Serfdom* and Milton Friedman's *Capitalism and Freedom*, Obama added: "I also think that there is a connection between the freedom of the marketplace and freedom more generally."[11] For Mitt Romney, Obama's opponent in the 2012 election, such praise was not enough: "[T]his is a president," he lamented, "who . . . thinks that the government can do a better job than the free market at picking successful enterprises."[12]

It is not difficult to find other less prominent public figures from the last several decades, and especially since the 1990s, arguing even more explicitly for the superiority of "markets" over "government," as described below in Section II.[13] The most succinct example may be the economist and Republican Representative Dick Armey's mantra that "the market is rational and the government is dumb."[14]

Yet there is something curious about thinking of economic policy in terms of a choice between "government" and "the market." At least on its face, the widespread, supposedly obvious opposition makes no sense.

As a chorus of largely ignored voices has been insisting for well over a century, even supposedly "laissez-faire" markets are creatures of the state and its market-structuring laws.[15] Far from being spontaneous natural orders, markets in the United States have always been changeable, politically determined legal constructions. It is, of course, theoretically possible for markets to exist in the absence of state-backed laws.[16] But

10. Bernard E. Harcourt, *On the American Paradox of* Laissez Faire *and Mass Incarceration*, 125 HARV. L. REV. F. 54 (2012) (quoting David Leonhardt, *A Free-Market-Loving, Big-Spending, Fiscally Conservative Wealth Redistributionist*, N.Y. TIMES (Aug. 24, 2008)).

11. Harcourt, *supra* note 10.

12. *Transcript: Cain Endorses Gingrich*, CNN (Jan. 29, 2012).

13. *See infra* Part II.A.

14. RICHARD K. ARMEY, THE FREEDOM REVOLUTION 316 (1995); *see* NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA 190 (2017) ("'The market's rational, the government's dumb' was 'Armey's Axiom No. 1,' which he repeated constantly . . . ."). A more recent, similarly categorical expression can be found in a 2013 speech by Republican Senator Ted Cruz in which he quoted a tweet stating that "ObamaCare" should be defunded "[b]ecause the free market works and government regulation does not." *Transcript: Sen. Ted Cruz's Speech*, HILL (Sept. 25, 2013).

15. *See infra* Appendix Section A.

16. *See* Simon Deakin, David Gindis, Geoffrey M. Hodgson, Huang Kainan, & Katharina Pistor, *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMPARATIVE ECON. 188, 189-91 (2017) (collecting scholarship on law without states, and noting the historical limitations of such law). For a critique of the traditional view that itinerant medieval merchants were governed by an autonomous *lex mercatoria* that existed independently from local laws, see Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 AM. U. INT'L L. REV. 686-812 (2006). Based on prior work, I would propose that discussions of states and markets might sometimes be clarified by replacing the often unclear or arbitrary distinction between "custom" and "law" with more concrete distinctions between the specific institutions that the parties perceive as binding. *See generally* Gregory Brazeal, *Law, War, and Four Modes of Conflict*, 20 OR. REV. INT'L L. 531, 559-81 (2019)

our markets—the markets that have been the focus of political debates throughout the history in the United States—have always, overwhelmingly, been markets structured by legal rules that are chosen, applied, and enforced by federal and state governments. Markets were no less the product of government-defined, government-backed law in the Gilded Age than markets have been since the New Deal. Only the rules have changed.

Moreover, there is no single set of rules that defines a "free market." Markets can be designed in any number of ways, with any number of often predictable consequences—not only for the distribution of wealth, but for other matters of concern to political economy, such as growth, innovation, resilience to shocks, environmental sustainability, and political power. How a state designs its markets is inevitably a matter of political choice. There is no natural or politically neutral baseline.[17]

These ideas are far from new. The view of markets as legal constructions has been associated over the years with various intellectual movements, from "institutionalist economics" and "legal realism" in the early twentieth century, through "critical legal studies" ("CLS") in the late twentieth century, to "law and political economy" ("LPE") today.[18] This article refers to the view of markets as legal constructions as "legal institutionalism," drawing on the term used by some of its leading contemporary proponents.[19] The essential insight of legal institutionalism is that markets, in the overwhelming majority of cases that matter to us,

(distinguishing four modes of conflict based on legal institutions). In terms of the "four modes" model, much of what is referred to as "custom" falls under "mode two" (shared rules but no shared judge or enforcer) while much of what is referred to as "law" falls under "mode four" (shared rules, judge, and enforcer). *See id.* at 577.

In any case, none of the arguments in the present article require taking a position on the extent to which markets can and sometimes do exist apart from states, or apart from other forms of governance. It is sufficient for the purposes of this article to establish that many people use language suggesting that at least laissez-faire markets somehow exist apart from state-defined, state-backed legal rules. For evidence that this language is, in fact, widespread, despite the fact that it appears to rest on assumptions that are in some sense obviously false, see below Part II.A-B.

Finally, I take this opportunity to note that this article will ordinarily use the terms "government" and "the state" interchangeably, following contemporary popular usage. For illustrations of how "government" might be productively used to refer to something *other* than government by the state, see ELIZABETH S. ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017); JOHN DEWEY, *Democracy and Educational Administration*, *in* 11 JOHN DEWEY: THE LATER WORKS: 1925-1953, at 217, 221 (Jo Ann Boydston ed., 1987) (1937) (rejecting the "superficial view that holds government is located in Washington and Albany," because "[t]here is government in the family, in business, in the church, in every social group"); MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977-1978, at 88 (Graham Burchell trans., 2007) (arguing that "the general problem of 'government'" also encompasses "how to govern oneself," "the government of souls," and "the government of children").

17. *See infra* Part II.C.

18. *See infra* Appendix Sections A-B.

19. *See, e.g.*, Deakin et al., *supra* note 16.

are best understood as the product of changeable, politically determined legal rules that are created, applied, and enforced by states.

Section II(A) introduces the view of markets as legal constructions through a critical analysis of the "government versus market" distinction in the public economic discourse of the United States over the last several decades. Readers who are already persuaded that the "government versus market" distinction played a prominent role in shaping popular economic debates are invited to skip Section II(A). It may be worth noting at the outset that, at least in the author's experience, readers of the arguments in this article often fall into one of two camps. First, there are those who believe that the constitutive role of government in markets is so obvious that the critique of the "government versus market" distinction is barely worth stating, and certainly not worth arguing at length. Second, there are those who, by contrast, believe the "government versus market" distinction is obviously, even self-evidently true. Each camp seems to be largely unaware of the other's existence. Section II(A) largely addresses itself primarily to the first camp, attempting to make the case that the "government versus market" distinction is, in fact, a significant, even central, feature of the public economic discourse of the last several decades in the United States.

Section II(B) turns to the second camp, addressing the apparently common-sensical objection that the "government versus market" distinction makes sense because "markets" obviously *are* distinct from "government." This reaction may be accompanied by the observation that there obviously *is* a choice between "letting the market decide," on the one hand, and "planning," on the other, or between "free competition" and "picking winners and losers." To someone who has never questioned the opposition between markets and government, the opposition may at first seem uncontroversial. Either an individual is free to choose what to buy and sell in the market, or the government decides—where is the room for dispute? Section II(B) attempts to shake loose the apparently intuitive appeal of the "government versus market" distinction.

In doing so, Section II(B) offers the article's central introduction to the legal institutionalist view of markets. The section concludes by addressing a difficult question raised by the preceding discussion: how is it possible that our public economic discourse has rested for so long on premises that are, at least when taken at face value, plainly false?

Section II(C) completes the introduction to the legal institutionalist view of markets by offering concrete illustrations of the legal institutionalist claim that the design of markets is inevitably a matter of political choice, often with relatively predictable benefits for some groups over others, and that markets can take many forms, based on many different legal rules, without ceasing to be "markets" in the general sense

of systems of exchange based on prices.

The critique of the "government versus market" distinction in Sections II(A-C) creates a puzzle for contemporary discussions of "neoliberalism." Section II(D) attempts to resolve this puzzle. Recent scholarship on neoliberalism has emphasized that many of the leading neoliberal theorists defined themselves in part by their *rejection* of the "laissez-faire"[20] or "classical liberal"[21] opposition between "government" and "the market." Section II(D) concludes that if neoliberal thought distinguishes itself from so-called laissez-faire thought through its promotion of a strong role for states in markets, then the public economic discourse of the neoliberal era in the United States was, paradoxically, not neoliberal.

By discussing the use of the term "neoliberal," Section II(D) also clarifies the precise focus of this article: the *public economic discourse* of recent decades in the United States—that is, the vocabularies, assumptions, and arguments that shaped popular economic debate, as reflected in popular books, opinion pieces, journalism, and the pronouncements of political candidates and public officials. To be clear, this article is not concerned with analyzing the economic policies of the last several decades, nor with analyzing professional economic thought, except to the extent that such policies and thought played a role in shaping

20. By using the term "laissez-faire," I obviously do not mean to suggest, in contradiction to the central claims of this article, that the various market rules advocated by proponents of "laissez-faire" somehow reflect the withdrawal of the state from the market, nor that the actual economic policies of the United States have ever reflected laissez-faire ideals. As Morton Horwitz notes, "[s]trictly speaking, there could never be a laissez-faire regime unless judges refused to enforce all contracts and refused to compensate for all injuries to persons and property." MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 xv (1977). On the phrase "laissez-faire," see below notes 34, 36.

21. In this article, I will use the term "classical liberal" interchangeably with "laissez-faire," purely for stylistic variation, and out of a recognition that the stand-alone term "liberal" underwent an ideological transformation in the public economic discourse of the United States in the 1930s. *See* LAWRENCE B. GLICKMAN, FREE ENTERPRISE: AN AMERICAN HISTORY 144-46 (2019). My invocation of "classical liberal" is not meant to call to mind, for example, John Locke or Adam Smith, both of whom wrote before the term "liberalism" existed, but rather the self-identified "liberals" of the later nineteenth century United States, around the time that legal historians often associate with "classical legal thought." *See generally* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1944) (describing the thought of Herbert Spencer, William Graham Sumner, and other Gilded Age advocates of laissez-faire); HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM: FROM ANCIENT ROME TO THE TWENTY-FIRST CENTURY 42-43 (2018) (describing the history of the modern, political meaning of the term "liberal" and noting that the term "liberalism" emerged only around 1811, and in France); RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865-1896, at 172-212 (2017) (describing Gilded Age liberalism); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 (1998) (describing classical legal thought). Others have used the term "classical liberalism" in different senses. *See, e.g.*, LUDWIG VON MISES, LIBERALISM IN THE CLASSICAL TRADITION 194-95 (Ralph Raico trans. 2002) (1927) (describing Hume, Smith, and "especially" Bentham as founding the literature of "classical liberalism," with Mill an "epigone" who "especially in his later years, under the influence of his wife," was "full of feeble compromises"); F.A. HAYEK, *Preface to the 1976 Edition*, *in* THE ROAD TO SERFDOM 54 (Bruce Caldwell ed., 2003) (1944) (Hayek describing his later work as an attempt "to restate and make more coherent the doctrines of classical nineteenth-century liberalism").

public economic discourse.

But at this point a skeptic, especially one with little regard for the role of public opinion in a democracy, might object: why does the language used in public economic discourse matter? Even if we accept that the distinction between "government" and "the market" makes no sense, why does it matter if the public happens to discuss economic policy in terms of a nonsensical distinction?

Section III responds by making a case for the significance of legal institutionalism. Section III argues that, at least from an egalitarian perspective, the widespread acceptance of the "government versus market" distinction has harmful political effects that go beyond the public's views regarding any particular economic policy. The distinction reinforces what the article refers to as the myth of "just deserts"—the widely accepted, often racially infused idea that economic inequalities in the United States are best understood as the result of differences in individual character. From an egalitarian perspective, the greatest value of a legal institutionalist reframing of public economic debates is legal institutionalism's capacity to undermine the myth of "just deserts."

The article concludes with a bibliographical appendix that draws attention to some of the leading contributions to legal institutionalist thought in recent years. A number of writers in different disciplines, traditions, and settings have offered defenses of the view of markets as legal constructions, but their contributions have often developed independently, without apparent recognition of one another. The goal of the appendix is to compile some of the different strands of legal institutionalist thought in the hope of encouraging greater interdisciplinary discussion in the future.

The century-old idea that our markets are changeable creatures of the state rather than spontaneous reflections of a natural order may be one of the most significant ideas ever produced by legal scholarship. But it has never played a significant role in public economic debates in the United States. This article suggests that in the wake of the upheavals of recent years, as so many of the unspoken political and economic assumptions of the last half-century have apparently become unmoored, it is worth considering whether the time has finally come to discard the illusory distinction between "government" and "market," to abandon our habitual invocations of government "interference" in economic matters, and instead to choose, democratically and without imaginary constraints, the economic rules that will govern our lives.

II. "GOVERNMENT" VERSUS "THE MARKET" IN THE REAGAN ERA

The claim that public discourse in the United States during the Reagan

era routinely framed economic policy in terms of an opposition between "the free market" and an oppressive, wasteful "government" may at first glance seem obvious and thus unnecessary to argue.

But once the constitutive role of law in markets is accepted, it may be tempting to reverse course. That is, once it is accepted that the opposition between "government" and "the market," at least on its face, does not make sense, it may be tempting to deny that anyone asserted the opposition. The observer who in one moment insists on the obvious ubiquity of the contrast between "the market" and "government" in the Reagan era may in the next moment insist that at the same time *no one denied* the fact that our markets, and even idealized laissez-faire markets, are structured by government-backed legal rules.

Did the public economic discourse of the Reagan era assume an opposition between "government" and "the market," or not?

The following section assembles an illustrative collection of evidence that praise of "the market" as a superior alternative to "government" activity, rather than as an *expression* of government activity, was in fact a defining feature of public economic discourse during the Reagan era.

As noted in the Introduction, any reader who is already persuaded that the distinction between "government" and "the market" played a central role in the public economic discourse of the last several decades may wish to proceed to Section II(B).

A. The Evidence

1. The Tea Party—and Richard Posner

In 2009, as the Tea Party movement gained strength, an opponent of President Obama's health care legislation forcefully demanded to his House representative: "Keep your government hands off my Medicare."[22]

22. *See, e.g.*, Timothy Noah, *The Medicare-Isn't-Government Meme*, SLATE (Aug. 5, 2009). More recently, the 2022 Republican candidate for the U.S. Senate in New Hampshire, retired U.S. Army brigadier general Don Bolduc, seemed to echo the idea of protecting Medicare from government interference when he "denounced the provision in Democrats' Inflation Reduction Act authorizing Medicare to negotiate lower drug prices, saying, 'Anything the government's involved in, it's not good, it doesn't work.'" Trip Gabriel, *In New Hampshire, Republicans Weigh Another Hard-Right Candidate*, N.Y. TIMES (Aug. 31, 2022). On the Tea Party movement, see generally JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 203-42 (2016) (history of the Tea Party movement); THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM (2016) (analysis of the Tea Party movement). It is disorienting to compare the embrace of Medicare by an anti-government voter in 2009 with Ronald Reagan's warning in 1961 that socialized medicine—that is, what later became Medicare—would lead to the end of American freedom, or with Republican presidential candidate Mitt Romney's 2012 warning that with the enactment of Obamacare, which in many ways resembled Romney's health care plan in

The anecdote attracted widespread ridicule.[23] Observers mocked the frustrated speaker for apparently failing to recognize that Medicare is, in fact, a government program.[24]

But countless other, structurally similar distinctions between "government" and "the market" passed unremarked in the everyday economic discourse of the last several decades, and continue to pass unremarked today. Routine references to government "intervention" or "interference" in the market provoke no laughter, even though such references seem to assume that "the market" exists apart from the state until the state "intervenes" through some type of "regulation." Sophisticated observers scoff at the idea that the government should not interfere in Medicare—because how could the government *not* interfere in what it created and administers? But the same observers react very differently to discussions of whether the government should or should not "interfere" in markets, even though an analogous objection seems to apply. How could the government *not* interfere in what it created and administers through the definition, application, and enforcement of, at the very least, the laws of property, contracts, and torts?

For example, a 1974 article by the Chicago School law and economics pioneer Richard Posner, one of the leading public intellectuals of the Reagan era, begins: "A major challenge to social theory is to explain the pattern of government intervention in the market—what we may call 'economic regulation.' Properly defined, the term refers to taxes and subsidies of all sorts as well as to explicit legislative and administrative controls over rates, entry, and other facets of economic activity."[25] Rather than being greeted by scornful laughter, the article has been cited over

Massachusetts, "we will have effectively ceased to be a free-enterprise society." GLICKMAN, *supra* note 21, at 53.

23. *See* Noah, *supra* note 22.

24. In the speaker's defense, public policies during the Reagan era were often designed in ways that obscured the beneficial role of government. Rather than "visible benefits administered fairly directly by the government," Reagan-era policies often provided benefits "through indirect means such as tax breaks . . . or payments to private actors who provide services." SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 4 (2011). More generally, research suggests that Americans "have fuzzy ideas about government, not understanding, for example, that highways, libraries, and public schools are, in fact, government." HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER 18 (2021). Beginning with tax revolts such as California's Proposition 13 in 1978, the American public has often "demand[ed] a rollback of big government" while at the same time "calling for better schools, roads, and other public services." PATTERSON, *supra* note 5, at 66.

25. R. A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 335, 335 (1974). Morton Horwitz identifies progressive historians as the source of the idea that "laissez-faire" stands for "objections to governmental regulation of the economy," with "governmental regulation" defined as "legislative (statutory) or administrative intervention in the economy," but not "the common law power of judges." HORWITZ, *supra* note 20, at xv.

3,000 times.[26]

Defenders of Posner's language may object that he was obviously aware of the foundational role of legal rules in our economic markets. Posner was surely assuming certain common law rules of property, contracts, and torts as a kind of baseline, and was simply defining "economic regulation," for convenience of expression, as a departure from that baseline.[27]

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26. *See* GOOGLE SCHOLAR (last visited Jan. 23, 2022).

27. Brink Lindsey has observed that this way of speaking about markets and regulation remains common among sophisticated libertarians. *See infra* note 102 and accompanying text. More generally, Roberto Mangabeira Unger has observed that the dominant, mainstream legal thought of the mid-twentieth century United States assumed "the idea that certain varieties of private property and contract were the natural and necessary legal basis of a market economy, with limited scope for variation." ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 8 (2015).

Although this article is ultimately concerned with public economic discourse and not with specialized philosophical debates, I note that the philosopher Robert Nozick offers an illustration of how a sophisticated libertarian might defend Posner's language. Nozick himself sometimes writes as though he conceives of contemporary market transactions as something that exist apart from the state. For example, he casually claims that "[t]he major portion of distribution in a free society does not . . . come through the actions of the government," and suggests that "no . . . distributional patterned principle of justice can be continuously realized without continuous interference with people's lives." ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 163, 223 (1974); *see also id.* at 149-50 (similar language). A legal institutionalist might respond that not just a major portion, but *all* distribution of property even in a minimal state—one "limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on"—"come[s] through the actions of the government," because it is the government that defines and enforces property rights and the other legal rules implied by Nozick's list of "narrow functions." *Id.* at ix, 223. Similarly, a legal institutionalist might object that even a minimal state engages in "continuous interference with people's lives" through the legal institutions that define what non-state actors may and may not legally do. *See infra* Part II.B. But at this point, Nozick could appeal to some version of "natural law" as a way of defining property, contract, and other rights apart from the state. He could then define state "interference" as any departure from these naturally defined rights. In fact, Nozick does ground his arguments for a minimal state on an appeal to Locke's early modern state-of-nature theory, which itself rests upon an appeal to natural law. *See* NOZICK, *supra*, at 3-25. (The recurring appeal to natural law in social contract theories serves a need that is especially evident from a legal institutionalist perspective. Without it, the social "contract" appears circular: to the extent that contracts are creatures of state-backed law, as legal institutionalism suggests, it is hard to see how a contract could found a state.)

Oddly, however, Nozick explicitly declines to explain why anyone in the contemporary world should believe in the existence of natural law, or how one goes about determining the contents of natural law in a world of widespread skepticism toward invocations of universal rational necessity, especially in matters involving values. *See* NOZICK, *supra*, at 9; *cf., e.g.*, Gregory Brazeal, *Webs of Faith as a Source of Reasonable Disagreement*, 23 CRITICAL REV. 421 (2011) (describing "webs of faith" as a potential source of interminable disagreement); Gregory Brazeal, *Between Description and Prescription: Law, Wittgenstein, and Constitutional Faith*, 120 W. VA. L. REV. 100, 371 n.26 (2017) (describing the logical imperfection of natural languages as a potential source of interminable disagreement). At the very least, appeals to natural law would have to swim against the current of a great deal of modern thought, including mainstream legal thought in the United States, which largely abandoned the invocation of natural law over a century ago. *See* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021); *see, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 218, 222 (1917) (Holmes, J., dissenting) (noting that "[t]he common law is not a brooding omnipresence in the sky"); *see also* TAMAR HERZOG, A SHORT HISTORY OF EUROPEAN LAW 4-8 (2018) (describing the transition from premodern visions of law as something *given* to the contemporary vision of law as

Without denying that this was Posner's intent, it is worth pausing to note how odd this common approach to speaking about economic policy is. According to this way of speaking, when a sheriff enforces a judge's application of one set of government-defined legal rules, the result is simply the operation of "the market," free from "government interference" or "regulation." By contrast, when the same government-employed sheriff enforces the same government-employed judge's application of a different set of government-defined legal rules, the result is no longer the operation of "the market," but instead reflects government "intervention in the market."

Surely the government has acted equally in both cases?

Yet Posner's way of defining "intervention" and "regulation," which is consistent with the dominant public economic rhetoric of the Reagan era, suggests that so long as the government acts to enforce a certain set of often vaguely defined classical liberal economic rules, it does not act—it holds back and lets the market determine the outcome. Only if the government decides upon rules that differ from these classical liberal rules does the government "intervene" and coercively determine the outcome.

From a pragmatic perspective—and Posner always expressed an affinity for philosophical pragmatism[28]—the distinction seems to turn on a kind of metaphysics. In both cases, there *appears* to be a market constituted by government-backed legal rules. But according to the metaphysics of classical liberalism, these appearances do not reflect reality. In fact, the only *real* market is the market defined by the classical liberal's preferred legal rules, and the only *real* state action occurs when the government departs from these rules.

Just as the doctrine of transubstantiation teaches that the substance of a piece of bread can become the body of Christ even as the outward characteristics of the bread remain unchanged,[29] so Posner's distinction teaches that what appears to be state action is not *in substance* state action[30] when the rules the government enforces are close enough to those

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something *made*, and changeable); *infra* note 36 (collecting sources describing the rise of constructivist thought in modernity). For more on the history of the assumption that some set of market rules is natural or necessary, see below notes 34-36 and accompanying text.

28. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 29 (1995).

29. *See* WILLIAM JAMES, *Pragmatism*, *in* WILLIAM JAMES: WRITINGS 1902-1910, at 479, 524 (Library of America 1987).

30. On the puzzling "state action" doctrine in U.S. constitutional law, see Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition*, 81 HARV. L. REV. 69, 95 (1967) (describing the state action doctrine as a "conceptual disaster area"). An embrace of legal institutionalism might seem to lead naturally to an erosion or outright rejection of the state action doctrine, in the sense that legal institutionalism draws attention to the ways in which state-backed law shapes supposedly "private" transactions. *Cf.* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 209-10

advocated by, for example, the Gilded Age Supreme Court Justice Stephen Field.[31]

2. From Laissez Faire to Free Enterprise

A pre-history of the "government versus market" distinction might begin at least as far back as the eighteenth century, when the French theorist François Quesnay, in the words of Bernard Harcourt, portrayed "[g]overnmental intervention in the markets" as "oppressive and interfering with the autonomous functioning of an economic system governed by natural laws and natural order."[32] Quesnay's intellectual circle came to be known as the "physiocrats" because they believed in the "rule of nature,"[33] and his thought became associated with the slogan "*laissez faire, laissez passer*."[34]

(2001) (noting that Robert Hale's "broad reading of state action potentially turned all private discriminatory action into a constitutional wrong"). Rather than assuming that legal institutionalism leads naturally to an even greater role in our politics for judicial-supremacist interpretations of constitutional rights, however, it would be equally consistent with legal institutionalism to conclude that the apparently hopeless muddle surrounding the state action doctrine provides a further argument for moving away from reliance on judicially enforced constitutional rights and toward a more democratic form of government. For various arguments against the dominant role that judicially interpreted constitutional rights currently play in our democracy, see Ryan D. Doerfler & Samuel Moyn, Opinion, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022); JAMAL GREENE, HOW RIGHTS WENT WRONG: OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1996); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1998); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

31. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 83, 111 (1873) (Field, J., dissenting) (quoting Adam Smith on the "sacred and inviolable" character of property). On the influence of Stephen Field in the juristocracy of the Gilded Age, see generally WHITE, *supra* note 21, at 811-21.

32. BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 27 (2011); *see also* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 94 (1977) (describing how Physiocrats such as Quesnay viewed "the economy as an intricately built mechanism or machine that functions independently of men's will," and in which no "interference" should be permitted). Polanyi criticizes the association of the Physiocrats' use of the term "laissez faire" with the policies of economic liberalism that began to emerge in Britain in the 1820s. *See* KARL POLANYI, THE GREAT TRANSFORMATION 141 (2001) (1944). He argues instead that "[a]ll that the Physiocrats demanded in a mercantilistic world was the free export of grain . . . . For the rest their *ordre naturel* was no more than a directive principle for the regulation of industry and agriculture by a supposedly all-powerful and omniscient government." *Id.*

33. HARCOURT, *supra* note 34, at 28.

34. *See* JEREMY D. POPKIN, A NEW WORLD BEGINS: THE HISTORY OF THE FRENCH REVOLUTION 52 (2019) (stating that Quesnay "invented the slogan *laissez faire, laissez passer* to sum up his teaching that individuals should be allowed to do whatever they wanted with their economic resources"); *cf.* HARRY LANDRETH & DAVID C. COLANDER, HISTORY OF ECONOMIC THOUGHT 61-62 (4th ed. 2001) (stating that the Physiocrats believed "[t]he proper role of government was to follow a policy of *laissez faire*—to leave things alone"). *But see* THE HISTORY OF ECONOMIC THOUGHT: A READER 106 (Steven G. Medema &

"Laissez faire" would eventually become a rallying cry of the Gilded Age in the United States, when jurists such as Field and popular writers such as Herbert Spencer insisted on the continuing validity of laissez-faire principles in a rapidly transforming, industrializing world.[35] The slogan would only lose its elite appeal in the wake of the Great Depression,[36] which succeeded in undermining the economic ideology of the Gilded Age in a way that even the Great Depression of 1893 had failed to do.[37]

The substance of the idea that there exists a somehow natural economic order in which the government should not "interfere," however, did not

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Warren J. Samuels eds., 2d ed. 2013) (noting that Quesnay did not use the term "laissez faire" in his own writings). For more detail on the Physiocrats and Quesnay, see HARCOURT, *supra* note 34, at 27-30.

An extended discussion of the historical background of the "government versus market" distinction would risk distracting from this article's primary goals. But it may be worth noting, briefly, how the distinction resonates with much earlier ideas. In particular, it is possible to see in the "government versus market" distinction an echo of what the philosopher Charles Taylor has called the "modern moral order," a recurring vision of natural order in modern thought. *See* CHARLES TAYLOR, A SECULAR AGE 125-29, 158-65 (2007). In this vision, equal individuals have a natural capacity to satisfy each other's needs through harmonious, mutually beneficial service. *See id.* Like Grotius's and Locke's "natural law," Quesnay's "natural order," Smith's "invisible hand," and the sphere of "the private" in classical legal thought, "the market" in today's public economic discourse is often imagined as a natural, spontaneous order existing apart from the politically constructed, coercive state. *See generally* Part II. It is politically significant that "the market" and other expressions of the modern moral order are envisioned as natural or given. Harms or inequalities that are experienced as "natural" (and in that sense "necessary") tend to be more easily endured and accepted, while the same conditions might provoke furious resistance if experienced as the arbitrary product of someone else's will. *See infra* note 263.

Unlike the modern moral order, with its appeal to nature, legal institutionalism belongs to what might be called the "constructivist" trend in modern thought. On the modern trend toward seeing as "made" (or "constructed") what was earlier seen as "found" (or "discovered"), see ISAIAH BERLIN, *The Counter-Enlightenment*, *in* THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 243, 262-63 (Henry Hardy ed., 1995) (describing the emergence of historicism in thinkers such as Vico, and the related romantic idea that "values are not found but made, not discovered but created"); JEDEDIAH PURDY, AFTER NATURE 3 (2015) (describing politics, then economics, and now nature as "[t]hree kinds of order once thought to be natural and self-sustaining [that] have shown themselves to be artificial, fragile, and potentially self-immolating"); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 3 (1989) ("About two hundred years ago, the idea that truth was made rather than found began to take hold of the imagination of Europe."). Legal institutionalism rejects the modern moral order and its naturalizing myths, instead endorsing the constructivist belief "that many of the things which common sense thinks are found or discovered are really made or invented." RICHARD RORTY, *Introduction: Relativism: Finding and Making*, *in* PHILOSOPHY AND SOCIAL HOPE xvi, xvii (1999).

At least from an egalitarian constructivist perspective, the modern moral order as a whole resembles a kind of halfway house on the road away from pre-modern myths of natural social hierarchy, such as the caste-like social order of medieval Europe. On the one hand, the modern moral order rejects certain previously assumed social hierarchies; on the other hand, it retains the appeal to a *natural order* beyond the reach of human determination. Perhaps earlier in modernity it took an appeal to nature (such as "the rights of man") to defeat an appeal to nature (such as "the divine right of kings"). It is less clear that appeals to myths of natural order are necessary today.

35. *See generally* WHITE, *supra* note 21, at 811-21; HOFSTADTER, *supra* note 21.

36. *See* GLICKMAN, *supra* note 21, at 124-28; ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION 9, 56, 103-07, 184, 210 (2012).

37. *See* WHITE, *supra* note 21, at 772 (noting that the depression of 1893 was referred to as the "Great Depression" until the 1930s).

disappear. Opponents of the New Deal continued to object to government "interference" in their preferred economic arrangements. But rather than invoking the term "laissez faire" or the classical liberal distinction between "public" and "private,"[38] the opponents relied more often on a rhetorical opposition between "government" and "free enterprise" or "business."[39]

In his history of the phrase "free enterprise," Lawrence Glickman observes that in the 1940s, "[f]or many business leaders and politicians, free enterprise served as a shorthand for the kind of political economy that they preferred, one with minimal government interference in the form of laws, taxes, and regulations and maximal freedom for firms to do as they wished."[40] As Glickman's invocation of "interference" suggests, the substance of the opposition between "government" and "free enterprise" or "business" during the New Deal era was structurally similar to the later contrast between "government" and "the market" during the Reagan era. Reagan himself provided an explicit illustration of the opposition when he stated in 1976: "I still believe in free enterprise, and the government doesn't have any place in it."[41]

Of course, criticizing government "interference" in "business" or "free enterprise" runs into many of the same conceptual difficulties as criticizing government "interference" in "the market." If anything, the role of government-backed laws in constituting business associations should be even clearer than the role of government-backed laws in constituting markets.[42] No one would claim that there are LLCs in the state of nature.

The primary difference between the public economic discourse of the postwar decades and that of the Reagan era does not seem to have been that the former recognized the constitutive role of government-backed laws in markets, while the latter denied such a role. Rather, debates in both eras often assumed something like the distinction between "government" and "the market." The primary difference was that New Deal-era debates tended to *embrace* government "interference" in the

38. *See* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PENN. L. REV. 1349 (1982).

39. *See, e.g.*, GLICKMAN, *supra* note 21, at 4; KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL 231 (2009).

40. GLICKMAN, *supra* note 21, at 44; *see also id.* at 131 (quoting a columnist in 1944: "What is free enterprise? . . . [I]t's our right to live our own lives, run our farms and businesses in our own way—without needless interference."); *id.* at 138 (quoting Gallup poll in 1945 contrasting "[g]overnment control or interference" with "free enterprise").

41. GLICKMAN, *supra* note 21, at 196.

42. *See, e.g.*, Robert C. Hockett & Saule T. Omarova, *'Special,' Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation—and Vice Versa*, 39 SEATTLE U. L. REV. 453, 463-69 (2016); *infra* notes 141-44 and accompanying text.

imagined non-governmental economic sphere as a necessary measure to protect the "public interest,"[43] while debates in the Reagan era more often expressed hostility toward such "interventions."[44]

3. Milton Friedman, Ayn Rand, and the Freedom School

A number of recent histories have explored the roots of Reagan-era economic thought and policy in the decades before 1980.[45] Milton Friedman, who was also a mid-twentieth-century intellectual popularizer of economic ideas, often plays a central role. Indeed, according to the historian Angus Burgin, the popular success of Friedman's 1962 book *Capitalism and Freedom* made him "the leading advocate of free-market economics on the public scene" in the United States.[46]

Did Friedman endorse the distinction between "government" and "the market" that came to play such a prominent rhetorical role in the public economic discourse of the Reagan era? What kind of "free-market economics" did he advocate?

Burgin makes a compelling case that Friedman was in substance a libertarian, in the sense of a largely unreconstructed supporter of the laissez-faire economic ideals of the Gilded Age.[47] Like other defenders of laissez-faire after the disasters of the Great Depression,[48] Friedman did not use the term "laissez-faire," and resisted the term "libertarian" as well because of what he believed to be its anarchistic associations.[49] But he privately admitted that in an ideal world he "would like to be a zero-

43. *See, e.g.*, Posner, *supra* note 27, at 335. "As recently as the 1950s, government was broadly appreciated by Americans. In his first State of the Union address, the Republican president Dwight Eisenhower mentioned 'government' nearly 40 times, almost always positively." Matthew Bishop, *"American Amnesia," by Jacob S. Hacker and Paul Pierson*, N.Y. TIMES (Apr. 6, 2016).

44. In fact, some leading figures of the era, such as the British Prime Minister Margaret Thatcher, seemed to call into question whether a "public interest" or "common good" could be said to exist at all. In Thatcher's memorable phrase: "There's no such thing as society." *Margaret Thatcher: A Life in Quotes*, THE GUARDIAN (Apr. 8, 2013).

45. *See, e.g.*, BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY (2019); BURGIN, *supra* note 38; PHILLIPS-FEIN, *supra* note 41; THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Plehwe eds., 2009).

46. BURGIN, *supra* note 38, at 125.

47. *See, e.g.*, BURGIN, *supra* note 38, at 150-51, 175-78. As with any political label, there are, of course, many contested varieties of "libertarianism," some of which would reject an association with other contested political labels such as "laissez-faire" or "classical liberalism." *See, e.g.*, ANDREW KOPPELMAN, BURNING DOWN THE HOUSE: HOW LIBERTARIAN PHILOSOPHY WAS CORRUPTED BY DELUSION AND GREED (2022) (describing differing views of assorted libertarians). This article is a critique of the "government versus market" distinction in public economic discourse, not a critique of "libertarianism," and thus attempts to avoid engaging with disputes about the meanings of "libertarianism." *See infra* note 243.

48. *See* GLICKMAN, *supra* note 21, at 124-28.

49. BURGIN, *supra* note 38, at 175.

government libertarian."[50]

On the other hand, toward the beginning of *Capitalism and Freedom*, Friedman acknowledges that government has a role to play in doing what "the market cannot do for itself, namely, to determine, arbitrate, and enforce the rules of the game."[51] In fact, he almost sounds like a legal institutionalist when he notes that "[t]he notion of property, as it has developed over centuries and as it is embodied in our legal codes, has become so much a part of us that we tend to take it for granted, and fail to recognize the extent to which just what constitutes property and what rights the ownership of property confers are complex social creations rather than self-evident propositions."[52] Friedman notes intellectual property rights and corporate ownership as particularly obvious illustrations of "the role of generally accepted social rules in the very definition of property,"[53] and also draws attention to the role of government in the monetary system.[54]

But in a turn that will become typical of popular Reagan-era economic discourse, Friedman then proceeds to ignore the constitutive role of government in markets that he has just seemed to acknowledge. He contrasts government "intervention" with "private enterprise," using national parks as an example of an unjustified "intervention."[55] Friedman writes: "I cannot myself conjure up any [negative externalities] or important monopoly effects that would justify governmental activity in this area"[56]—as though there would be no "governmental activity" if the state assigned ownership of the park to a private entity, and applied and enforced that entity's property rights. Friedman also makes the following, even more puzzling claim:

> Fundamentally, there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of coercion—the technique of the army and of the modern totalitarian state. The other is voluntary co-operation of individuals—the technique of the market place.[57]

But once it is accepted that government enforces the rules of "the market place" through physical force if necessary, as Friedman seems to

50. *Id.*

51. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 27 (2020) (1962); *see also id.* at 14, 15.

52. *Id.* at 26.

53. *Id.* at 27.

54. *Id.*

55. *Id.* at 30-31. The book contains more than a dozen references to "state intervention," "governmental intervention," or "government intervention." *Id.* at 8, 40, 43, 47, 50, 66, 80, 81, 93, 103, 113, 115, 124, 136, 171, 193, 210, 231, 242, 243.

56. *Id.* at 31.

57. *Id.* at 13.

recognize, surely "the market place" "involve[s]" "the use of coercion"?[58] Throughout *Capitalism and Freedom*, Friedman simply ignores the issue, falling back on a vision of markets as though they were spontaneously self-constituting and self-supporting. He envisions a "*free private enterprise exchange economy*" as a society consisting of "a collection of Robinson Crusoes" who "need not enter into any exchange . . . unless both parties do benefit from it. Co-operation is thereby achieved without coercion."[59] The coercive role of state-backed law, including criminal law, in constituting markets disappears, replaced by a vision of harmonious natural order echoing Smith's invisible hand.[60]

Nor is there any reckoning, even in Friedman's chapter on "Capitalism and Discrimination,"[61] with the ways in which *past* laws chosen and enforced by the state, including the laws of slavery,[62] Jim Crow,[63] convict leasing,[64] the New Deal's affirmative action for whites,[65] and government-incentivized redlining,[66] shape the present distribution of wealth among groups—the very wealth that will obviously determine an individual's freedom to "vote, as it were, for the color of tie he wants and get it,"[67] not to mention her ability to hold out for a better job offer.[68] The failure to consider some of these factors may be understandable based on a relative lack of public awareness at the time. But Friedman explicitly acknowledges that "[t]he Southern states after the Civil War took many measures to impose legal restrictions on Negroes."[69] Writing shortly before the passage of the civil rights legislation of the 1960s, Friedman

58. *Cf.* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). *See generally* FRIED, *supra* note 32 (describing Hale's thought).

59. FRIEDMAN, *supra* note 51, at 13.

60. *Cf.* Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, *in* THE ROAD FROM MONT PÈLERIN, *supra* note 45, at 139, 162 (describing how according to the Chicago School view of "freedom," "it became impossible . . . to regard any economic transaction whatsoever as coercive").

61. FRIEDMAN, *supra* note 51, at 108-18.

62. *See, e.g.*, EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2014).

63. *See, e.g.*, MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017).

64. *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

65. *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2006).

66. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

67. FRIEDMAN, *supra* note 51, at 15.

68. Nor, for that matter, does Friedman reckon with coercion by and within private firms. *See generally* ANDERSON, *supra* note 16.

69. FRIEDMAN, *supra* note 51, at 109. Friedman again shows his awareness of legal discrimination when he makes a point of praising a specific discriminatory policy adopted as part of Virginia's campaign of "massive resistance" against *Brown v. Board of Education*, 347 U.S. 483 (1954), the adoption of a voucher system "for the purpose of avoiding compulsory integration." FRIEDMAN, *supra* note 51, at 118.

was obviously aware of legally authorized discrimination against African Americans. Yet in general he ignores the role of past government laws, including horrendously coercive ones, in shaping contemporary markets.[70]

In sum, *Capitalism and Freedom*—a book that may have had more influence on the public economic discourse of the Reagan era than any other single work—presents a general picture of the world in which a coercive "government" is contrasted with voluntary individual cooperation "through private enterprise operating in a free market."[71] Friedman does not deny that markets are constituted by legal rules that are in turn politically chosen and enforced by the state. Instead, in a move that will turn out to be characteristic of the era, he simply ignores any inconsistency between his recognition of the constitutive role of government in markets and his presentation of "government" and "a free market" as distinct alternatives.

Like Friedman, the novelist and polemicist Ayn Rand made a contribution to the popular economic discourse of the Reagan era that can hardly be overstated. A 1991 survey found Rand's novel *Atlas Shrugged* to be second only to the Bible in its influence on American readers.[72] Alan Greenspan, the chairman of the Federal Reserve from 1987 to 2006, was an acolyte of Rand's, and she "is regularly cited as a formative influence upon an entire . . . generation of Republican leaders," including 2012 Republican vice presidential candidate Paul Ryan.[73]

In *The Virtue of Selfishness* (1964), Rand promotes "a full, pure, uncontrolled, unregulated laissez-faire capitalism—with a separation of state and economics, in the same way and for the same reasons as the separation of state and church."[74] Rand emphasizes the centrality of property rights to her vision of society, but her conception of property seems to rest more on natural rights than on government laws, and in any

70. By contrast, even Nozick recognizes, in a passing remark that threatens to undermine the core of his argument for a minimal state, that historical injustices could justify "transfer payments" of an unspecified magnitude in order to realize "the principle of rectification." NOZICK, *supra* note 29, at 231. As Alasdair MacIntyre notes: "central to Nozick's account is the thesis that all legitimate entitlements can be traced to legitimate acts of original acquisition. But, if that is so, there are in fact very few, and in some large areas of the world *no*, legitimate entitlements." ALASDAIR MACINTYRE, AFTER VIRTUE 251 (2d ed. 1984).

71. FRIEDMAN, *supra* note 51, at 4.

72. *See* COREY ROBIN, THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO DONALD TRUMP 167 (2d ed. 2018). On Rand's vast influence among libertarians in particular, see BRIAN DOHERTY, RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT 11-12 (2007).

73. ROBIN, *supra* note 73, at 185; *see also, e.g.*, MAYER, *supra* note 24, at 183, 299, 351.

74. AYN RAND, THE VIRTUE OF SELFISHNESS 29 (1964).

case is deeply unclear.[75] What is clear is that the call for a separation of "state" and "economics" mirrors the "government versus market" distinction at the heart of Reagan-era economic discourse.

Perhaps Rand assumes in the language quoted above that the state only becomes involved in the economy when it enforces "regulations." Thus, if the state withdrew from economic matters, the result would not be a lawless world without defined or enforced property or contract rights, but simply "laissez-faire" "unregulated" markets. The vision seems to assume that market rules currently defined through government-backed laws would somehow persist even in the absence of such laws. In other words, the vision seems to rest on a lack of appreciation for the constitutive role of state-determined, state-backed law even in laissez-faire markets.

Other, possibly even more extreme libertarian visions played powerful roles in shaping the public economic discourse of the Reagan era. In her book *Dark Money*, Jane Mayer describes Robert LeFevre's "Freedom School," a radical libertarian institute in Colorado that billionaire Charles Koch attended and then helped to fund and support as an executive and trustee.[76] Koch talked his brothers into attending the school, and as late as the 1990s, he credited the school with having exerted a profound influence over him.[77] The school and LeFevre had close ties to the conspiracy-theorizing John Birch Society, and apparently promoted contrarian libertarian ideas such as that the Civil War should not have been fought, slavery was better than military conscription, the Gilded Age was a golden era, the New Deal was a mistake, taxation is theft, and "government is a disease masquerading as its own cure."[78] Other than LeFevre, who claimed to have supernatural powers and had previously been indicted for mail fraud during his involvement in a right-wing, anti-FDR self-actualization movement,[79] the faculty at the Freedom School included James J. Martin, who later achieved notoriety as a Holocaust denier.[80]

As Mayer describes, the hundreds of millions of dollars spent by families such as the Kochs, Scaifes, Olins, and Bradleys on libertarian

75. A critic with libertarian sympathies notes that "Rand's vision . . . depends on an underdeveloped account of property." Andrew Koppelman, *Involving Orcs*, NEW RAMBLER (Dec. 11, 2019). The libertarian historian Brian Doherty emphasizes the natural rights foundation of Rand's thinking. *See* DOHERTY, *supra* note 73, at 242.

76. *See* MAYER, *supra* note 24, at 53.

77. *Id.* at 56; *see also id.* at 54-55.

78. *Id.* at 52-53. Koch's father, Fred Koch, a millionaire oil-refiner, was a cofounder of the John Birch Society, whose "adherents lived in a strange world of conspiracy and fantasy, seeing communism and its agents lurking everywhere." PHILLIPS-FEIN, *supra* note 41, at 59; *see* MACLEAN, *supra* note 14, at 128, 129.

79. *See* MAYER, *supra* note 24, at 53.

80. *See id.* at 55.

think tanks, academic institutes and endowed professorships, judicial influence campaigns, manufactured grassroots organizations, and political ads have helped give anti-"government," pro-"market" economic rhetoric the public dominance it has enjoyed in recent decades.[81] Read in combination with Kim Phillips-Fein's *Invisible Hands: The Businessmen's Crusade Against the New Deal*, Mayer's book suggests that many of the leading voices that shaped the public economic discourse of the Reagan era were "libertarian" in the sense of favoring, in theory, an idealized version of the laissez-faire policies of the Gilded Age. In practice, they may have supported whatever government policies served the interests of their businesses and their families.[82] But in theory, they aimed, as Koch stated in 1978, to "destroy the prevalent statist paradigm."[83]

4. Contemporary Testimony

Extravagant praise for "the market" as opposed to "government" is also easy to find in journalistic writings from the Reagan era, such as the newspaper columnist Thomas Friedman's enormously successful 1999 book on globalization, *The Lexus and the Olive Tree*.[84] Throughout the book, Friedman's language makes clear that more "market" means less "government," and vice versa, as when he suggests that Southeast Asian nations in the 1990s needed to "reduce the role of governments, [and] let markets more freely allocate resources to their most productive uses."[85]

Similarly, when Friedman criticizes those who favor too little "government," his criticisms suggest a kind of hydraulic system in which the withdrawal of "government" necessarily corresponds to the expansion of "markets." Friedman condemns the 1994 freshman class of Republicans in Congress for presenting the American government as "some kind of

81. For the families at the center of Mayer's story, see, for example, MAYER, *supra* note 24, at 6. In their account of the rise of economic inequality in the United States since the 1970s, the political scientists Jacob Hacker and Paul Pierson, echoing Mayer, give a central role to the influence of organized groups including "business coalitions, Wall Street lobbyists, [and] medical industry players." HACKER & PIERSON, *supra* note 5, at 291, 295.

82. *See generally* MAYER, *supra* note 24.

83. *Id.* at 66. Whether the opposition between "markets" and "government" is labelled as libertarian, laissez-faire classical liberal, or something else, it is clearly reflected in a message that Koch sent to his seventy thousand employees shortly after President Obama's election: "It is markets, not government," Koch warned, "that can provide the strongest engine for growth, lifting us out of these troubling times." *Id.* at 9-10.

84. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (1999).

85. *Id.* at 160. Elsewhere, Friedman seems to recognize that markets have something to do with legal rules chosen and enforced by states. *See, e.g., id.* at 151-52 (discussion of economic "hardware," "operating systems," and "software"); *cf. supra* Part II.A.3 (similarly unresolved tension in Milton Friedman's writing).

evil enemy," and for "insist[ing] that the market alone should rule."[86] He mocks their anti-government rhetoric by suggesting that Liberia is "a freshman Republican's paradise," because "[t]hey don't worry about 'big government' in Liberia."[87] Elsewhere, Friedman makes clear that his favored policies do not "just mean government getting out of the way and letting the free markets rip."[88]

Such defenses of "government" speak of the market as though certain basic market-constituting laws such as property, contracts, and torts would in some unspecified way continue to operate in a society without "government." Like Rand, Friedman seems to imagine that even if the state and its laws ceased to exist, the laws that structure market activity would somehow remain in effect.

A popular 1998 book and 2002 PBS documentary, *The Commanding Heights: The Battle for the World Economy*, provides further evidence that the framing of economic policy in terms of a choice between "government" and "the market" was typical of the era.[89] The opposition between the two terms pervades *Commanding Heights*, as in the authors' description of the Chicago School:

> By the end of the 1950s, people were already talking about a distinctive Chicago School, which, in opposition to the new Keynesianism, emphasized laissez-faire—free markets—and argued against government intervention. . . . The Chicago economists believed . . . [that] [l]eft to their own devices, markets produced the best outcomes. . . . Any intervention to change what markets, left alone, would achieve was likely to be counterproductive. For the Chicago economists, the conclusions for government policy were clear: Wherever possible, private activity should take over from public activity. . . . Faith in "big government" fell under the

86. FRIEDMAN, *supra* note 85, at 435. Other sources reinforce the sense that the "anti-government, pro-market" rhetoric that this article has associated generally with "the Reagan era" reached a new intensity and radicalism in the Republican Party in the 1990s. *See, e.g.*, HACKER & PIERSON, *supra* note 5, at 192-222 (describing the decline of the GOP's moderate wing in the 1990s).

87. FRIEDMAN, *supra* note 85, at 435.

88. *Id.* at 446. The promotion of "free markets" against "inappropriate government intervention" by New York Times columnists has continued up to the time of this article's composition in 2022. *See, e.g.*, Peter Coy, *This Economist Really Loves Free Markets*, N.Y. TIMES (Mar. 25, 2022) (praising Brookings Institution fellow Clifford Winston, who is quoted as saying: "'[f]ree markets' is an unambiguous term, which implies a lack of inappropriate government intervention").

89. *See* DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY (1998). As of this writing, it remains possible to read excerpts from the book on a PBS website designed to introduce readers to "the forces, values, events, and ideas that have shaped the present global economic system." *See* Commanding Heights: Home, pbs.org/wgbh/commandingheights/. In an indication of how the popular historiography of the Reagan era has changed since 2002, the site offers a definition of "Neo-Liberalism" drawn from Microsoft's Encarta encyclopedia that refers not to the work of thinkers associated with the Mont Pèlerin Society, but to an offshoot of the "liberal" school of international relations theory. *See* Commanding Heights: Glossary, pbs.org/wgbh/commandingheights/shared/glossary/index.html.

> attack. . . . The work of Chicago—and, more indirectly, Hayek's contribution—proved crucial to a general shift in the center of gravity of economic thinking and to a reevaluation of the appropriate balance of government and marketplace.[90]

The point is not that *Commanding Heights* presents a historically accurate family portrait of the Chicago School economists. Rather, the point is that the book's presentation faithfully reflects common assumptions, terms, and conceptual arrangements at what may have been the peak of Reagan-era economic discourse in the late 1990s and early 2000s, after the collapse of the Soviet Union and before the near-collapse of the American economy in 2008.[91] The book captures the era's common sense in its casual, unexplained contrast between "free markets" and "government intervention," and its suggestion that a balance exists between "government" on the one hand and the "marketplace" on the other—rather than the marketplace itself being seen as a creature of government-backed laws.

If any doubt remains that the rhetorical opposition of "government" and "the market" played a powerful role in shaping public economic discourse in the United States over the last several decades, it may be worth noting the words of economic commentators who lived through the era. An especially clear example can be found in an article by Robert Kuttner, a journalist who has written on economic policy for over forty years and co-founded the progressive journal *The American Prospect*. Kuttner summarizes the views of self-proclaimed "free-market conservatives" during "the era of Margaret Thatcher and Ronald Reagan" as follows:

> Markets work; governments don't. If you want to embellish that story, there are two corollaries: Markets embody human freedom. And with markets, people basically get what they deserve; to alter market outcomes is to spoil the poor and punish the productive. That conclusion logically flows from the premise that markets are efficient. Milton Friedman became rich, famous, and influential by teasing out the several implications of these simple premises.[92]

Many of the contemporary writers who are presented below in the

90. YERGIN & STANISLAW, *supra* note 90, at 128-31.

91. For suggestive evidence that the 1990s and 2000s were the peak of the "market versus government" distinction, see below note 101; *see also* EUGENE MCCARRAHER, THE ENCHANTMENTS OF MAMMON: HOW CAPITALISM BECAME THE RELIGION OF MODERNITY 15 (2019) ("By the early twenty-first century, capitalism has reached its highest meridian of enchantment in the neoliberal deication of 'the Market.'").

92. Robert Kuttner, *Neoliberalism: Political Success, Economic Failure*, AM. PROSPECT (June 25, 2019). As will be discussed below in Part II.D, the leading experts on the history of neoliberal thought might object that what Kuttner presents as "[t]he basic argument of neoliberalism" is in fact the basic argument of laissez-faire classical liberalism, and thus something that many "neoliberals" rejected.

Appendix as part of the legal institutionalist tradition also testify to the dominance of the "government versus market" distinction in the Reagan era.[93] For example, in his 2016 book, economist Dean Baker writes:

> The standard framing of economic debates divides the world into two schools. On the one hand, conservatives want to leave things to the market and have a minimal role for government. Liberals see a large role for government in alleviating poverty, reducing inequality, and correcting other perceived ill-effects of market outcomes.[94]

Of course, Baker believes that "this framing is fundamentally wrong," because "we don't have 'market outcomes' that we can decide whether to interfere with or not."[95] Rather, "[g]overnment policy shapes market outcomes."[96] "Pretending that the distribution of income and wealth that results from a long set of policy decisions is somehow the natural workings of the market," he concludes, "is not a serious position."[97]

Similarly, in his 2015 book, former labor secretary Robert Reich writes that the notion of a "'free market' existing somewhere in the universe, into which government 'intrudes,'" "is so dominant that it is now almost taken for granted. It is taught in almost every course on introductory economics. It has found its way into everyday public discourse. One hears it expressed by politicians on both sides of the aisle."[98] Reich cites no specific examples, but as a prominent participant in public economic debates over the course of the Reagan era,[99] his general impressions carry weight.

Moreover, a rough textual search of the *New York Times*'s archive supports the general sense that invocations of the government versus market distinction rose during the Reagan era. Articles containing the phrases "government interference" and "market" increased in the 1970s, and fluctuated at a high level through the 1990s and 2000s, before falling over the last decade.[100]

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93. *See infra* Appendix.

94. DEAN BAKER, RIGGED: HOW GLOBALIZATION AND THE RULES OF THE MODERN ECONOMY WERE STRUCTURED TO MAKE THE RICH RICHER 217-18 (2016).

95. *Id.* at 217-18.

96. *Id.*

97. *Id.*

98. ROBERT REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW 4 (2015).

99. *See id.* at 3.

100. Using the New York Times's "Times Machine," I conducted a search in July 2022 for articles containing the terms "government interference" and "market." The search was overinclusive, in part because the database does not allow search terms to be limited by their proximity to one another, but also underinclusive because it excluded variants of the terms such as "state interference," "government intervention," "economy," or "economic policy." Nevertheless, after generating an average of one result per decade in the century before the 1950s, the combined terms suddenly produce seven results in 1964, including an article contrasting Milton Friedman's support for Barry Goldwater with the lack of support among establishment Republican economists. *See* M.J. Rossant, *Republican Economists Split on*

Finally, it is not only critics on the Left who perceive the "government" versus "market" distinction as having played a dominant role in the public economic discourse of the Reagan era. Brink Lindsey, the former Vice President for Research at the libertarian, partially Koch-funded Cato Institute, has described "[t]he rise of libertarian anti-statism as the reigning economic orthodoxy of the American right" and notes that

> [t]he root of the problem is to conceive of free markets as phenomena that occur in the absence of government "intervention." Libertarians imagine that "economic freedom" is a condition that exists prior to the state and independent of the political realm. At their most simplistic, they believe all the rules needed for a free-market order can be deduced from a single "nonaggression principle"—basically, don't hurt people or take their stuff. Even when their thinking is considerably more sophisticated, they still envision as their ideal a pristine and "unregulated" free market described only by the common-law rules of property, contract, and tort—with these rules seen as somehow "natural" and apolitical because they evolved through case law rather than being imposed through legislation.[101]

Lindsey presents the notion of "free markets" existing apart from "government intervention" as libertarian, but as Reich and Baker suggest, the basic idea has structured economic discourse across the partisan spectrum during the Reagan era. The primary disagreement between self-identified "progressive" Democrats and self-identified "conservative" Republicans has been over how much the government should "intervene" in markets, not over whether the idea of such intervention is incoherent.

Even today, it is not uncommon to encounter deeply informed, prominent progressive scholars and other writers who wish to criticize the economic policies of the Reagan era nevertheless assuming the distinction between "government" and "the market." In many cases, these writers do not seem to have *rejected* the idea of markets as legal constructions. They appear to be unaware of it. Even if the idea of markets as legal constructions is obvious once stated, it remains remarkably absent from the framing of economic debates.[102]

To be clear, contemporary progressive thinkers are typically very aware of the role that government has played in U.S. economic history

Goldwater, N.Y. TIMES (July 31, 1964). No additional results appear until 1970. Then, in the 1970s, the terms appear together with growing frequency, rising to roughly 11 articles per year in the 1980s and 1990s, 15 per year in the 2000s, and then declining to 7 per year in the 2010s.

101. Brink Lindsey, *The Dead End of Small Government*, NISKANEN CTR. (June 16, 2020). Indeed, even sophisticated contemporary libertarians routinely use language suggesting a lack of awareness of the legal foundations of markets. *See, e.g.*, DOHERTY, *supra* note 73, at 3 (referring to "state interference in the economy").

102. *See infra* text accompanying notes 106-110; *infra* Part II.A.5.

through infrastructure and other public spending.[103] Thus, when progressive academics are confronted with a legal institutionalist critique of the distinction between "government" and "the market," or with the claim that "laissez-faire" is not only unrealistic but incoherent, they may dismiss the observation as obvious. They may assume that they already understand the gist of legal institutionalism, perhaps by assimilating it to more familiar ideas from Rousseau, Paine, or Marx regarding the contingent social construction of property in general and capitalism in particular.[104]

But it is possible to understand that property is a historical creation, that capitalism emerged as the contingent product of historical circumstances, and that public spending has always played a significant role in the American economy, without fully appreciating the legal institutionalist claim that even laissez-faire markets are created through the definition, application, and enforcement of legal rules by the state, including criminal law and the laws of property, contracts, and torts.

For example, this article has already mentioned a thoroughly researched, deeply insightful recent history of the phrase "free enterprise" in American economic rhetoric.[105] On one occasion, the author sounds as though he might be striking a legal institutionalist note when he critiques

103. *See, e.g.*, *infra* text accompanying notes 106-110; Joseph Stiglitz, *Phony Capitalism*, HARPER'S MAG., Sept. 2014 ("Of course, there is no such thing as a 'purely' capitalist system. We have always had a mixed economy, relying on the government for investment in education, technology, and infrastructure."). To be clear, these observers are obviously correct that the economic policy of the United States has never been limited to a set of laissez-faire legal rules, and has always involved various forms of public spending, as well as regulatory rules that depart from any conventional understanding of laissez-faire. *See, e.g.*, GREG GRANDIN, THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA 102-10 (2019) (presenting the Freedmen's Bureau as a pre-New Deal provider of social welfare services, including through the distribution of basic necessities); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (describing nineteenth-century safety, health, and morality regulations); WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE (2022) (describing the expansion of public administration after the Civil War); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1995) (describing pre-New Deal social spending for Civil War veterans and their families); GORDON WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 478-79 (2009) (describing the rapid expansion of the federal postal system in the early republic). The United States has always had a "mixed economy" in the sense of an economy including both market and non-market mechanisms for organizing production and distribution.

104. Because the figure of Marx continues to play such a prominent role in our public economic discourse, it may be worth noting that his thought is not legal institutionalist. Rather than viewing markets as creatures of the state and its politically determined laws, "law plays a minor role" in conventional Marxism, because laws are "merely reflective of an underlying set of material conditions" defined by class "ownership or nonownership of the means of production." Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991); *accord* GEOFFREY M. HODGSON, CONCEPTUALIZING CAPITALISM: INSTITUTIONS, EVOLUTION, FUTURE 6, 8, 66 (2015). In other words, generally speaking, Marxism tends to present law as a creature of economic relations, rather than economic relations as a creature of law.

105. *See supra* text accompanying notes 42-43.

the notion that "economic matters . . . [are] 'natural' and therefore off-limits to 'artificial' political solutions."[106] He also emphasizes that economic matters are in fact historically "constructed."[107] Yet in the same paragraph, he states the following:

> To accept that capitalism's worst excesses can and should be redressed is to acknowledge that economic and political flourishing requires government intervention—the use of the power of the state to shield workers, consumers, and their environment from the storm gusts of the market. It is to highlight the hypocrisy of business conservatives who have condemned government in the abstract while endorsing many of the most potent forms of modern state power, such as mass incarceration and military spending, that have shaped modern capitalism far more than the free market they celebrate. It is also to challenge the view that political freedom is best embodied by unrestrained capitalism, and to insist that democracy requires a state strong enough to regulate and sometimes displace capitalists.[108]

In this passage, the progressive, erudite contemporary historian seems to assume that where the government does not "interven[e]" in "capitalism" through "regulat[ions]," a determinate thing called "capitalism" will be "unrestrained." He seems to associate "the state" with government spending on social insurance, public infrastructure such as prisons, and public employment of the police and the military—but not with constituting and giving determinate shape to "capitalism" through the definition, application, and enforcement of legal rules. His writing does not suggest an awareness of the legal institutionalist view of markets as politically determined legal constructions.[109]

To take another contemporary progressive example, even the German philosopher Jürgen Habermas, perhaps the most celebrated living theorist of liberal democracy, seemed to ignore the constitutive role of politically determined law in markets when he recently called for Europe's left-leaning parties to "go on the offensive against social inequality by embarking upon a coordinated and cross-border taming of unregulated

106. GLICKMAN, *supra* note 21, at 263.

107. *Id.*

108. *Id.*

109. Similarly, the political scientist Suzanne Mettler has offered an insightful and persuasive account of the harmful tendency of progressive policymakers to hide popular benefits in the tax code rather than making such benefits visible and politically salient. *See generally* METTLER, *supra* note 26. Yet throughout the book, the foundational role of the state in defining not only tax benefits and administrative regulations but *all the legal rules of the market* passes unremarked. *See, e.g.*, *id.* at 6 (arguing that the "policies of the submerged state obscure the role of the government and exaggerate that of the market"). This article argues that beneath Mettler's submerged state of tax incentives and subsidies is an even more deeply submerged state of market-constituting legal rules.

markets."[110] What exactly does it mean for markets to be "unregulated," and if any meaning can be given to this phrase, do such markets in fact exist?

Further to the Left, the German economic sociologist Wolfgang Streeck's widely discussed 2014 essay "How Will Capitalism End?" echoes the assumptions of Reagan-era economic discourse in its claim that "[d]ecades of rising inequality have cast doubt" on the idea that states have "a capacity to intervene in markets and correct their outcomes in the interest of citizens."[111] How could a state lack the capacity to "intervene" in an institution that it constitutes through its laws?

The prevalence of language assuming a distinction between "government" and "markets" even in writing by contemporary progressive scholars suggests how deeply ingrained the distinction is in our economic discourse. A leading, long-term public opinion survey used by social scientists in Europe even defines the difference between "Left" and "Right" economic attitudes based on "positions toward the role of state vs. markets."[112] Against the background of such widespread assumptions, it is hard, in practice, to avoid referring to government "intervention," or using other phrases that seem to imply the natural existence of markets apart from the state. References to "market failure" are another example, at least if "market failures" are contrasted with "government failures."[113] Even in works in the legal institutionalist tradition, one sometimes encounters the persistent language of "intervention."[114]

5. Thomas Piketty versus Mehrsa Baradaran

Even some of the most prominent voices in the progressive critique of contemporary economic conditions have failed to fully acknowledge the foundational role of politically determined legal rules in those conditions. The economist Thomas Piketty, for example, achieved global renown for

110. *See* William E. Scheuerman, *Habermas and the Fate of Democracy*, BOSTON REV. (Apr. 12, 2017).

111. Wolfgang Streeck, *How Will Capitalism End?*, NEW LEFT REV. (May/June 2014); *see also* Ruth Dukes & Wolfgang Streeck, *Labour Law and Political Economy*, LPE BLOG (Sept. 26, 2022) (contrasting "state-managed capitalism" and "neoliberal capitalism").

112. PIPPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM 14 (2019).

113. *See* Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1, 24-26 (2011).

114. *See, e.g.*, Sanjay Jolly & Victor Pickard, *Towards a Media Democracy Agenda: The Lessons of C. Edwin Baker*, LPE BLOG (Nov. 29, 2021) (recognizing that "the state is always actively involved in market design, so the issue is not if, but how, structural media policy ought to intercede, and with what distributional consequences," yet also referring to "how government intervention can either promote or undermine the First Amendment").

his historically informed critique of economic inequality in his 2013 book, *Capital in the Twenty-First Century*.[115] Piketty condemns contemporary economic inequalities and is willing to propose bold, even currently "utopian" policy responses, such as a global wealth tax.[116]

But the central thesis of the book is a universal economic law, $r > g$, that entirely ignores the role of changeable legal rules in constituting markets and shaping their outcomes. According to Piketty, "a market economy based on private property, if left to itself, contains powerful forces of convergence"—that is, forces leading to reductions in wealth inequality—"but it also contains powerful forces of divergence," including, above all, "the fact that the private rate of return on capital, r, can be significantly higher for long periods of time than the rate of growth of income and output, g."[117] In other words, "the inequality $r > g$ implies that wealth accumulated in the past grows more rapidly than output and wages."[118] The law of $r > g$ is "the fundamental structural contradiction of capitalism."[119]

What does Piketty mean when he writes of "a market economy based on private property, . . . left to itself"? He seems to accept the common sense of the Reagan era that "the market" is something with a determinate natural form, and thus that states can "leave a market economy to itself" by not disturbing the outcomes that result from this natural form. At least rhetorically, Piketty's language seems to reject the legal institutionalist idea that markets, including markets "based on private property," can be designed in different ways based on different legal rules, and that the choice of market-structuring legal rules could powerfully affect both the private rate of return on capital, r, and the rate of growth of income and output, g.[120] Similarly, Piketty discusses the response to the Great

115. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2013).

116. *Id.* at 597-98.

117. *Id.* at 746.

118. *Id.*

119. *Id.* at 747.

120. Other institutionally minded readers of Piketty have made similar observations. *See, e.g.*, Dean Baker, *Living in the Short-Run: Comment on Capital in the 21st Century*, CTR. FOR ECON. & POL'Y RES. (Apr. 2014); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014); Samuel Moyn, *Thomas Piketty and the Future of Legal Scholarship*, 128 HARV. L. REV. FORUM 49 (2014); REICH, *supra* note 99, at 84. In fairness, Piketty sometimes seems to approach a recognition of the legal constitution of markets. He writes, for example, that "the price of capital . . . is always in part a social and political construct: it reflects each society's notion of property and depends on many policies and institutions that regulate relations among different social groups, and especially between those who own capital and those who do not." PIKETTY, *supra* note 116, at 234; *see also id.* at 563 (recognizing the role of state-granted monopolies in generating inequalities of wealth). Even here, however, the somewhat imprecise references to "social" factors and "notion[s]" do not make clear the pervasive, foundational role of specifically *legal* rules in contemporary markets, much less the implications of such a role for Piketty's larger argument. The fact that rent control, rather than property, contract, labor, corporate, antitrust, or criminal law, appears

Recession in terms of the degree of "state intervention in the economy," and describes the financial crisis as "both an indictment of the markets and a challenge to the role of government," seeming to adopt the Reagan-era distinction between "government" and "the market."[121]

From a legal institutionalist perspective, the absence of legal rules as a variable in the formula "$r > g$" is striking. A legal institutionalist might wish to contrast Piketty's approach with that of the law professor Mehrsa Baradaran in *The Color of Money* (2017), a history of African American economic and financial exclusion.[122] If Baradaran had been trained as a neoclassical economist rather than a lawyer, she might have stated that her historical research could be distilled to the "fundamental inequality $w > b$," that is, a transhistorical economic law stating that white wealth grows more rapidly than Black wealth. This is, indeed, one way of expressing what her research shows over the course of U.S. history. But because Baradaran's account draws relentless attention to how legal rules and related historical factors resulted in white wealth growing more quickly than Black wealth in the United States, it is obvious that stating "$w > b$" as an abstract economic law would obscure more than it reveals. Baradaran's account makes clear that the contemporary racial wealth gap is not the result of unchangeable laws of nature, but, above all, of changeable legal rules.

In general, legal institutionalism suggests that neoclassical economic attempts to discover the "laws" governing the economy have paid inadequate attention to the *laws* that actually govern the economy. Economists have too often treated the positive laws of states as though they were the unchanging laws of nature.[123]

In any case, the point of mentioning the lack of attention to the legal constitution of markets in Piketty's *Capital* is not to criticize what is, after all, a monumental and extremely valuable work of historical and statistical research.[124] Rather, the point is to suggest that if *even Thomas*

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to be Piketty's primary, recurring example of a "policy" that shapes market outcomes also suggests a limited appreciation of the constitutive role of law in markets. *See, e.g.*, *id.* at 190.

121. PIKETTY, *supra* note 116, at 600; *see also id.* at 545 (referring to economic growth as a "'natural' countervailing force" to the rise of inequality, "where by 'natural' I mean not involving government intervention").

122. BARADARAN, *supra* note 65.

123. *Cf.* GRANDIN, supra note 104, at 173 (quoting Franklin Roosevelt's argument "that the laws of economics are not made by nature. They are made by human beings."). In contrast to neoclassical economics, legal institutionalism denaturalizes market interactions "by making visible the hand of the state behind the invisible hand of the market." Gregory Brazeal, *The Legal Construction of Discriminatory Mass Surveillance*, LPE BLOG (Mar. 17, 2022).

124. Piketty himself appears to have abandoned the formula $r > g$ in his more recent book on inequality and ideology, which instead emphasizes the role of political decisions in creating inequality—and acknowledges that "capitalism" "depends on the development of an increasingly sophisticated and globalized legal system, which 'codifies' different forms of material and immaterial property so as to

Piketty apparently remained unaware of the idea of markets as legal constructions as recently as 2013, we should be skeptical of any suggestion that this idea is old news, or so obvious as to be undeserving of renewed attention.

Other examples of prominent contemporary progressive writers on economic subjects being apparently unaware of legal institutionalist ideas are not difficult to find.[125]

B. A Picture Held Us Captive

At this point, even if the reader is persuaded that the opposition between "government" and "the market" pervaded public economic discourse in the United States during the Reagan era, there may still be some hesitation about what the use of this rhetoric implies.

Surely, it might be objected, few people who invoked the opposition

protect ownership claims." THOMAS PIKETTY, CAPITAL AND IDEOLOGY 154 (2019) (citing KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019)). By contrast, the closest Piketty came to citing legal institutionalist scholarship in *Capital* may have been a footnote criticizing Acemoglu and Robinson's *Why Nations Fail*, characteristically, for not giving sufficient attention to the effects of contemporary tax policy on the distribution of wealth. *See* PIKETTY, *supra* note 116, at 563 n.20. The newer work acknowledges at the outset that "the market" does not exist in "nature" but is a "social and historical construct[]" that "depend[s] entirely on," among other things, "the legal . . . systems that people choose to adopt." PIKETTY, *supra*, IDEOLOGY, at 7. The book also concludes that "it is clear that no transfer policy . . . can deal satisfactorily" with the "massive distortion in the distribution of primary incomes," and thus that "one also needs to think about policies capable of modifying the primary distribution, which means making deep changes to the legal, fiscal, and educational system to give the poorest people access to better paying jobs and ownership of property." *Id.* at 528.

125. *See, e.g.*, Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1276 (2020) (criticizing Shoshana Zuboff's widely praised book, *The Age of Surveillance Capitalism* (2018), for presenting surveillance capitalism as a "lawless zone" rather than one structured by politically determined legal rules); MARIANA MAZZUCATO, THE VALUE OF EVERYTHING: MAKING AND TAKING IN THE GLOBAL ECONOMY 274-77 (2017) (recognizing markets as "socially" and "politically" constructed, and calling for policy to "actively 'shap[e]' and 'creat[e]' markets," but showing little recognition of the constitutive role that law already plays in markets); Amartya Sen, *Introduction*, *in* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS vii, xii, xiii (2009) (appearing to assume that there is such a thing as "an unregulated market economy," or "pure capitalism, with complete reliance on the market mechanism guided by pure profit motive"); Paul Krugman, *Challenging the Oligarchy*, N.Y. REV. BOOKS (Dec. 17, 2015) (expressing "mixed feelings" about Reich's argument that "[g]overnment doesn't 'intrude' on the 'free market.' It creates the market"); PAUL KRUGMAN & ROBIN WELLS, MACROECONOMICS 16 (2006) (noting that "when markets go wrong, an appropriately designed government policy"—a "*government intervention*"—"can sometimes move society closer to an efficient outcome"); LAWRENCE LESSIG, CODE: VERSION 2.0 123, 127 (2006) (describing "the law" and "the market" as distinct "constraints" on behavior, despite recognition pages later that "[t]he market is regulated by law . . . in its elements"); Joseph E. Stiglitz, *Foreword*, *in* POLANYI, *supra* note 34, at ix (suggesting that it is somehow possible for an economy to be "self-regulating," and seeming to suggest that such economies have actually existed, although they do "not always work as well as [their] proponents would like us to believe"). More recently, Stiglitz seems to have turned in an institutionalist direction. *See, e.g.*, Joseph E. Stiglitz, *The American Economy Is Rigged*, SCIENTIFIC AM. (Nov. 1, 2018) (recognizing that inequality has resulted not from "the laws of nature" but from "the laws of humankind," and specifically "rules and regulations, which can be designed to favor one group over another").

between "government" and "the market" actually believed that government played *no role* in markets structured by property, contract, and tort law. Even when commentators seemed to assume that "laissez-faire" markets were "free from government intervention," surely they recognized *in some sense* that these markets were shaped by the government's enforcement of its legal rules?

It is true that a sophisticated thinker might defend the language of government "interference" or "intervention" in the market by arguing that the term "market" in that phrase was merely being used as a convenient shorthand for some idealized set of nineteenth-century liberal legal rules, as already suggested in the discussion of Richard Posner's language above.[126]

For that matter, most non-experts who rhetorically invoke a distinction between "government" and "the market" would presumably be willing to acknowledge, if pressed, that our market transactions take place "in the shadow of the law," in the sense that the parties could call upon the government to enforce one or another legal rule if necessary.[127] Most would presumably acknowledge that the government's legal rules play a constitutive role in market transactions in this sense.

But it would be a mistake to assume that such hypothetical responses demonstrate that the pervasive opposition between "government" and "the market" in public economic discourse has always contained an implicit recognition of the constitutive role of the government's legal rules in markets. Rather, it is worth at least considering the possibility that many speakers making rhetorical invocations of the opposition between "government" and "the market" meant what they said when they said it. In other words, the "common sense" of Reagan-era public economic discourse may have been based on an assumption about markets that is, in some sense, obviously false.

In order to appreciate how an otherwise reasonable speaker might envision "the market" as literally "free from government interference," consider the following statement about how a market should work: "[T]he parties in the market should be free to sell and buy at any price at which they can find a partner to the transaction and . . . anybody should be free to produce, sell, and buy anything that may be produced or sold at all."[128]

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126. *See supra* note 2929.

127. The habitual citation is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

128. F. A. HAYEK, THE ROAD TO SERFDOM 86 (Bruce Caldwell ed., 2003) (1944). Duncan Kennedy paints a similar picture in greater detail when he describes the rules that make up a "freedom of contract" regime. *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 568-69 (1982). Wiecek likewise emphasizes the centrality of something like this picture to the classical legal thought of the later nineteenth and early twentieth century United States, which envisioned "binary

Here is a picture of "the market." Two individuals meet. Each possesses something that the other values. They make a voluntary exchange, and then go on their separate ways, each having gained through trade.

In this image of "the market," the state is truly invisible. Only if something goes wrong—only if, for example, one party hands over a payment, and the other party keeps the payment but refuses to hand over the purchased item—would the state enter the picture. The police might be called, or one party might file a lawsuit against the other for breach of contract. Otherwise, we might be tempted to say, the state plays no role. The transaction is purely a matter of the free, private choices of individuals.

If this picture of "the market" seems intuitively plausible to many people today, that may be, in part, because it seems to fit a certain understanding of our everyday experiences as consumers. For example, we enter a gas station, buy a snack, and leave. It appears that the government played no role. If a state inspector entered the gas station and interrupted the transaction, telling the cashier that the sale of the snack was prohibited under new administrative regulations, or ordering the cashier to charge a lower price, the government would then have "intervened" in the market. But so long as public employees stay offstage, it might seem natural to say that the outcome is simply a result of the interaction of free individuals voluntarily pursuing their interests.

If both parties wish to enter the transaction, why should the state "interfere"? Why not simply let the market be "governed" by "the law of supply and demand"?

Further reflection reveals, however, that this common, apparently intuitive picture of "the market" leaves out the countless ways in which the government has *already* played a role in the transaction. There is no option for the government "not to interfere" in the purchase at the gas station, no possibility for the government to avoid "picking winners and losers,"[129] and certainly no scenario in which the government would not be shaping how "the law of supply and demand" operates.[130]

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economic relationships that presumed one person freely contracting with another," while of course "overlook[ing] legal arrangements inconsistent with this presumed individualism," such as Southern restrictions on African American labor, or trusts in most cases. WIECEK, *supra* note 21, at 9. The law "exalted the primacy of the individual will" and opposed it to state coercion, except when, for example, "the coercive might of the state . . . was deployed to crush labor unions or other impediments to the pure theoretical one-to-one contractual employment relationship." *Id.* at 9-10.

129. *Cf.* FRIEDMAN, *supra* note 85, at 159. A similar critique could be made of language such as: "I don't think government has all the answers, so we should leave things to the market." Again, the statement seems to assume that some unspecified set of market rules is a neutral or natural baseline, such that the government does not act when it acts to enforce those rules.

130. *Cf.* BARRY GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 57 (1960) (criticizing unions for causing the consumer to "suffer[]" "for he pays prices that are fixed not by free market competition—the law of supply and demand—but by the arbitrary decision of national union leaders").

To begin with, it is the law of property, as defined by the state, that says the gas station owns the snack in the first place, and more specifically has the right to require the customer to pay for the snack before taking it away.[131] As law students quickly learn in their first-year property courses, legal *ownership* is very different from physical *possession* or the various other conflicting intuitions we may have about something being "mine" or "not mine."[132] Arguments that "the free market" should be protected from "state interference" often seem to assume that the rules of ownership are natural or uncontroversial. Consider, for example, a leading libertarian historian's definition of the "simple idea" at the core of libertarianism: "Government, if it has any purpose at all . . . should be restricted to the protection of its citizens' persons and property against direct violence and theft."[133] The rules of property are left undefined. How are we to determine who owns what, and what that ownership entails?

At this point, some libertarians might be tempted to assert that property rights should simply be "absolute" or "unlimited." But this response does not, in fact, resolve the problem of indeterminacy in the definition of property rights. Let us set aside the theoretical concern that a world of "unlimited" property rights might permit a single tyrant to own all the land on earth and enslave or kill the rest of humanity as a punishment for their trespass.[134] Let us also set aside the historical fact that modern, classically liberal property law rests not on "unlimited" property rights, but on *limiting* the property rights of landowners in order to encourage the alienability of land and thus to prevent the reestablishment of a feudal aristocracy.[135] The more significant objection is that the very idea of a

131. *See infra* note 204.

132. For a popular summary of these intuitions, see generally MICHAEL HELLER, MINE!: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES (2021).

133. DOHERTY, *supra* note 73, at 3. Doherty goes on to criticize "state interference in the economy, whether through taxing or regulation," without explaining how the "protection of . . . property" can be distinguished from state regulation. *Id.* Similarly, he refers to "unrestricted markets," without giving any indication of how to distinguish the "protection of . . . property" from a "restriction." *Id.* at 6.

134. Some libertarians, such as Murray Rothbard, have apparently been willing to accept the harsh consequences of a world that is "fully owned by others," while other libertarians, such as Nozick, have endorsed a "Lockean proviso" that limits appropriation to ensure that "enough" is left for each individual. *See* Bas van der Vossen, *Libertarianism*, STANF. ENCYC. OF PHILO. (Jan. 28, 2019). Nozick's concession is remarkable in light of his willingness to accept other harsh consequences in the interest of freedom. *See, e.g.*, NOZICK, *supra* note 29, at 331 (stating that a "a free system" would allow an individual "to sell himself into slavery").

135. *See* Joseph William Singer, *Property Law as the Infrastructure of Democracy*, Harvard Public Law Working Paper No. 11-16, at 1-5 (2011); WIECEK, *supra* note 21, at 9 (noting that in the age of classical legal thought, "common law courts sloughed off restraints on alienation to encourage the free transferability of both realty and personalty"); *accord* PISTOR, *supra* note 125, at 29-33. In other words, property law under the sway of classical legal thought expanded the freedom of property owners in one sense by restricting their freedom in another sense: the law expanded the freedom to *transfer* land by restricting the freedom to *condition* the transfer of land on the acceptance of limits on future transfers. Similarly, the law expanded the right of property owners to exploit their own land without concern for

world of "absolute" or "unlimited" property rights is itself unclear. My freedom to do what I wish with my property often conflicts with your freedom to do what you wish with yours.[136] Whose property rights should prevail? A libertarian might assert that correct answers in such situations can somehow be deduced from the very idea of property, or of freedom. But reasonable people often have deeply conflicting intuitions regarding whose "rights" should prevail when various parties' interests in a piece of property conflict, and a long tradition of critical thinkers has drawn attention to the limits of deduction in natural languages, including the natural language used in law.[137]

Ultimately, nothing may stop us from believing in a heaven of legal concepts where property rights define themselves, magically, apart from the state's laws.[138] A defender of this idea can always appeal to one or another theory of "natural rights,"[139] perhaps based on metaphysical notions of labor "mixing with" the soil,[140] although presumably no longer featuring a racist fantasy of industrious European men homesteading in a vacant wilderness.[141]

But if we choose a non-magical approach, and if we define property rights in terms of the state's property laws, then we may start to appreciate

damaging the property of others—by restricting the right of property owners not to have their property damaged by others. *See* HORWITZ, *supra* note 20, at 102-03.

136. *See* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISC. L. REV. 975, 980 (describing a fundamental "contradiction" in liberal theory between "freedom to engage in the pursuit of happiness" and "security from harm"); *infra* note 167-169 and accompanying text.

137. *See, e.g.*, Brazeal, *supra* note 27, at 371 n.26 (describing Ludwig Wittgenstein's emphasis on the logical imperfection of natural languages); Duncan Kennedy, *The Hermeneutics of Suspicion in Contemporary American Legal Thought*, 25 LAW & CRITIQUE 91, 99 (2014) (citing FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (1899) for the critique of the "abuse of deduction" in legal reasoning); Singer, *supra* note 136, at 978 n.4, 988-89, 993-94 (describing Hohfeld's critiques of logical errors in legal reasoning in Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applies in Judicial Reasoning*, 23 YALE L.J. 16 (1913)).

138. *Cf.* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935) (describing Rudolf von Jhering's "curious dream" of a "heaven of legal concepts" containing "all the logical instruments needed to manipulate and transform these legal concepts and thus to create and to solve the most beautiful of legal problems").

139. *See supra* note 28.

140. Even Nozick seemed to recognize the absurdity of Locke's assertion: "If I own a can of tomato juice and spill it in the sea so that its molecules . . . mingle evenly throughout the sea, do I thereby come to own the sea . . . ?" NOZICK, *supra* note 29, at 175.

141. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19-20 (C.B. Macpherson ed., 1980) (1690); PISTOR, *supra* note 125, at 33-35; ELLEN MEIKSINS WOOD, THE ORIGIN OF CAPITALISM 109-15 (1999). Fittingly, Milton Friedman begins the narration of his multipart PBS TV series, *Free to Choose*, with a description of how Europeans founded New Amsterdam "at the edge of an empty continent," only a moment after repeating the claim that Indians had traded Manhattan to the Dutch for $24. *See* FREE TO CHOOSE (PBS 1980); *cf.* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 75-76 (2005) (noting that the sellers "don't seem to have vacated the island afterward, so it is doubtful that they intended to convey exclusive rights to the Dutch").

how the state is always "present" in the transaction at the gas station, even when no public employee appears on the scene. The state not only defines who owns what, and what ownership entails, but also plays several other easily overlooked market-structuring roles. The state's criminal law prohibits the customer from taking the snack and running, or coercing the cashier into giving her the snack based on threats. The state's law of contract gives the customer a right to the snack once she pays for it, and a remedy if the cashier keeps the money but refuses to hand over the snack. In the United States, federal antidiscrimination law not only prevents the cashier from refusing to transact with the customer based on, for example, her race, but also prevents the state from refusing, based on such suspect classifications, to hear the customer's suit for a contractual breach.

Moreover, the gas station itself, as a legal entity, exists only by virtue of the laws governing the creation of business associations. This point should probably be emphasized because it is so often ignored in contemporary public economic discourse. For example, assume that the gas station is owned by a corporation. According to one historian, in the early nineteenth century, before the advent of general incorporation laws, Americans recognized that corporations were, by definition, "a form of government intervention."[142] But by the end of the Gilded Age, corporations had transitioned "in the popular imagination, from semi-public to private entities, from bodies sponsored by government to serve the people's needs to concentrations of unaccountable power."[143] The illusion persists to this day that corporations somehow exist apart from the state, such that the government "interferes" with the corporation if it departs in some way from whatever the present rules governing corporations happen to be.[144] As a result, someone thinking casually about

142. T.J. Stiles, *The Robber Baron Who Remade Wall Street in His Own Image*, N.Y. TIMES (Aug. 27, 2022).

143. *Id.* In the early 19th century, "the view that corporations were 'creatures of the state' . . . was so dominant that, in 1805, Justice Locke of the North Carolina Supreme Court noted that, 'it seems difficult to conceive of a corporation established for merely private purposes,'" while today "corporations are primarily understood to be private economic actors," and are "seen as ordinary features of the private, social landscape, rather than as government creations." Carly Knight, *How the Corporation Lost Its Image as a "Creature of the State"*, LPE BLOG (Oct. 26, 2022); *see also* Robert Hockett, *Accounting for Incorporation: Part 1*, LPE BLOG (Sept. 24, 2018).

144. *See infra* notes 170-180 and accompanying text. Even if one thinks of a corporation as somehow set free from the state after its creation, it is difficult to see a non-arbitrary basis for defining one set of corporate law rules as "interference" in the corporation, and another as not.

Incidentally, the choice of the gas station transaction as a picture of "the market" may distort our perceptions in various ways unrelated to the role of the state. For example, the picture encourages us to think markets from the perspective of a consumer making a purchase rather than a worker selling her labor, which may obscure the many significant differences between a snack at a gas station shelf and one's life. *See, e.g.*, HODGSON, *supra* note 105, at 4-5 (noting that "capital and labor do not meet on a level playing field," in part because workers cannot use their future labor as collateral); POLANYI, *supra* note

the gas station transaction might not recognize that one of the parties to the transaction is literally a creation of the state. But surely the state can be described as "present" in a transaction if the state is responsible for the creation and continuing existence of one of the parties.

The list of government-determined and government-enforced legal rules structuring the transaction at the gas station, both directly and indirectly, could be continued at great length, especially once we consider the *history* of market-structuring legal rules that have, over the course of generations, contributed to the customer's ability to pay for the snack, or not. A great deal of legal realist, CLS, and LPE scholarship has been dedicated to exploring the manifold ways in which the conditions for apparently "private," purely voluntary, government-free market transactions are shaped by past and present government policies, and this article will not attempt to elaborate the details further here.[145]

34, at 75-76 (describing labor as a "fictitious" commodity); WOOD, *supra* note 140, at 7 (defining capitalism as a system where "all individuals must in one way or another enter into market relations in order to gain access to the means of life"). The relatively greater ability of capital and goods as opposed to workers to flow across national borders is another relevant difference between labor and other "commodities."

Even more broadly, it is worth noting that the gas station transaction is only a picture of "the market," and not of "the economy," a term that has its own tendency to exclude politically relevant considerations from our thought. In particular, discussions of "the economy" tend to obscure aspects of life and the world that are significant and valuable but happen to be unmonetized, such as unpaid care work.

145. For some of the CLS and LPE literature, see Section A of the Appendix below. An excellent, relatively recent contribution is Noah Zatz, *The Public Law of Private Promising, and Not Even That: LPE 101 for Contracts*, LPE BLOG (Feb. 26, 2019).

Simply as a clarification of the argument, I note that legal institutionalism does not deny that the gas station transaction may be shaped by countless legal rules that even a defender of the "government versus market" distinction would presumably recognize as government activity, such as labor law, antitrust law, bankruptcy law, trade law, intellectual property law, safety and environmental regulations, taxation, monetary policy, and various types of government spending, including agricultural spending and infrastructure spending on the public road that passes by the gas station—not to mention the potential background role of health care law, family law, immigration law, national security decisions, and a wide variety of energy policies. If we take account of such policy decisions, we can see in even greater detail that it is only as a result of countless government choices over generations that the gas station even exists, or that *this* customer is alive and living in the United States. The argument in the text does not emphasize the role of such non-laissez-faire policies in the gas station transaction, however, because a defender of the "government versus market" distinction might simply describe such policies as "government interference in the market," while still insisting that *the market itself* in some sense exists apart from the government.

As a final gesture toward what the argument in the text does not address, it might be noted that there is an even deeper historical sense in which "the market" is constituted by "the state." Even the general phenomenon of strangers using money to engage in market transactions is far from a universal feature of human societies, and can be understood as an artifact of the state and its politically determined laws. *See* DAVID GRAEBER, DEBT: THE FIRST 5000 YEARS 21-41 (2011) (criticizing the myth that barter is a "natural" feature of human societies, in part by describing non-market norms of interaction and exchange in non-state societies); JOSEPH HENRICH, THE WEIRDEST PEOPLE IN THE WORLD: HOW THE WEST BECAME PSYCHOLOGICALLY PECULIAR AND PARTICULARLY PROSPEROUS (2020) (describing psychological and cultural transformations associated with modernity, especially the rise of individualism).

In sum, the simple picture of "the market" sketched above is better understood not as portraying a "purely private" transaction existing apart from "government interference," but rather as a picture of one moment in a long series of decisions by federal, state, and local governments as well as non-governmental actors. To suggest that the government has somehow "left the market to itself," or "left the parties free to make their own decisions," so long as public employees do not dictate the precise outcome of the *final* step—the parties' decision to agree, or not to agree, to a specific transaction—is like suggesting that an arsonist who has placed bombs throughout a warehouse bears no responsibility for the building's destruction so long as he leaves the detonator button in an accomplice's hands.

Yet when we imagine a picture of two parties engaged in an economic transaction, provided that no agents of the state appear within the scene *at that very moment*, it is tempting to view the outcome solely as a matter of private wills, free from government interference. It is as though we are habitually unable to maintain our awareness of what lies outside the frame, even though we seem willing to concede, when confronted, that the picture is radically incomplete.

It is possible that a skeptical reader might still wish to object that no one truly accepts the simple picture of "the market" described above. Even if many people *speak* of the market in a way that leaves out the constitutive role of the state, it might be argued, no one truly *believes* or *reasons on the basis of* such a picture.

But sometimes a writer will make an argument that is difficult to understand without assuming that the writer is, in fact, held captive by a picture of "the market" from which the state has been erased. One example arrived in a *New York Times* opinion piece written by the Harvard economist N. Gregory Mankiw in 2014.[146] Mankiw was Chairman of the Council of Economic Advisers for George W. Bush, and is the author of what may be the most widely used undergraduate economics textbook in the United States.[147] He is also one of the most widely cited economists in the world.[148]

In the opinion piece, Mankiw argued against progressive economic policies such as the Affordable Care Act and raising the minimum wage.[149] He suggested that economists should adopt the Hippocratic principle "first, do no harm."[150] "This principle suggests that when people have voluntarily agreed upon an economic arrangement to their mutual

146. N. Gregory Mankiw, *When the Scientist Is Also a Philosopher*, N.Y. TIMES (Mar. 22, 2014).

147. Greg Mankiw, WIKIPEDIA.COM.

148. *Id.*

149. Mankiw, *supra* note 148.

150. *Id.*

benefit, that arrangement should be respected," unless there are, for example, "negative externalities."[151]

In other words, Mankiw assumes an analogy between a doctor deciding whether to intervene with medical procedures to help a patient, and an economist deciding whether to intervene with policies to help the economy. Mankiw presents voluntary agreement between private parties not simply as the status quo at the time of the economist's decision, but as a kind of baseline from which intervention through economic policy represents a departure. "[W]hen a policy is complex, hard to evaluate *and disruptive of private transactions*," Mankiw writes, "there is good reason to be skeptical of it."[152] He is not simply suggesting, in a Burkean spirit, that economists should be wary of departing from the status quo—*whatever the status quo is*—and that potential harms should receive greater weight than potential benefits. Rather, he is suggesting that voluntary agreements between private parties deserve a *special* deference. Why? Because, according to Mankiw's analogy, they represent a kind of baseline, the natural state of things *in the absence of intervention*, the equivalent of a patient lying on a gurney, before the doctor has taken any action. Mankiw assumes that just as it is possible for the doctor to "do no harm" by refusing to treat the patient, it is possible for the economist to "do no harm" by refusing to interfere in the parties' voluntary agreement.

In other words, Mankiw seems to assume the picture of "the market" described above. He seems to assume that the economist, and by extension the government, can choose to "do no harm" by not "interfering" in the parties' private agreement.

In reality, of course, there is no option for the government to "do no harm" by the time the parties enter the transaction. The government is not like an ancient doctor who encounters a patient complaining of headaches and who must decide whether to do nothing, or to engage in trepanation. Rather, in deciding whether to pass the Affordable Care Act, the government was like an ancient doctor who has already drilled several holes in the patient's skull and then must decide whether to bandage the holes or leave them exposed. "Doing no harm" is not an option. As in all the economic matters at the center of contemporary debate, the government is already inextricably involved. During the debate over Obamacare, the choice was not between, on the one hand, the government establishing rules to govern private agreements in the healthcare marketplace, and, on the other hand, letting private parties choose healthcare for themselves without government interference. There were already government-established rules in the marketplace by virtue of the

151. *Id.*

152. *Id.* (emphasis added).

healthcare marketplace *being* a marketplace. The only question was *which* rules should govern.

In some sense, Mankiw must have been aware that state-enforced legal rules structured choices in the healthcare marketplace before the ACA. In fact, his textbook explicitly recognizes the constitutive role of legal rules in markets, noting early on that "the invisible hand can work its magic only if the government enforces the rules and maintains the institutions that are key to a market economy."[153] But as in the case of Milton Friedman,[154] Mankiw's recognition of markets as legal constructions seems to recede into a fog of ideological oblivion almost as soon as it emerges.

Over the last two centuries, theorists who have tried to make sense of this kind of selective, widely shared, politically consequential blind spot have often referred to it by using the term "ideology" in a pejorative sense.[155] The assumption that "the market" is one thing and "government" is another seems to fit a standard critical conception of ideology: the assumption is a significant, pervasively unrecognized falsehood that regularly works against the interests of those who believe and reproduce it.[156] Like many ideological beliefs, the "government versus market" distinction also seems bafflingly resilient. Writers like Friedman and Mankiw seem to recognize the distinction's falsity, then to drift back under its spell.

In recent years, popular writers attempting to capture the experience of awakening from an ideological illusion have often turned to analogies from popular books or movies. Drawing on a plot device from *The Matrix*, contemporary critics of liberalism sometimes use the phrase "redpilled" to refer to the revelation that liberal ideals such as democracy and human equality are illusions created by elite institutions to perpetuate their own power.[157] The anti-authoritarian Isabel Wilkerson similarly invokes *The*

153. N. GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 10–11 (5th ed. 2009).

154. *See supra* Part II.A.

155. In this article, I have used the term "ideology" in a different, neutral sense, "simply as shorthand for the defining political, cultural, and economic views of one or another political grouping." Brazeal, *Between*, *supra* note 28, at 364 n.4. For the pejorative sense of ideology often associated with Marx, Gramsci ("hegemony"), Barthes ("myths"), Althusser, and critical theory in the tradition of the Frankfurt School, see generally THE NORTON ANTHOLOGY OF THEORY AND CRITICISM 2588, 2590-91, 2601 (Vincent B. Leitch et al. eds., 2001) (noting canonical theorists of ideology).

156. *See infra* Part III.

157. *See, e.g.*, Jacob Siegel, *The Red-Pill Prince*, TABLET (Mar. 30, 2022) (describing the thought of Curtis Yarvin, who popularized the "red pill" metaphor, opposes democracy and equality, and once "argued that certain races were better suited to slavery than others").

The remarkable overlaps between various strands of libertarianism and authoritarianism, or at least hostility to democratic self-government, lie outside the scope of this article, but certainly present a challenge to any political science model that presents the two terms as opposite ends of an ideological spectrum. *Compare, e.g.*, NORRIS & INGLEHART, *supra* note 113, at 73 ("[T]he antithesis to authoritarianism is libertarianism."), *with, e.g.*, JASON BRENNAN, AGAINST DEMOCRACY (2016) (critique

Matrix in her book *Caste*, arguing that caste "goes about its work in silence . . . in the guise of normalcy, injustice looking just, atrocities looking unavoidable to keep the machinery humming, the matrix of caste as a facsimile for life itself."[158]

But the "government versus market" distinction seems more tenacious than a dream from which a person can awake in a single moment and for all time. To the extent that the distinction is woven into our way of talking,

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of democracy by libertarian philosopher), Andrew Koppelman, Opinion, *The Libertarian Party Is Collapsing: Here's Why*, HILL (Oct. 9, 2022) (noting that in May 2022, the Libertarian Party "was taken over at its national convention by the so-called Mises Caucus, a far-right group, some of whose members have been associated with racist and antisemitic ideas"), MACLEAN, *supra* note 14, at 151-52 (quoting libertarian theorist James Buchanan's warning that "[d]emocracy may become its own Leviathan," and libertarian economist George Stigler's proposal that "the restriction of the franchise to property owners, educated classes, employed persons, or some such group" might solve the problem that "we seek what many do not wish"), PHILLIPS-FEIN, *supra* note 41, at 133, 136, 148 (noting that in the 1964 presidential campaign, Barry Goldwater, who voted against the Civil Rights Act of 1964, ultimately won only his home state and "the five states of the Deep South," although he also attracted the support of "free-market intellectuals," including Milton Friedman), Siegel, *supra* (quoting a statement, later retracted, by the libertarian billionaire and longtime Yarvin patron Peter Thiel that "I no longer believe that freedom and democracy are compatible"), *id.* (quoting Yarvin's statement that "[m]y ideas really came from reading the Austrian School—Mises and Rothbard—and then Hoppe"), QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 146-81 (2018) (describing approval for apartheid among some neoliberal thinkers, including Röpke, whose support for white supremacy and opposition to democracy led him away from Hayek and "toward an alliance with the traditionalist conservatives of the U.S. New Right, especially William F. Buckley"), JANEK WASSERMAN, The MARGINAL REVOLUTIONARIES: HOW AUSTRIAN ECONOMISTS FOUGHT THE WAR OF IDEAS 134 (2020) (quoting Ludwig von Mises's praise in 1927 for authoritarian defenses of economic liberty against socialist threats: "It cannot be denied that Fascism and all similar dictatorial endeavors are full of the best intentions and that their interventions have saved European values for the moment."), *id.* at 280 (describing how libertarian theorist Murray Rothbard in his later years defended "the right to racial discrimination, and even the right of secession"); *id.* at 281 (describing libertarian theorist Hans-Hermann Hoppe's argument in *Democracy: The God that Failed* that an authoritarian monarchy is preferable to democracy), *id.* at 284-85 (describing libertarian Congressman Ron Paul's "connections to neo-Confederate scholars" and the "series of racist, white supremacist, antisemitic, and homophobic articles that appeared in his 1980s and 1990s newsletters"), *id.* at 262-63 (describing Hayek's "open advocacy," which he "never recanted," for Augusto Pinochet, "an authoritarian strongman" who carried out a campaign of "repression and murder" after violently overthrowing Salvadore Allende, "a democratically elected socialist leader," although noting that Hayek was "not as complicit with the Pinochet regime as Milton Friedman and the Chicago School were").

For an ideological model that assumes libertarianism and authoritarianism are opposite ends of a spectrum, these overlaps may appear anomalous. The overlaps can perhaps be explained, however, using the group-grid model of political psychology. *See infra* note 244. From the perspective of this model, many libertarians can perhaps be understood as committed to the value of *individual* hierarchy (for example, the dominance of a heroic figure like John Galt), while traditional authoritarians are more committed to the value of *group* hierarchy (for example, fascism, white supremacy, or theocracy). Rather than being diametrically opposed, these libertarians and authoritarians can then be seen to share an ideological commitment to *hierarchy* rather than *equality*, and to differ primarily in whether they think of dominance in terms of *individuals* or of *groups*. *Cf. generally* ROBIN, *supra* note 73 (emphasizing the defense of social hierarchy as a central commitment, across historical periods, of intellectual figures currently identified with the Right or "conservatism").

158. ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 34-35 (2020) (italics removed).

abandoning it may require not only an instant of recognition, but a longer process of breaking linguistic habits and developing new ones—for example, no longer using the phrase "government interference in the market," or perhaps speaking of "market design" instead of "regulations." This section has attempted to open the door to such a change in habit by undermining the sense that the "government versus market" distinction is natural or necessary. To the contrary, this section has suggested, the distinction often rests on a failure to consider significant aspects of how markets work.

C. The Inevitably Political Design of Markets

Central to this article's argument against the "government versus market" distinction is the claim that there is no natural or politically neutral baseline for market rules. Above all, it is arbitrary to treat one or another idealized version of nineteenth-century U.S. rules of property, contract, and torts as the natural definition of a "market," and then to treat any departures from these legal rules as "regulations" that represent "government interference in the market." To the contrary, this article has suggested that markets can take many forms, based on many different legal rules, without ceasing to be "markets" in the general sense of systems of exchange based on prices.[159] The point matters for at least two

159. To be clear, the legal institutionalist insight that markets have no single determinate form does not imply that it is impossible to distinguish market from non-market arrangements. The critique of the "government versus market" distinction does not imply a critique of the "market versus non-market" distinction. If markets are generally defined as systems of exchange based on prices, it becomes possible to distinguish economic systems that give a greater or lesser role to markets. For example, the legal rules of the Gilded Age in the United States gave a far greater role to markets, in this sense, than did the economic policy rules created by Gosplan, the central planning agency in the Soviet Union. *See* ERIC HOBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991, at 372-94 (1994) (describing and criticizing Soviet economic policy).

It may also be useful to state explicitly that, although markets could in theory be designed in any number of ways, in practice virtually all markets have operated based on monetary price-signals that amplify the preferences of individuals based on their wealth. That is, in practice, markets generally do not lead to efficient outcomes if efficiency is defined in terms of the equally weighted preferences of all individuals, or even their theoretical willingness to pay; rather, in practice, even perfectly functioning markets (which rarely exist in any case) create efficient outcomes only if efficiency is defined in terms of what market participants are willing *and actually able* to pay. *See* ADAM SMITH, LECTURES ON JURISPRUDENCE 496 (R.L. Meek et al. eds., 1978) (noting that the market price of goods depends not only on "demand or need for the commodity" but on "[t]he riches or poverty of those who demand"); *cf.* Zachary Listow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1652 & n.12 (2018) ("When critics say that efficient policies are biased against the poor, they reference efficiency's basis in 'willingness to pay.' Because the rich have greater wealth, the view goes, they will tend to have a greater willingness to pay . . . ." (citing C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 15 (1975))). In the absence of wealth equality, the choice of a money-based market mechanism for organizing economic activity will obviously have a tendency to satisfy, and to incentivize the satisfaction of, the preferences of those with greater wealth more than the preferences of those with less wealth. On the other hand, the wholesale rejection of markets has often led, in practice, to equally predictable

reasons: first, as legal institutionalist thinkers such as Dean Baker and Roberto Mangabeira Unger have suggested for decades,[160] attention to the wide possibilities of market design can remind us that we are free to experiment with different rules that might better achieve our democratic ends; and, second, as Section III argues below, recognizing that market rules are political choices can help to undermine the pernicious myth that current market outcomes are simply the natural result of individual initiative.

Up to now, however, this article has simply asserted that markets can take many forms, without offering examples. This section provides a few brief illustrations of how policymakers cannot avoid making political choices in the design of markets. The purpose of this section is not to argue for one rule over another, but rather, simply, to emphasize that the choice of rules is inevitably political, in the sense that there is no natural or politically neutral baseline for market design.[161] Even someone who has an unquestioning faith that "the free market" is always superior to "central planning"[162] must still make a choice of rules in market design, and these choices often have predictable consequences that favor some parties over others.

This section focuses on contemporary illustrations, but it may be worth noting that the design of markets through legal rules has always necessarily involved political decisions. The first volume of Morton

problems, as the communist historian Eric Hobsbawm recognized in his criticisms of the Soviet system. *See* HOBSBAWM, *supra*, at 384-85.

The point in making these obvious observations is simply to emphasize that legal institutionalism implies neither a general preference for nor opposition to market arrangements. If anything, legal institutionalism aims to reorient economic policy debates away from ideological feuds focused on devotion or hostility to "the market," and toward a pragmatic, empirically informed focus on the likely effects of different economic policy rules, with an emphasis on the breadth of possible policy designs. Just as markets can take many different forms, non-market arrangements can take many forms as well, not only the "central planning" model reflected in Gosplan and the managerial bureaucracy of private firms. *See, e.g.*, Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) (describing commons-based peer production in the style of Wikipedia); Evgeny Morozov, *The Calculation Debate in the Age of Big Data*, NEW LEFT REV., May/June 2019 (speculating about the possibility of a digital feedback infrastructure as an alternative to markets); Vanessa Williamson, *Public Futility*, DEMOCRACY (Winter 2020) (discussing the promises and pitfalls of "public options," such as public libraries or postal banking, hybrid forms that sometimes exist between "market" and "non-market" design).

160. *See infra* Appendix Section A (Unger); *id.* Section B (Baker).

161. Of course, even if one option were "natural," this would not be a reason to accept it. *See* LORRAINE DASTON, AGAINST NATURE 58-59 (2019) (noting that cultures that draw a clear line between "the natural" and "the human" do not "always accord greater majesty or dignity to nature," and citing the praise of "civilization" as an example of celebrating human transcendence of nature).

162. With regard to the blanket ideological opposition to "central planning," Judith Shklar's criticism of Hayek remains valid: "It is . . . difficult to see why we are able to plan the vast enterprises that have created modern technologies and the business and manufacturing organizations that realize them, if we are so ignorant of the probable future." Judith N. Shklar, *Political Theory and the Rule of Law*, *in* POLITICAL THOUGHT & POLITICAL THINKERS 21, 27 (Stanley Hoffmann ed., 1998).

Horwitz's classic *Transformation of American Law* is a book-length study of the market rules chosen by common law judges in the antebellum United States, and the often-predictable effects of their chosen rules on the growth and distribution of wealth.[163] For example, Horwitz contrasts an antidevelopment property rule that prohibited a landowner from making "any use of water that conflicted with the interests of any other proprietor on the stream," with a later prodevelopment property rule that allowed such property uses if they satisfied a "reasonable use" or "balancing test" that considered "the relative efficiencies of conflicting property uses."[164] The latter rule predictably benefited the owners of cotton mills at the expense of neighboring landowners who used their land for domestic purposes and husbandry.[165] More specifically, the latter rule encouraged—or even, if the earlier rule is taken as a baseline, legally subsidized—the construction of a small number of large cotton mills rather than a large number of smaller ones.[166]

As a contemporary example of the inevitably political design of markets, consider the rules governing the pay of corporate CEOs. According to one analysis, "average CEO pay remained relatively constant at around $1 million from the mid-1930s to the mid-1970s."[167] Then, between 1978 and 2020, inflation-adjusted CEO pay in the United States rose 1,322%.[168] During the same period, the inflation-adjusted compensation for the typical American worker rose 18.0%.[169] The rise in CEO pay even outpaced the rise in earnings for the top 0.1% of wage earners, suggesting that the rise in CEO compensation "does not simply reflect a competitive race for skills."[170]

Numerous studies have suggested that the rise in CEO compensation relative to the compensation of workers has been driven, in part, by a shift toward paying CEOs in stock options, especially short-term stock options that reward "CEOs who can create quick stock market gains through job cuts, restructuring, or creative accounting."[171] Currently, over 80% of

163. *See generally* HORWITZ, *supra* note 20.

164. *Id.* at 35, 37-38.

165. *Id.* at 36, 40.

166. *Id.* at 40-41, 100.

167. JOSEPH E. STIGLITZ, ROOSEVELT INST., REWRITING THE RULES OF THE AMERICAN ECONOMY 35 (2015).

168. Lawrence Mishel & Jori Kandra, *CEO Pay Has Skyrocketed 1,322% Since 1978*, ECON. POL. INST. (Aug. 10, 2021) (adjusted for inflation).

169. *Id.*; *cf.* Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018) ("After adjusting for inflation, . . . today's average hourly wage has just about the same purchasing power it did in 1978, following a long slide in the 1980s and early 1990s and bumpy, inconsistent growth since then.").

170. Mishel & Kandra, *supra* note 171.

171. HACKER & PIERSON, *supra* note 5, at 63; Mishel & Kandra, *supra* note 171; STIGLITZ, *supra* note 170, at 34-35. Hacker and Pierson also note that in the 1990s, "stock options rose from less than a

CEO pay comes from vested stock awards and exercised stock options.[172]

It is easy to imagine any number of legal rules that would create disincentives to paying CEOs with short-term stock options. As Jacob Hacker and Paul Pierson noted in 2011, other countries have made greater efforts "to monitor executive pay and facilitate organized pushback against managerial power."[173] In addition, firms in other countries use restrictions, "such as payouts depending on a company outperforming others within the same industry," that "link pay much more closely to performance."[174] Such restrictions might have prevented Robert Nardelli, the CEO of Home Depot from 2001 to 2007, from leaving his position with "$210 million in compensation after the company's stock lost almost 40 percent of its real value," even as "the stock price of its main competitor, Lowe's, nearly doubled over the same period."[175]

In the words of Hacker and Pierson, "the experience of other rich nations shows that nothing about modern globalized capitalism makes extraordinary executive salaries inevitable or even likely."[176] As an illustrative example of the rules that might be changed to reduce unnecessary or even counterproductive CEO compensation, consider stock option cost reporting. In the United States, "when the Financial Accounting Standards Board, which oversees accounting practices, tried to make firms report the costs of stock options like other compensation in the early 1990s, it was beaten back by a bipartisan coalition in the Senate galvanized by industry opposition."[177]

Counterfactually, however, different rules can be imagined. Consider two alternatives. One rule would say that when corporations issue stock options, they are required to report the estimated cost of the options. Another rule would say that corporations are not required to report the cost of stock options at the time they are issued.

Which rule represents "the free market" at work, and which represents "government interference in the market"?

It is difficult to make sense of the question. Once again, corporations are creatures of state law.[178] They have no "natural" existence apart from state law, and whatever rules define and govern their existence are inevitably the result of political determinations by states. The government

quarter of executive compensation to half." HACKER & PIERSON, *supra* note 5, at 246; *see also* REICH, *supra* note 99, at 97-107, 155, 194.

172. Mishel & Kandra, *supra* note 171.

173. HACKER & PIERSON, *supra* note 5, at 65.

174. *Id.* at 246.

175. BAKER, *supra* note 95, at 134.

176. HACKER & PIERSON, *supra* note 5, at 62-63; *accord* BAKER, *supra* note 95, at 132-33.

177. HACKER & PIERSON, *supra* note 5, at 65; *see also id.* at 246-47 (describing the episode in greater detail).

178. *See supra* notes 141-144 and accompanying text.

"acts" as much when it authorizes its corporate offspring to issue stock options without reporting their costs as it does when it authorizes corporations to issue stock options only if costs are reported. Whatever the difference between the rules might be, it is not that the government "plays a role" in one case and not in the other.

Assuming that corporations are generally required to report executive compensation, a rule that exempts stock options from the reporting requirement would not even be a "reduction in regulation" in the sense of a simplification of the legal rules governing corporations.[179] It is a further complication, and one that creates added difficulties for investors who wish to know about executive compensation. The "deregulation" of the corporation's duty to report executive compensation corresponds to a "regulation" of the investor's right to demand information about executive compensation—through a lawsuit, if necessary. To the extent that "deregulation" is taken to mean "less freedom from legal restriction," it could be argued that the reduction in restrictions on the corporation is effectively cancelled out by the increased restriction on the investor. The corporation is more free to conceal information, while the investor is less free to demand information.

Similar conceptual exercises could be carried out with regard to countless other rules of market design. Consider monetary policy. When the Fed sets its benchmark interest rate, what is the rate that corresponds to "the free market," and what is the rate that represents "government intervention in the market"?[180] But perhaps some of those who defend laissez-faire rules as a natural baseline for market design would object that any monetary policy represents "government intervention in the market," and that transactions should instead be conducted in gold, Bitcoin, or some other alternative to "government money."

Consider, then, trade policy. Take two simplified sets of legal rules. Rule A: a trade agreement in which the United States is required to permit the importation of goods that are produced with the support of massive subsidies from a foreign government. Rule B: a trade agreement in which the United States is allowed to place tariffs on the importation of the subsidized goods. Which of these rules reflects "the free market," and which reflects "government intervention in the market"? If the importation of subsidized goods is consistent with "the free market," then does the United States "intervene" in the market if it subsidizes domestic

179. *See infra* note 204.

180. BAKER, *supra* note 95, at 40-43 (describing the impossibility of avoiding policy choices in interest rate policy). In the words of a leading monetary historian: "The dollar, like every other sovereign money, is a public project." Christine Desan, *Money As a Constitutional Medium*, LPE BLOG (May 14, 2019).

production?[181] By contrast, if tariffs can be part of the rules constituting "the free market," then why not any number of other ostensibly "market-correcting" taxes as well?[182] For that matter, if labor is a commodity, is any immigration rule other than absolutely open borders an example of "government intervention in the market"? What about licensing restrictions that limit the "importation" of qualified dentists, doctors, and lawyers, while autoworkers are effectively required to compete against workers in low-wage countries?[183]

Or antitrust policy. Is all antitrust policy a "government intervention in the market," in which case the government does not "intervene" if it *actively authorizes* the creation of Standard Oil, but does "intervene" if it *declines to authorize* the creation of Standard Oil?[184] Why not describe the authorization of any merger as a "government intervention in the market," in which case a policy permitting fewer mergers would represent "less intervention"?

Or labor policy. Largely as a result of legal rules in the United States related to union organizing, the power of organized labor has declined in the United States over the last four decades to a far greater extent than in many other wealthy Western countries.[185] It might be tempting to argue that the United States has taken a more "free market" approach, while these other countries have "intervened" more aggressively to protect unions. But, as in the discussion of stock options above, any strengthening of an employer's right to interfere in union organizing will inevitably correspond to a weakening of employees' rights to organize, and vice versa. The choice between any two legal rules governing the right to bargain will either facilitate union organizing, or facilitate employer interference in union organizing. There is no neutral baseline.

More specifically, if the absence of "government interference" in the labor market means that every individual is free to enter whatever

181. On the revival of industrial policy under the Biden administration, see Robert Kuttner, *Bringing the Supply Chain Back Home*, N.Y. REV. BOOKS (Nov. 18, 2021).

182. For an accessible introduction to Pigovian taxes, which attempt to correct for externalities in markets, see Elizabeth Kolbert, *Paying for It*, NEW YORKER (Dec. 2, 2012).

183. *See* David Autor, David Dorn, & Gordon Hanson, *On the Persistence of the China Shock*, BROOKINGS (Sept. 8, 2021) (describing effect of "China shock" on American labor). On China's ability to undercut American wages, see MATTHEW C. KLEIN & MICHAEL PETTIS, TRADE WARS ARE CLASS WARS 112-13 (2020) (noting, among other things, that "[l]abor organizing and adversarial unions are illegal in China," that political prisoners "are often unpaid or underpaid workers for private companies," and that "hundreds of millions" of workers have migrated illegally to cities and "remain under constant threat of eviction, . . . which makes for a relatively compliant workforce").

184. On alternatives to Reagan-era antitrust policy, see REICH, *supra* note 99, at 193-94; Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).

185. *See* BAKER, *supra* note 95, at 30; HACKER & PIERSON, *supra* note 5, at 56-61; REICH, *supra* note 99, at 194; STIGLITZ, *supra* note 170, at 76.

agreement she pleases, then is a labor market free from "government interference" only if, for example, all the workers in a sector of the economy are free to choose, by majority vote, to form a sectoral union? Does the government "interfere" in the labor market if it enforces a collective agreement requiring a firm to hire only union members? If it provides a social safety net that effectively subsidizes participation in a strike, or allows a worker to hold out for a better job offer? Conversely, does the government "interfere" in the labor market, or not, if it allows firms to sue unions for damages resulting from a strike? If every employer requires every employee to sign a lifelong non-compete and non-disclosure agreement, does the government "interfere" in the labor market by enforcing such agreements?

Or, finally, consider the choice between different property rules. Even Milton Friedman seemed to recognize that *intellectual* property is one of the most obvious examples of the role of the state's legal rules in constituting markets.[186] When the government grants someone an artificial monopoly over the sale of an artistic work or invention, does the government "intervene in the market," or, rather, create the market? Either way, is a three-hundred-year monopoly "more regulation" than a three-year monopoly, or less?[187]

As Jeremy Bentham observed over a century ago, the constitutive role of government does not stop with intellectual property. Moving beyond Rousseau's presentation of property as a social convention,[188] Bentham recognized property specifically as a creature of the law: "Property and law are born together and die together. Before the laws there was no property; take away the laws, all property ceases."[189] Once it is accepted that property rules are the product of political decisions and that the details of the rules cannot be inferred from any premises that we are required by logical necessity to accept,[190] remarkable consequences follow.

Consider two possible rules for the ownership of a plot of land.[191]

186. *See* FRIEDMAN, *supra* note 51, at 27.

187. *See* BAKER, *supra* note 95, at 77; PISTOR, *supra* note 125, at 222, 224; REICH, *supra* note 99, at 154-55, 193; STIGLITZ, *supra* note 170, at 58; *infra* note 204.

188. *See* JEAN-JACQUES ROUSSEAU, *Discourse on the Origin of Inequality*, *in* BASIC POLITICAL WRITINGS 25, 60 (Donald A. Cress trans., 1987) (1755) ("The first person who, having enclosed a plot of land, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society.").

189. JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE, *in* 1 THE WORKS OF JEREMY BENTHAM 297, 309 (John Bowring ed., 1843).

190. *See supra* note 28.

191. I use the ownership of land to illustrate the inevitably political design of property rules because land is a familiar example of property. But it would also be possible to illustrate the politically constructed nature of property by considering what should be allowed to count as "property" at all: what kinds of exotic financial instruments, claims, ideas, expectations, or digital phenomena should it be possible to

Under the first rule, the law permits the owner of the land to transfer it with any conditions whatsoever, including perpetual restrictions on its future use or non-use. Ownership, according to this rule, means freedom to dispose of one's land however one chooses. By contrast, under the second rule, the law limits the encumbrances that the owner can attach to the sale of land. For example, the law might dictate that any restrictions on the use of the land that the seller includes in a deed must expire at some future point in time.

Which of these two rules reflects "the free market," and which reflects "government intervention in the market"? It might be assumed that the first rule is the classically liberal one, because it seems to give absolute primacy to the will of the owner. But in fact, the first rule is closer to the feudal idea of property. As noted above, classically liberal property law places limits on the power of landowners to exert control over their property.[192] It restricts the ability of landowners to realize their wills, in order to expand the ability of future generations to realize theirs.[193]

Once we set aside the early modern metaphysics of "natural rights,"[194] it is also difficult to make sense of the idea that one of the two property rules above involves *more* "government intervention in the market" or *more* "regulation" than the other.[195] Under both rules, the government allocates rights, and on the basis of those rights, parties engage in transactions. As already noted in the case of intellectual property, to the extent that markets involve transactions based on legal rights, the government allocation of rights does not intervene in a preexisting market. Rather, it helps to create the market: it makes market transactions possible.[196]

Furthermore, once it is recognized that the allocation of property rights is inevitably a policy decision and cannot be inferred from the nature of property, any number of radical transformations of our political economy can be seen as no less consistent with "the free market" than our economic

encode as capital, and what attributes should such capital have? Katherina Pistor's *Code of Capital* explores how such decisions are made, especially through the work of highly paid lawyers, "the masters of the code," who shape the rules of property, collateral, trust, corporate, bankruptcy, and contract law. *See* PISTOR, *supra* note 125, at 3, 13-15, 21-22. Another inevitably political aspect of the legal construction of property concerns what should not be ownable or sellable on moral grounds. *See* DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2010).

192. *See supra* note 137.

193. *See* Singer, *supra* note 137.

194. *See supra* note 28.

195. *See infra* note 204.

196. Again, it is possible to point to theoretical, historical, and isolated contemporary examples of markets existing in the absence of legal rights, but such cases are largely peripheral to the concerns of public economic discourse in the United States, the focus of this paper. *See supra* note 16.

status quo. As Thomas Paine noted in the eighteenth century,[197] there is nothing "natural" about the government granting ownership rights over land without asking for anything in return. Rather than imagining land as somehow existing in an eternal chain of private ownership through sale and conquest, Paine suggested that it would be just as natural to imagine all land as inalienable "common property" that the people, through their government, allow to be used, temporarily and under various conditions, by titleholders. Property taxes could then be reconceptualized not as redistribution—in fact, not as taxes at all, as ordinarily understood—but rather as an implied contractual obligation or "indemnification," in Paine's words, for the public's temporary loss of access to its property.[198]

Similar changes in the allocation of property rights could be imagined in the context of intellectual property, where the public might demand ownership shares in exchange for granting a temporary legal monopoly, or a share of profits for permission to use data generated through online activities;[199] or in the context of corporations, where the public might demand some fraction of ownership in exchange for granting the corporation's owners immunity from the corporation's liabilities. No taxes or "redistribution" would be required. The government would simply have allocated property rights in a different way, and then, based on the allocation of property rights, the parties would have engaged in a market transaction.

There may be any number of practical reasons why it would be a good or bad idea to adopt any of the preceding changes in the allocation of property rights. But unless we are willing to revive one or another metaphysical version of "natural rights," the argument that the changes would constitute an "interference in the market" is not a valid objection. The changed rules would be no more nor less a reflections of "the free market" than our current rules. The parties would be equally free to engage in mutually beneficial exchanges under either scenario. All that would have changed is the allocation of rights, and there is no logically necessary reason to conclude that one allocation of rights is any more

197. *See* THOMAS PAINE, *Agrarian Justice*, *in* THE THOMAS PAINE READER 471, 477 (1987) (1795) (calling for a "national fund" providing "indemnification" to every person "for the loss of his or her natural inheritance, by the introduction of the system of landed property"). In the nineteenth century, the journalist Henry George proposed a similar idea that achieved enormous popularity in the United States. *See* WHITE, *supra* note 21, at 452-58 (describing George's support for the state ownership of all land, or in the alternative a "single tax" that would confiscate "the unearned increment that came from the ownership of land" and transfer wealth to the people, abolishing poverty and creating "'equality in the distribution of wealth and power'").

198. PAINE, *supra* note 200, at 477.

199. *See* JARON LANIER, WHO OWNS THE FUTURE? 20 (2013) (proposing that each individual should be "the commercial owner of any data that can be measured from that person's state or behavior," including, for example, the human translators of works that have been assembled in a database used to train "a machine language translation algorithm").

"natural" than the other.

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Finally, before moving beyond this article's introduction of the legal institutionalist view of markets, it may be worth addressing a potential response to the critique of the "government versus market" distinction. A reader who concedes that even laissez-faire markets are constituted by state-backed legal rules, and thus that the distinction, on its face, does not make sense, might nevertheless wish to fall back on the claim that it can make sense to contrast a *greater* as opposed to a *lesser* role for government in a market, in the style of Thomas Friedman. The reader might defend the language of "government intervention" in the market by using it only in relative and never in absolute terms, arguing that it is possible to distinguish *more* government interference from *less* government interference, even if one recognizes that the government plays *some* role even in a laissez-faire market. The reader might illustrate the argument by describing an idealized laissez-faire market system as one involving *less* government activity than, say, a market system in which a central agency like the National Recovery Administration dictates business and labor practices and sets prices.

It is certainly possible to distinguish a "greater" from a "lesser" government role in markets in a way that satisfies the minimal requirement of "making sense" according to most people's linguistic intuitions—provided that one defines "greater" and "lesser" in some comprehensible way. For example, one could define "more" government involvement in terms of more frequent contact between market participants and public employees who dictate practices, or more complex legal rules. Similarly, this article has never denied that one can make sense out of the "government versus market" distinction by defining "the market" in terms of some baseline of rules, and then any law departing from those rules as "government intervention."

This article has no interest in attempting to police linguistic usage for no practical purpose, in the style of analytic philosophy.[200] Speakers are ultimately free to define terms however they wish, and if some wish to defend the superficially nonsensical "government versus market" distinction by defining "the market" in terms of an arbitrarily chosen set of rules, no logical necessity prevents them from doing so. Likewise, nothing prevents speakers from referring to market systems involving more complex legal rules as "more regulated" or as involving "more of a governmental role."

200. *See* Brazeal, *Between*, *supra* note 28, at 364-65 n.4 (critiquing logical perfectionism).

Legal institutionalism might, however, suggest various reasons for not adopting the contrast between "more" and "less" regulation. To begin with, it seems misleading to suggest that "government" is only "partly present" or "partly involved" in any system where state-backed law defines property rights. As soon as ownership within a jurisdiction is defined by the law of the state, the state is in that sense entirely "present" and "involved" in every market transaction.[201] The market is already "fully regulated" in the sense that everything the actors do with property in the market, they do subject to the state's law—its permissions, prohibitions, and requirements. To speak of the government being "more involved" in markets after the New Deal than it was before ignores, once again, the basic legal institutionalist insight that government constitutes markets from the ground up through law.

More detailed arguments involving counterfactual scenarios could be offered to challenge the intuition that laissez-faire-style markets necessarily involve "less government intervention" than New Deal-style markets, or the further intuition that laissez-faire-style markets necessarily entail greater "freedom" than New-Deal-style markets, even in a negative sense.[202] Such arguments might involve noting that, despite our intuitions, there is in fact no necessary conceptual or historical connection between the first terms in the following list: simple versus complex market rules, the use of common law judges versus expert administrators as rule-makers, decentralized versus centralized rule-making, rare versus frequent interactions between market participants and the public employees who administer markets, and market rules favoring the interests of concentrated wealth versus market rules favoring parties with less wealth. In other words, laissez-faire market rules favoring the concentration of wealth have no necessary conceptual connection to the features that we ordinarily associate with "less government intervention in markets," such as the use of common law judges. However, questioning

201. *Cf.* HARCOURT, *supra* note 34, at 47-48, 241-42 (arguing against the distinction between "more or less regulation," because "[i]n all markets, the state is present," and noting that "[m]odern American economic organization is a system as fully regulated as any previous economic order"); Kennedy, *supra* note 129, at 568 ("[A] regime of freedom of contract is a set of rules about agreements within a domain of pre-existing property rights.").

202. To offer one hint of an argument that might be made: Polanyi notes that the transition to laissez-faire policies in England in the 1830s and 1840s took place through legislation and resulted in

> an enormous increase in the administrative functions of the state, which was now being endowed with a central bureaucracy able to fulfil the tasks set by the adherents of liberalism. . . . [C]ontrary to expectation, . . . the introduction of free markets, far from doing away with the need for control, regulation, and intervention, enormously increased their range. Administrators had to be constantly on the watch to ensure the free working of the system.

POLANYI, *supra* note 34, at 145, 147. Polanyi's example calls into question the intuition that the enforcement of laissez-faire market rules necessarily involves "less government intervention" than the enforcement of alternative market rules.

the premises of the "more versus less government intervention" distinction would require addressing a variety of terminological disputes that would take us far beyond the primary focus of this article, which is to critique the distinction between "government" and "the market."[203]

D. THE QUESTION OF "NEOLIBERALISM"

This Part addresses a final objection that might be raised against the idea that public economic discourse in the Reagan era was defined by an opposition between "government" and "the market." The objection is as follows: what this article has generally referred to as "the Reagan era" is roughly the same period that many scholars refer to as the "neoliberal era," and according to the leading historians of neoliberal thought, neoliberalism defined itself in part by its *rejection* of the naïve laissez-faire classical liberal view of markets as natural orders existing apart from the state. Thus, it cannot make sense to define the public economic discourse of the Reagan era in terms of an assumed opposition between "government" and "the market."

The response to the objection is awkward but seems unavoidable based on the current usage of the relevant terms: in the United States, the public economic discourse of what has come to be known as "the neoliberal era" was not "neoliberal." That is, the dominant public economic discourse of the 1970s through the 2010s was closer to the assumptions and commitments of laissez-faire, "classical liberal" thought than to those of elite "neoliberal" thought.

According to many of the leading historians of neoliberal thought, including Philip Mirowski and Quinn Slobodian, neoliberal thought defined itself in opposition to "laissez-faire classical liberal" thought partly by emphasizing the need for strong states to defend markets.[204] If classical liberal economic thought largely called for the government somehow to "remove" itself from markets, as suggested by the phrase "laissez-faire,"[205] then neoliberal economic thought, according to these historians, distinguished itself by emphasizing the need for a strong

203. As a final terminological clarification, none of the preceding discussion should be understood as suggesting that there is no meaningful difference between an economic system in which centralized public administrators set prices, and one in which prices result from the behavior of decentralized market participants in the shadow of common law rules. There is a very meaningful difference between the two systems. But the difference is not between "government" and "the market," or "more government intervention in the market" and "less." The difference is between a market system and a non-market system. Both systems are equally constituted by government-backed legal rules. *See supra* note 162.

204. *See generally* Philip Mirowski, *Postface: Defining Neoliberalism*, *in* THE ROAD FROM MONT PÈLERIN, *supra* note 47, at 417, 431, 433-40; SLOBODIAN, *supra* note 158, at 1-19, 271-72.

205. *See supra* note 36.

government to "encase" markets against democratic interference.[206] In other words, "neoliberal" thought *rejected* the opposition of "markets" and "government." If anything, this "neoliberal" thought seems to come close to accepting the legal institutionalist view of markets as legal constructions.[207]

At the same time, it is worth noting that neoliberal economic thinkers, whether heterodox or neoclassical in their assumptions and methods,[208] did not aim to encase just any market rules. They remained captivated by a dream of something like laissez-faire classical liberal market rules. Even if they were *neo*-liberals, they remained neo-*liberals*.[209]

Rather than attempting to reconcile the awkward terminological tension described in the preceding paragraphs, the remainder of this Part proposes that the tension is probably unavoidable. First, the Part rehearses

206. SLOBODIAN, *supra* note 158, at 2.

207. *See, e.g.*, SLOBODIAN, *supra* note 158, at 6-7 (describing attention by Hayek and ordoliberals to legal institutional framework for markets); *see also id.* at 89, 92, 204-05, 207, 212-13 (examples of such attention, especially by second-generation ordoliberals such as Ernst-Joachim Mestmäcker, who was, not coincidentally, trained as a lawyer rather than an economist). Hayek "emphasizes . . . that, in order that competition should work beneficially, a carefully thought-out legal framework is required and . . . neither the existing nor the past legal rules are free from grave defects." HAYEK, *supra* note 129, at 86; *see also id.* at 118 ("Of course, every state must act and every action of the state interferes with something or other."). One of the leading intellectuals of the neoliberal "Washington Consensus," Hernando de Soto, wrote a widely read book with a legal institutionalist thesis, arguing that capitalism has failed in much of the world due to a lack of adequately documented legal rights to assets, which prevents those assets from being used as capital. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 3-7 (2000). De Soto notes, in line with the arguments of this article, that many people "take this mechanism so completely for granted that they have lost all awareness of its existence" and fail to see the "implicit legal infrastructure hidden deep within their property systems." *Id.* at 8.

208. Accessible, critical introductions to neoclassical economic thought, with an emphasis on the kind of materials taught in Economics 101 courses in recent decades, include JAMES KWAK, ECONOMISM: BAD ECONOMICS AND THE RISE OF INEQUALITY (2017); ROBERT SKIDELSKY, WHAT'S WRONG WITH ECONOMICS? A PRIMER FOR THE PERPLEXED (2020); *see also* JOHN QUIGGIN, ZOMBIE ECONOMICS: HOW DEAD IDEAS STILL WALK AMONG US (2010) (offering critical introductory accounts of more advanced ideas in mainstream professional economic thought). For my own diagnosis of the alleged abuse of mathematics in neoclassical macroeconomics, drawing on earlier critical writings in the wake of the 2007-2008 financial crisis, see Brazeal, *supra* note 114, at 36-46. For an insider's perspective on mainstream macroeconomics as of 2022, see Noah Smith, *Macroeconomics Is Still in Its Infancy*, NOAHPINION (Nov. 7, 2022) (concluding that "DSGE—the big innovation in macroeconomic theory over the past 40 years—has so far not proven itself useful for anything other than publishing more econ papers"). The fact that professional macroeconomics was dominated by "neoclassical" thought in the "neoliberal" era has sometimes led commentators to blur the distinctions between the two. *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 20-21 (2005). Hayek, who is seen as a core neoliberal thinker but who rejected the rationalistic, utility-maximizing assumptions of neoclassical economics, is an illustration of the difference between the two categories. *See infra* note 231.

209. *See, e.g.*, BURGIN, *supra* note 38, at 71-75 (describing Colloque Walter Lippmann's goal of developing a "revised" liberalism); *id.* at 149 (Mont Pèlerin Society's "Statement of Aims" calling for defending "competitive markets"); *id.* at 177-78 (Milton Friedman's defense of imagined nineteenth-century laissez-faire); SLOBODIAN, *supra* note 158, at 271 (quoting Röpke's demand: "Laissez-faire—yes, but within a framework laid down by a permanent and clear-sighted market police in the widest sense of this word").

the case for referring to many of the distinctive economic policies of the last several decades, from a global perspective, as "neoliberal," and thus for referring to the period generally as "the neoliberal era." Second, the Part summarizes the historical argument for referring to the thought of various leading economic thinkers of this era as "neoliberal." Third, the Part addresses the conflict between this "neoliberal" thought and the classically liberal rhetoric that dominated public economic discourse during the "neoliberal era" in the United States.

At the outset, it is important to acknowledge that the term "neoliberal" has been applied in a variety of contexts and used in a variety of ways. In particular, the term has been used to describe a set of economic policies, a collective of political-economic thinkers connected to the Mont Pèlerin Society ("MPS"), an era in global political and economic history, and a market-focused, anti-democratic mode of governance encompassing not only economics but politics and ethics.[210]

This article does not argue against the use of "neoliberal" as, at the very least, a convenient term for the global shift in economic policy goals that occurred between the 1970s and the present. Wendy Brown, in her 2015 book on neoliberalism, offers a typical list of economic policy goals associated with neoliberalism:

> deregulation of industries and capital flows; radical reduction in welfare state provisions and protections for the vulnerable; privatized and outsourced public goods . . . ; replacement of progressive with regressive tax and tariff schemes; the end of wealth redistribution as an economic or social-political policy . . . ; and, most recently, the financialization of everything.[211]

All of these economic policy goals represented departures from the more social democratic and Keynesian fiscal, monetary, and "regulatory" (what a legal institutionalist might call "market-design") policies

210. *See, e.g.*, WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015) (governance); HARVEY, *supra* note 211 (economic policies); Mirowski, *supra* note 207 (thought collective); SLOBODIAN, *supra* note 158 (set of ideas). *See generally* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMPORARY PROBS. 1, 2-3 (2015) (surveying uses of "neoliberalism").

211. BROWN, *supra* note 213, at 28; *cf.* HARVEY, *supra* note 211, at 3 (associating neoliberalism with "[d]eregulation, privatization, and withdrawal of the state from many areas of social provision"). A similar list can already be found in Thomas Friedman's 1999 description of the "Golden Straightjacket" that a country must adopt to achieve prosperity in an age of global economic competition. *See* FRIEDMAN, *supra* note 85, at 105 (listing policies that constitute the Golden Straitjacket). At the same time, there is room for debate regarding the extent to which neoliberal economic policy goals were actually accomplished in the United States. *Compare, e.g.*, Noah Smith, *Was There Really a "Neoliberal" Turn?*, NOAHPINION (Sept. 23, 2022) (noting, for example, that "public social spending as a share of GDP stayed flat under Reagan and rose slightly under Clinton, before rising substantially under Bush and Obama"), *with* HACKER & PIERSON, *supra* note 5, at 7 (introducing book's central argument that since roughly 1980, "America's public officials have rewritten the rules of American politics and the American economy in ways that have benefited the few at the expense of the many").

associated with the decades before the 1970s.[212]

In the 1990s, as public consciousness of global economic transformations grew in the United States, commentators often referred to the policy shift under the banner of "globalization."[213] But as a label for the shift, "neoliberal" has an obvious appeal, in part because so many of the policies were foreshadowed by the self-proclaimed "liberal" policies of the later nineteenth century, when "liberal" was synonymous with "laissez-faire."[214] The label "neoliberal" was also already widespread in Europe by the 1990s, partly because the term "liberal" had never become associated with social welfare policies as in the United States, and partly as a result of Michel Foucault's prescient 1978-1979 lectures, which distinguished the thought of certain economists—including figures now identified with German ordoliberalism and the Chicago School, such as Walter Eucken, Hayek, and Gary Becker—as "neo-liberal," in contrast to the classical liberal economists of the eighteenth century.[215]

In light of the global nature of the shifts in economic policy beginning in the 1970s, it also arguably makes sense to use a label that refers to something other than the name of a U.S. president or British prime minister.[216]

In any case, at least in the present-day United States, "neoliberalism" seems to have displaced "globalization" as the most widely used catch-all term for the economic policy transformations listed above.[217] It may be futile to object to the use of the term at this point.

Second, a defensible case can also be made for referring to the thought of at least some prominent economic thinkers of the era as "neoliberal." Any history of the distinctive economic thought of the neoliberal era would surely agree that the intellectual networks surrounding the MPS played a significant role, and that Friedrich Hayek was a significant

212. *See* HARVEY, *supra* note 211, at 10-11. Just as "neoliberalism" offers a more global label for what might be described as "Reaganism" in the United States and "Thatcherism" in the United Kingdom, the earlier era has both national labels—"the New Deal era" in the United States, "*les trentes glorieuses*" in France, the "*Wirtschaftswunder*" in Germany—and sometimes receives the more general label of "embedded liberalism." *See, e.g.*, HARVEY, *supra* note 211, at 11; SLOBODIAN, *supra* note 158, at 5.

213. *See* HARVEY, *supra* note 211, at 2.

214. *See* WHITE, *supra* note 21, at 172 (defining "liberal" in the later nineteenth century United States in part based on an embrace of "minimal government, a free market economy, individualism, and property rights").

215. *See generally* MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978-1979 (Michel Senellart ed., Graham Burchell trans., 2008).

216. *Cf.* FREIDMAN, *supra* note 85, at 105 (referring to the "Thatcherite-Reaganite revolutions").

217. *See* SLOBODIAN, *supra* note 158, at 2-3 (noting increased adoption of the term "neoliberal" especially around 2016, including by the IMF and Fortune magazine); Jonathan Chait, *How 'Neoliberalism' Became the Left's Favorite Insult of Liberals*, N.Y. MAG. (July 16, 2017) (reflecting on the rise of the term "neoliberalism"). For a prominent recent example of the use of the term "neoliberal" as a periodizing label, see GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022).

figure. At least some members of the network of thinkers that first began to coalesce at the Walter Lippmann Colloquium in Paris in 1938, and later became associated with MPS, initially called themselves "neoliberal" rather than "liberal" precisely because they aimed to reimagine and renovate, rather than simply recreate, the classical liberalism that they thought of as having existed in an irretrievable golden age before World War I.[218]

In addition, as previously noted, the historians of economic thought with the greatest expertise in the intellectual network surrounding MPS have shown that many of its associated thinkers did not aim for "the rollback of the state and the return of laissez-faire."[219] They did not believe in a "market fundamentalism,"[220] nor in "self-regulating markets, shrunken states, and the reduction of all human motivation to the rational self-interest of *Homo economicus*."[221] According to Mirowski and Slobodian, many MPS-affiliated thinkers diverged from classical liberals in viewing markets not as something that will naturally spring into existence when the state pulls back from interfering in private economic behavior, but rather as something that must be constructed through concerted political efforts, and protected (or, in Slobodian's term, "encased") against democratic interference.[222]

In Slobodian's words, "self-described neoliberals did not believe in self-regulating markets as autonomous entities. . . . In fact, the foundational neoliberal insight is comparable to that of John Maynard Keynes and Karl Polanyi: the market does not and cannot take care of itself."[223] In Mirowski's words, "the central tenet of neoliberalism" is "that a strong state was necessary to neutralize . . . the pathologies of democracy."[224] Put differently, in the name of a particular negative vision of "freedom,"[225] the neoliberal "strong state"[226] could "inoculate capitalism against the threat of democracy."[227] Thus, a case can be made

218. SLOBODIAN, *supra* note 158, at 3-4, 17; Mirowski, *supra* note 62, at 161; Mirowski, *supra* note 207, at 427 (noting, however, that MPS participants generally stopped using the label "neoliberal" in the late 1950s); *see also supra* note 212.

219. Philip Mirowski & Dieter Plehwe, *Introduction*, *in* NINE LIVES OF NEOLIBERALISM 1, 4 (Philip Mirowski, Dieter Plehwe, & Quinn Slobodian eds., 2020).

220. *Id.* at 4.

221. SLOBODIAN, *supra* note 158, at 2.

222. Mirowski, *supra* note 207, at 434; SLOBODIAN, *supra* note 158, at 2-6, 271.

223. SLOBODIAN, *supra* note 158, at 2.

224. Mirowski, *supra* note 207, at 443.

225. *Id.* at 437.

226. Slobodian & Plehwe, *supra* note 223, at 4.

227. SLOBODIAN, *supra* note 158, at 2. The label "neoclassical" would also be an inappropriate general label for the thought associated with MPS. Far from embracing the neoclassical economic view of human beings as rationally calculating, self-interested utility-maximizers, for example, Hayek

both for referring to many of the distinctive economic policies of the Reagan era as "neoliberal," and for referring to the thought of some of the notable economic thinkers of the era as "neoliberal" as well.

Third, however, as Section II(A) argued, the public economic discourse of the Reagan era in the United States was, according to the sophisticated distinction between "neoliberal" and "classical liberal" (that is, laissez-faire) thought introduced above, far more consistent with classical liberalism than with neoliberalism. The distinction between "government" and "the market" belongs to classical liberal thought and is difficult to reconcile with neoliberal thought. The idea of "the market" existing apart from "government" as a kind of natural order in which "government" should not "intervene" is one of the ideas that neoliberals such as Hayek rejected when they tried to distance themselves from laissez-faire thought.

In fact, it is possible to draw an even stronger contrast between the public economic discourse of the Reagan era and elite neoliberal thought. Section II(A) focused on the extent to which the "government versus market" distinction was shared across the political spectrum in the Reagan-era United States, including by Democrats. But many of the most distinctive, dominant voices in the public economic debates of the era were Republicans, from Reagan through the 1994 House Republicans to the Tea Party. These voices did not simply recognize an abstract conceptual distinction between "government" and "the market": they vehemently took the side of the market against government.[228] Far from arguing for a "strong state" to "encase" the market, these voices presented "government" as "the problem,"[229] an obstacle to be cleared away, and a

envisioned human beings as fundamentally irrational, their motives unknowable, and their collective behavior irreducible to statistics. *See id.* at 86-87, 224-35.

228. In addition to the references above in Part II.A, see generally JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 2, 9, 16-18 (2017) (describing "the last generation" as "an era of profound skepticism about government," influenced by "antigovernment politicians and conservative media celebrities, ultrawealthy activists and influential corporate leaders, [and] idea warriors bankrolled by the rich").

Attacks on government agencies as incompetent and untrustworthy came from the Left as well, although activists on the Left did not promote laissez-faire as a solution. A recent history has drawn renewed attention to the prominent role of anti-government rhetoric on the activist Left in the 1960s and 1970s. *See* PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM (2021) (describing how consumer activists such as Ralph Nader, environmental activists such as Rachel Carson, critics of planning such as Jane Jacobs, and figures associated with the "New Left," including the law professor Charles Reich, attacked government power). Even leading economists associated with the Democratic party often approached "government" with skepticism. In the words of Larry Summers's mother, Anita Arrow Summers, an economist at the Wharton Business School: "'Larry's generation re-emphasized the importance of markets and the failures of government.'" Sylvia Nasar, *Three Whiz Kid Economists of the 90's, Pragmatists All*, N.Y. TIMES (Oct. 27, 1991) (profiling Paul Krugman, Jeffrey Sachs, and Larry Summers).

229. *See supra* note 4; MILTON FRIEDMAN, WHY GOVERNMENT IS THE PROBLEM (1993).

threat to freedom.[230]

In other words, there appears to be a significant tension between the essentially anti-government, pro-market public economic discourse of the "neoliberal era" in the United States and the rejection of laissez-faire classical liberalism in elite "neoliberal" economic thought. Of course, in any intellectual history that attempts to group various texts and ideas into schools or periods, there will inevitably be simplifications and exceptions—as in the description of MPS as "neoliberal," despite the participation of avowedly classical liberal figures such as Ludwig von Mises, and arguably classical liberal figures such as Milton Friedman.[231] But the emerging history of economic ideas in the neoliberal era in the United States presents something more extreme: a period in which the *defining* theoretical ideas of the era seem to be the *opposite* of the era's defining public rhetoric.

The tension has contributed to the confusing spectacle of extremely well-informed commentators on U.S. economic policy making statements such as: "Neoliberalism's premise is that free markets can regulate themselves . . . . So government should get out of the market's way."[232]

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230. Nor can it be said that hostility to government was merely a rhetorical posture. To the contrary, there are superficially straightforward, even obvious, connections between the anti-government rhetoric of the Reagan era and some of the era's defining economic policy initiatives—above all, the attempt to cut taxes on corporations and the wealthy, and the attempt to place limitations on social programs. *See* JACOB HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 1-4 (2020) (emphasizing the singular focus of Republican leaders from the 1980s through the 2010s on tax cuts for corporations and the wealthy); APPELBAUM, *supra* note 47, at 119-23 (describing spending cuts, and attempted cuts, in the two decades after 1983). Of course, outside the context of public *economic* discourse—the concern of this article—bipartisan voices often called for a stronger, more expansive government, as in the militaristic rhetoric of many national security debates, and the "tough-on-crime" rhetoric that dominated public debates concerning criminal justice. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing calls for aggressive "law and order" policies); ANDREW BACEVICH, THE NEW AMERICAN MILITARISM (2005) (describing rhetorical celebrations of military strength). But it is valuable not to lose sight of the obvious, initial tension between, on the one hand, a commitment to a "strong state" in matters of economic policy, and, on the other hand, a commitment to cutting taxes and social programs.

231. *Cf.* BURGIN, *supra* note 38, at 96 (noting the tension between von Mises's commitment to "an uncompromising laissez-faire" and his colleagues in the 1940s and 1950s "who shared Hayek's assumption that their political ideals could be revived only if they were invented anew"); *id.* at 137-38 (Röpke observing tensions in 1955 in MPS between adherents of "neoliberalism" and of a "paleoliberalism" committed to laissez-faire); SLOBODIAN, *supra* note 158, at 7-8 (noting different strands of neoliberalism, including the Freiburg (ordoliberal), Chicago, Cologne, Geneva, and Virginia schools); *supra* note 49.

232. Kuttner, *supra* note 93. In a more recent article, Kuttner draws upon Slobodian's "authoritative intellectual history of neoliberalism." Robert Kuttner, *Free Markets, Besieged Citizens*, N.Y. REV. BOOKS (July 21, 2022) (reviewing GERSTLE, *supra* note 221). But the apparent contradiction between Slobodian's strong-state view of neoliberalism and Kuttner's anti-government definition seems to remain unresolved, resulting in paradoxical references to "government as [the] guardian of unregulated markets," "government's rules . . . as democratic counterweights to the abuses of capitalism," and neoliberalism as a way of "protect[ing] the market from the regulatory state." *Id.* Once it is accepted that markets are

The commentator, writing in 2019, reasonably follows the emerging convention and adopts "neoliberalism" as a label for the era in U.S. economic policy and thought since the 1970s. Then, presumably drawing on his own deep familiarity with U.S. economic policy debates during that period, the commentator reasonably characterizes the period in terms of the rejection of "government interference" in markets. But the result is a characterization of "neoliberalism" that is the very opposite of the meaning given to the term by its leading intellectual historians.

Mirowski indicates one way in which the theories of MPS-affiliated neoliberal intellectual elites might be reconciled with the popular rhetoric of the neoliberal era in the United States. He proposes the existence of a quasi-Straussian "double truth" in which neoliberal thinkers deliberately pursued a strategy of presenting markets to the public as "natural," while privately recognizing markets as constructed and requiring vigilant support from the state.[233] The MPS-affiliated thinkers who promoted classical liberal ideas, such as Milton Friedman, might then be denigrated as second-rate popularizers who were in a sense peripheral to the core of neoliberal thought.[234]

But it would be a subtle political strategy indeed that sought to win the war of ideas by persuading the public and its officials to believe precisely the opposite of the views that one believed should shape economic policy. As for Milton Friedman's significance, it is hard to dismiss as peripheral someone who played such a prominent role in MPS, the Chicago School, the Goldwater campaign, the academic economic turn away from Keynes, and the public sphere through his books such as *Capitalism and Freedom*, his lectures, his *Newsweek* columns, and his starring role in the PBS series *Free to Choose*.[235]

Nor does Hayek's celebrity in the United States necessarily indicate a popular rejection of classical liberal ideals in favor of a "strong state." In fact, Hayek's theoretical departures from his mentor von Mises's laissez-faire classical liberalism seem to have frequently escaped the notice of his American fans.[236] His esoteric neoliberal theories of cybernetics and

constituted by government rules, what does it mean to refer to an "unregulated" market, or a market apart from "the regulatory state"? What is "capitalism" without the government rules that create capitalism?

233. *See* Mirowski, *supra* note 207, at 434-35, 440-46.

234. *Cf.* Mirowski, *supra* note 62, at 166-67.

235. *See* BURGIN, *supra* note 38, at 152-85; *see generally* APPELBAUM, *supra* note 47, at 431 (portraying Milton Friedman as pervasive presence in economic debates of Reagan era).

236. *See, e.g.*, BURGIN, *supra* note 38, at 230 n.20 (quoting Reagan in 1981 praising Hayek, Milton Friedman, and von Mises in the same sentence: "they shaped so much of our thoughts"); PHILLIPS-FEIN, *supra* note 41, at 261 (same); *id.* at 265 (describing the Foundation for Economic Education promoting both Hayek and von Mises); MAYER, *supra* note 24, at 57 (Charles Koch citing Hayek and von Mises together as inspirations); Glenn Hubbard, *Even My Business-School Students Have Doubts About Capitalism*, ATLANTIC, Jan. 2, 2022 (referring to "Friedrich Hayek and Milton Friedman, whose

evolution probably played far less of a role in the public sphere and in economic policy than the *Reader's Digest* version of the *Road to Serfdom*, which seems to have been broadly understood as a defense of "free enterprise" against the New Deal.[237]

If the goal of an intellectual history of neoliberalism in the United States is to understand the ideas that shaped public economic opinion and economic policy during the neoliberal era, then the easiest way to reconcile the tension between the classical liberal public economic discourse of the Reagan era and the rejection of classical liberal ideas in elite neoliberal theory may simply be to accept the awkward conclusion that neoliberal thought, strictly speaking, was not the dominant popular economic thought of the neoliberal era in the United States. The public economic discourse of the "neoliberal era" in the United States was not neoliberal.

III. LEGAL INSTITUTIONALISM AGAINST THE MYTH OF "JUST DESERTS"

Sections I and II of this article attempted to make the case that the distinction between "government" and "the market," as the distinction has often been used in popular economic debates over the last several decades in the United States, does not make sense.

But a skeptical, practical-minded reader might object: what difference does that make? Why does it matter if our public economic discourse is unclear or misleading? What difference does it make, specifically, if we tend to treat an idealized set of laissez-faire rules as a natural baseline, and speak of any departure from this baseline as "government intervention in the market"? If both the view of "the market" as opposed to "government," and the alternative legal institutionalist view of markets as legal constructions, can be used to argue for or against more or less any

influential writings showed a deep antipathy to big government" and who argued that "government should step back and accommodate the dynamism of global markets").

It is not implausible that many Americans today who are familiar with the name "Hayek" gained their familiarity from broadcasts by the former Fox News host and conspiracy theorist Glenn Beck. *See* MAYER, *supra* note 24, at 316 (describing Beck's promotion of Hayek); WASSERMAN, *supra* note 158, at 1-2, 285 (same); MCGHEE, *supra* note 26, at 37-38 (describing Beck's often racially tinged conspiracy theories); *Glenn Beck: Obama Is a Racist*, ASSOC. PRESS (July 29, 2009) (describing how Beck responded to President Obama's criticism of the arrest of Harvard professor Henry Louis Gates, Jr. by stating that Obama has "a deep-seated hatred for white people").

237. On the popularity of the simplified *Reader's Digest* version, and its adoption "as a useful aid in . . . efforts to roll back the New Deal state," see BURGIN, *supra* note 38, at 88-89; PHILLIPS-FEIN, *supra* note 41, at 41. Hayek's thought had more of an impact in Great Britain, and in international economic institutions. *See* SLOBODIAN, *supra* note 158, at 245-50 (describing Hayek's influence on GATT reformers); WASSERMAN, *supra* note 158, at 259-60 (noting that "Hayek's greatest influence came in the political and economic culture of the United Kingdom," and that "in the mid-1970s, Thatcher became famous for toting *Constitution of Liberty* in her briefcase, stating 'This is what we believe'").

economic policy,[238] why should we care about the language in which debates are conducted?

Sections I and II mostly tried to appeal to widely held intellectual values such as clarity, consistency, and the ability to offer good reasons, rather than appealing to values associated with a specific political orientation. But in order to explain why a legal institutionalist reframing of popular economic policy debate matters, it will be helpful to focus on the concerns of a specific political orientation or family of orientations. Whether one believes that the legal institutionalist way of talking brings any practical advantages will depend on what one defines as an advantage, in line with one's own moral and political values.

The remainder of Section III discusses the advantages of legal institutionalism for an ideological orientation favoring the creation of a world of greater social equality.[239]

Addressing readers with relatively egalitarian commitments is especially appropriate because egalitarians might be understandably wary of legal institutionalism as it has been presented above. Legal institutionalism offers a view of markets as legal constructions. It draws attention to the political design of markets. Many egalitarians today in the United States, by contrast, may wish to stop talking about markets

238. In theory, the opposition between "government" and "the market" is sufficiently flexible that it is possible to argue for virtually any progressive economic policy as a "government intervention in the market" that is justified based on "market imperfections" or, say, cost-benefit analysis ("CBA"). Over the course of the Reagan era, progressives did, in fact, increasingly find ways to use the characteristic concepts and intellectual tools of the era to argue for relatively progressive economic policies. *See, e.g.*, APPELBAUM, *supra* note 47, at 208-10 (discussing progressive use of CBA by Kip Viscusi); Amy Sinden, *The Cost-Benefit Boomerang*, AM. PROSPECT (July 25, 2019) (describing how progressive results of CBA have increasingly created problems for the "[i]ndustry lawyers and lobbyists" who have long promoted CBA as a seemingly neutral and objective way of defending favored policies). On the other hand, as CBA also illustrates, the choice of rhetorical frame and intellectual tools for debating economic policy can tilt the playing field of debate in favor of or against certain policies and values. *See generally, e.g.*, ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (2022) (critically examining how the bipartisan use of an ostensibly "economic" style of reasoning focused on "efficiency," including through CBA, has shaped public policy debate to the detriment of progressive goals). For an illustration of what critics might view as a misapplication of CBA where a rights-based analysis might have been more appropriate, see, for example, Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape*, GEORGETOWN L. FACULTY BLOG (June 13, 2012). A strong case could be made that the "government versus market" distinction, like CBA, tilts the playing field of debate against egalitarian commitments in a number of ways. *See* Sinden, *supra*; *infra* text accompanying note 242.

239. In the contemporary U.S. political landscape, a general commitment to social equality is sometimes associated with being "liberal" or "progressive," while a general commitment to social hierarchy is more often associated with being "conservative" *See* Brazeal, *supra* note 27, at 364-65 n.4. Because the meanings of and economic policy positions associated with labels such as "progressivism," "liberalism," "conservatism," "libertarianism," "socialism," "the Left," and "the Right" are contested in ways that are not relevant to my argument in this section, I use the term "egalitarian," which may have a more stable referent. *See, e.g.*, Donald Braman & Dan M. Kahan, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 151 (2006) (summarizing group-grid typology of political orientations, where a "'low grid' worldview favors an egalitarian society").

altogether. They have lived through an era infused with the glorification of "the free market" and the vilification of "government"—alongside soaring economic inequality, the persistence of the racial wealth gap, unprecedented declines in life expectancy, the largest financial crisis since the Great Depression, and, for many Americans, stagnating wages accompanied by declining job, housing, and retirement security.[240] It

240. *See generally, e.g.*, BARADARAN, *supra* note 65; MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); HACKER & PIERSON, *supra* note 5; JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM (2d ed. 2019). Although this article is ultimately concerned with critically analyzing different ways of talking about economic policy, and not with the economic history of the last several decades, it may be worth noting, briefly, why contemporary egalitarians often take a critical view of recent economic developments—even though by some measures, material conditions continued to improve between 1980 and 2019, especially globally, and at least if one ignores the future effects of current carbon emissions. *See, e.g.*, Nicholas Kristof, Opinion, *This Has Been the Best Year Ever*, N.Y. TIMES (Dec. 28, 2019) (summarizing statistical evidence that "since modern humans emerged about 200,000 years ago, 2019 was probably the year in which children were least likely to die, adults were least likely to be illiterate and people were least likely to suffer excruciating and disfiguring diseases").

One way to capture the egalitarian critique of the U.S. economy in the Reagan era is to note the frequently invoked comparison between the last several decades and the Gilded Age. Some professional historians may caution against the invocation of similarities between historical periods, or may even oppose the invocation of historical periods in general. *See* David Mayhew, *Suggested Guidelines for Periodization*, 37 POLITY 531, 531 (2005) (recommending, with regard to periodization: "[*f*]*or the most part, don't do it*"). But the similarities between certain distinctive features of U.S. political economy in the last several decades and in the long Gilded Age of the later nineteenth and early twentieth centuries has made comparison almost irresistible. *See* Daniel Wortel-London & Boyd Cothran, *A Second Gilded Age? The Promises and Perils of an Analogy: Introduction*, 19 J. GILDED AGE & PROGRESSIVE ERA 191, 191 n.4 (2020) (collecting references); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 62-63 (2020) (noting among other parallels the increase in wealth inequality, political corruption, rising immigration, racial and cultural backlash, political violence, political polarization, demagoguery, and fabricated news). Space considerations argue against exploring other possible parallels that have been or might be noted—such as monetary policies disfavoring workers; speculation in novel investments leading to financial manias and panics; downward pressure on wages resulting from rising long-distance trade (internationally, but also between the states in the Gilded Age); experts seizing control of economic policymaking based on claims to neutral scientific objectivity (judges in the Gilded Age, economists today); enthusiasm for running government like a business; celebration of the wealthiest individuals as heroes and benevolent philanthropists; or the strange juxtaposition between laissez-faire economic rhetoric and a militant, punitive, "strong" state for dealing with out-groups, including overseas. But if a single statistical parallel between the economic outcomes of the long Gilded Age and the Reagan era had to be chosen, it might be the following: just as life expectancy and average height generally fell through the Gilded Age, with declines extending beyond the 1890s for citydwellers, the poor, and African Americans, so life expectancy in the United States, even before the coronavirus pandemic, fell to almost four years below the life expectancy in other wealthy countries over the course of the Reagan era. *Compare* WHITE, *supra* note 21, at 477-81, 524-26 (summarizing nineteenth century developments in a chapter entitled "Dying for Progress," as well as rising workplace deaths and injuries), *with* Shameek Rakshit et al., *How Does U.S. Life Expectancy Compare to Other Countries?*, HEALTH SYSTEM TRACKER (Dec. 6, 2022) (showing that in 1980, U.S. life expectancy trailed the OECD average by about a year, while by 2019, the gap had expanded to about four years). *See also* ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 33 (2020) (noting that the three-year decline in U.S. life expectancy between 2014 and 2017 had no precedent since 1918); Nicholas Kristof, Opinion, *Trump Struggles, but America Is Still Feverish*, N.Y. TIMES (Dec. 10, 2022) ("Life expectancy for a newborn boy in Mississippi appears to be shorter than for a newborn boy in Bangladesh."); Adam Tooze, *Chartbook #148: Life, Liberty and the Pursuit of Happiness? How China, Cuba and Albania Came To*

would be understandable, against this background, for an egalitarian to seek a simple inversion of the Reagan-era framing of economic debates: an embrace of "government" alongside a rejection of "the market."[241] Because legal institutionalism draws attention to markets by emphasizing their political design, an egalitarian might view legal institutionalism as tainted by the pro-market ideology of the Reagan era.

Against this charge, an egalitarian legal institutionalist might argue that legal institutionalism's wholesale rejection of the "government versus market" distinction in fact represents a more thorough repudiation of the economic assumptions of the Reagan era than the simple inversion of the conceptual opposition at the center of the era's economic debates. Legal institutionalism discards the premise that "government" and "the market" are opposed terms at all, and in doing so lays a foundation for the transformation of public economic discourse away from the terms of the Reagan era.

The dominance of the opposition between "government" and "the market" throughout the Reagan era placed egalitarians at a structural rhetorical disadvantage in economic policy debates, especially debates concerning market rules. By treating laissez-faire policies as the natural definition of "the market," the "government versus market" distinction has invited speakers to think of laissez-faire policies as a baseline from which any "regulatory" departure requires affirmative justification. In doing so, the distinction has anchored economic debate in the direction of a set of laissez-faire market rules that tend to generate profoundly unjust economic hierarchies and other predictable harms.

By contrast, speaking of markets as legal constructions tilts the playing field of economic debate in favor of egalitarian policies—simply because the burden of persuasion shifts to opponents of ostensibly egalitarian policies who must explain why a policy that at least intends to benefit the many should nevertheless be rejected.[242] Instead of focusing economic policy discussions on whether a given policy represents "government intervention" or "the free market," and, if the former, whether the "intervention" can be justified by some "market failure," legal institutionalism invites us to ask, simply: what economic policy rules will best serve our ends? What rules do we, as a democratic society, choose to govern our lives?

Have Higher Life Expectancy than the USA, CHARTBOOK (Sept. 2, 2022) (noting that in the wake of the coronavirus pandemic, life expectancy is now lower in the United States than in China, Cuba, or Albania).

241. *See, e.g.*, Corey Robin, Opinion, *The New Socialists*, N.Y. TIMES (Aug. 24, 2018) (describing "[s]ocialist freedom" as an end to domination by the market, in contrast to capitalism, in which "we're forced to enter the market just to live").

242. Of course, opponents of egalitarian policies have well-established rhetorical tools for arguing against such policies without openly defending hierarchy. *See generally* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991).

More importantly, a simple reversal of the Reagan-era celebration of "free markets" over "government" fails to address one of the most powerful sources of ideological opposition to equality-promoting economic policies in the United States, what this article calls "the myth of just deserts." According to this myth, the wealthy deserve what they have gained, and the poor have no one to blame but themselves.[243] Current economic outcomes are the result of individual efforts, rather than the product of government policy, and thus, poverty must be the result of laziness or other moral or intellectual flaws.[244] In other words, the distribution of wealth reflects just deserts for hard work or laziness, and those who live in economic insecurity do not deserve anything better.

From the perspective of egalitarian politics, legal institutionalism's greatest value lies in its power to undermine the myth of just deserts. Before explaining how legal institutionalism can do so, however, it is worthwhile to explore the myth in greater detail.[245]

Already in 2001, an influential article by three social scientists provided evidence of the significant role that "just deserts" thinking has played in the politics of economic inequality in the United States. In *Why Doesn't the United States Have a European-Style Welfare State?*, the authors concluded, based on a wide-ranging survey of proposed theories and empirical evidence, that "Americans dislike redistribution because they tend to feel that people on welfare are lazy, whereas Europeans tend to feel that people on welfare are unfortunate."[246] The authors also noted

243. *See, e.g.*, WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 158-59 (1996) (describing how, in the United States, "the basic belief system concerning the nature and causes of poverty and welfare frames economic and social outcomes mainly in individual terms" involving "moralistic themes," deemphasizing "the social origins . . . of poverty and welfare," with the result that the public "holds truly disadvantaged groups . . . largely responsible for their plight"); *see also id.* at 159-64 (summarizing evidence that the dominant American belief system assumes "*it is the moral fabric of individuals, not the social and economic structure of society, that is taken to be the root of the problem*").

244. *See infra* note 246.

245. I focus in the following paragraphs on the role of "just deserts" thinking in economic debates. A similar story could be told regarding "just deserts" thinking in the politics of criminal justice, where the United States has in recent decades taken a more punitive, retributive approach than its European peers. *See* RAM SUBRAMANIAN & ALISON SHAMES, VERA INST., SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 7 (2013) (noting that German and Dutch correctional systems focus on "resocialization and rehabilitation," while U.S. correctional systems focus on "incapacitation and retribution"). *See generally* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003). I also note at the outset that my reference to a myth of just deserts is simply intended to draw attention to a family of arguments that recur in the public economic discourse of the United States, not to develop an analytical theory of the myth that imposes an artificial precision or consistency on it, for example by distinguishing the myth's descriptive and prescriptive aspects. Nor does this article attempt to provide a comprehensive survey of "just deserts" thinking in public economic discourse, such as on the Left.

246. Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn't the U.S. Have a European-Style Welfare System?*, 2001 BROOKINGS PAPERS ON ECON. ACTIVITY 187, 247 (2001); *see also* NANCY

that hostility to welfare in the United States "derives in part from the fact that welfare spending in the United States goes disproportionately to minorities."[247] They concluded:

> Our bottom line is that Americans redistribute less than Europeans for three reasons: because the majority of Americans believe that redistribution favors racial minorities, because Americans believe that they live in an open and fair society and that if someone is poor it is his or her own fault, and because the political system is geared toward preventing redistribution.[248]

ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA 312 (2017) (describing "the backlash that occurs" in the United States "when attempts are made to . . . help the poor (implied or stated: undeserving)"); THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 4 (1991) (describing "the view among many whites that the condition of life for the disadvantaged—particularly for disadvantaged blacks—is the responsibility of those afflicted, and not the responsibility of the larger society" or "the result of an economic system that needed to be challenged").

247. Alesina et al., *supra* note 249, at 247; *cf.* IRA KATZNELSON, FEAR ITSELF 365-403 (2013) (describing how Southern Democrats began to turn against the New Deal because it threatened white supremacy in the South); EZRA KLEIN, WHY WE'RE POLARIZED 49-80 (2020) (summarizing social science research on attitudes to perceived out-groups, and how group identity shapes moral evaluations and perceptions of fairness); Ilyana Kuziemko & Ebonya Washington, 108 AM. ECON. REV. 2830, 2833 (2018) (concluding that the 17 percentage point decline in "Democratic identification among white Southerners relative to other whites" from 1958 to 1980 "is entirely explained by the 19 percentage point decline among racially conservative Southern whites"); Woojin Lee & John E. Roemer, *Racism and Redistribution in the United States: A Solution to the Problem of American Exceptionalism*, 90 J. PUB. ECON. 1027 (2006) (concluding that "voter racism reduced the income tax rate by 11–18% points," that "the Democratic vote share is 5–38% points lower than it would have been, absent racism," and that these effects "would seem to explain the difference between the sizes of the public sector in the US and northern European countries"); KAREN STENNER, THE AUTHORITARIAN DYNAMIC 248-49 (2005) (noting that Americans' sympathy for the plight of African Americans, and support for policies addressing those inequalities, has consistently depended on "[a]ssessments of the extent to which blacks themselves, rather than systematic discrimination, are to blame for their unequal standing"). Political scientists view racial resentment in the United States as so strongly associated with blaming African Americans for their economic disadvantage that survey questions about the latter are used to test for the former, such as by asking participants to respond to the statement: "It's really a matter of some people just not trying hard enough: if blacks would only try harder they could be just as well off as whites." *See* Katherine Cramer, *Understanding the Role of Racism in Contemporary US Public Opinion*, 23 ANN. REV. POL. SCI. 153, 154 (2020) (citing DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS (1996)).

In yet another illustration of the pervasive distorting effects of the "government" versus "market" distinction, including among progressive social scientists, Alesina and his co-authors refer not only to taxes and transfers but to "regulations designed to protect the poor" as "redistribut[ions]" of income. Alesina et al., *supra* note 249, at 187. Presumably the authors share the widespread sense that laissez-faire legal rules favoring the wealthy and businesses are in some sense a natural baseline for distribution, while legal rules that depart from this baseline in order to favor workers and the poor are "redistributive."

248. Alesina et al., *supra* note 249, at 247; *see id.* at 226-46 (providing evidence). For a similar and more recent account of how group identification and "last place aversion" could shape economic preferences, see William A. Darity Jr. et al., *Stratification Economics: A General Theory of Intergroup Inequality*, *in* THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY 35 (Andrea Flynn et al. eds., 2017); *see also* ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT 137-38 (2016) (concluding based on ethnographic study of Tea

Further supporting the centrality of the myth of just deserts, the authors added that the anti-redistributive structure of the political system "is likely to be endogenous to these basic American beliefs."[249] In other words, Americans' tolerance or embrace of the undemocratic features of our political system may result in part from our relatively punitive economic attitudes.[250]

Illustrations of racialized attacks on government assistance for the "undeserving" are not hard to find. In the infamous words of Lee Atwater, a political strategist for Presidents Ronald Reagan and George H.W. Bush:

> You start out in 1954 by saying, "N_____, n_____, n_____." By 1968 you can't say "n_____"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, [B]lacks get hurt worse than whites. . . . "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "N_____, n_____."[251]

In fact, Reagan, the president whose name has come to symbolize the era in American politics that began in the late 1970s, first won political office in a 1966 campaign for California governor that "was organized by a 'handful of millionaires' who characterized the former movie-star as 'the man who can enunciate our principles to the people.'"[252] According to Thomas and Mary Edsall, "[o]ne of Reagan's favorite and most often-repeated anecdotes was the story of a Chicago 'welfare queen' with '80 names, 30 addresses, 12 Social Security cards' whose 'tax-free income alone is over $150,000.'"[253] In the words of the leading history of "dog whistle" appeals to racial resentment:

> Reagan frequently elicited supportive outrage by criticizing the food stamp program as helping "some young fellow ahead of you to buy a T-bone steak" while "you were waiting in line to buy hamburger." This was the toned-down version. When he first field-tested the message in the South, that "young fellow" was more particularly described as a "strapping young

Party supporters in Louisiana that many were driven by a worldview in which racial minorities, women, immigrants, refugees, and public sector workers were "cutting in line" with help from the federal government).

249. Alesina et al., *supra* note 249, at 247.

250. On the undemocratic features of our political system, see, for example, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

251. MCGHEE, *supra* note 26, at 33.

252. EDSALL & EDSALL, *supra* note 249, at 139.

253. *Id.* at 148.

buck."[254]

In the 1980 presidential election, Reagan received 71 percent support from voters who felt "the government should not make any special effort to help [Blacks] because they should help themselves."[255] By 1986, "fully 56 percent of [B]lacks saw Reagan as racist."[256]

But Reagan was only continuing a "Southern Strategy" that had earlier been pursued by Barry Goldwater and Richard Nixon.[257] In the words of historian Nancy Isenberg:

> Some Nixon supporters acknowledged that there were hardworking people among welfare recipients who only occasionally took government assistance; but there were others, less deserving, whom they saw as permanently trapped in a cycle of dependence. Critics of welfare tended to see the issue as a racial one . . . . Nixon's supporters were seen angrily complaining about how welfare "breeds weak people." Poverty was once again being blamed on questionable breeding, and hard work was proclaimed as the means through which strong families put down solid roots and achieved upward mobility.[258]

As Isenberg's language suggests, the myth of just deserts has not been applied solely to perceived racial out-groups. Poor whites are also seen as undeserving, and often in a quasi-racialized way, as in the discussion of poor whites in terms of "breeding" that Isenberg traces throughout American cultural and political history.[259] The myth of just deserts can serve to naturalize all economic inequality, not only the economic subordination of African Americans.[260] Just as defenders of the economic

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254. IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 59 (2013).

255. *Id.* at 59.

256. EDSALL & EDSALL, *supra* note 249, at 139.

257. On Goldwater, see above note 158. On Nixon, see ALEXANDER, *supra* note 234, at 44. Even the leaders of the Republican National Committee have more recently acknowledged the existence of a decades-long Southern Strategy. *See* LÓPEZ, *supra* note 256, at 1 (quoting Michael Steele in 2010 and Ken Mehlman and 2005).

258. ISENBERG, *supra* note 249, at 275. For Reagan's invocation of the "dependency" argument, see MCGHEE, *supra* note 26, at 33 ("We're in danger of creating a permanent culture of poverty as inescapable as any chain or bond . . . .").

259. Isenberg traces the punitive stigmatization of poor white Americans back to the nation's colonial origins, and the inheritance of British analogies between poor "waste people" and "inferior animal stocks." ISENBERG, *supra* note 249, at xxvi-xxviii, 12-14, 20-22.

260. On the "naturalizing" and thus anaesthetizing effect of "free market" rhetoric, see HARCOURT, *supra* note 34, at 241 (noting that describing market changes as "liberalization" "serves as a cover that simply renders distributional outcomes more natural": it "appears to take the government out of the mix and thereby gives the impression that the outcomes are now based entirely on merit or talent," when in fact "the state actually facilitates and makes possible the new order"). A case could be made, in fact, that the most effective ideological tool for facilitating oppression over the course of human history has been the claim that one or another unjust, humanly constructed hierarchy was in fact "natural" or "necessary," from the claims of ancient kings to be demigods or otherwise in touch with divinity, to the various caste-like myths of innate social superiority or inferiority, to the myth that economic inequality today is simply

policies in the first Gilded Age sometimes justified vast economic inequalities by presenting them as the natural result of biological differences,[261] defenders of such inequalities today often present them as the natural result of fair competition in a "meritocracy."[262]

But in the contemporary United States, attitudes toward race, specifically, seem to be an especially strong predictor of attitudes toward "government" and economic policy.[263] Whether the connection is labelled "racialized economics"[264] or "stratification economics,"[265] an ever-

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the natural result of competition in "the market," a harsh but fair outcome already softened through the perhaps excessive benevolence of redistribution. *See, e.g.*, JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETY 265-92 (1997) (describing the role of hierarchical religious ideas in the transition from the relative egalitarianism of bands and tribes to the extractive hierarchy of early states); HENRICH, *supra* note 146, at 87-154 (same). The political power of myths that rationalize or excuse inequality by presenting it as an unavoidable fact of nature can hardly be overstated. A condition of exploited subordination that would be intolerable if recognized as the product of someone's willful decisions might, by contrast, provoke little or no resistance if perceived as an inevitable fact of nature, like the sun rising. Milton Friedman makes a similar point, taking as his focus inequalities that are perceived as resulting from "chance," a subcategory of the more general phenomenon of inequalities perceive as natural rather than humanly willed:

> Despite the lip service that we all pay to "merit" as compared to "chance," we are generally much readier to accept inequalities arising from chance than those clearly attributable to merit. The college professor whose colleague wins a sweepstake will envy him but is unlikely to bear him any malice or to feel unjustly treated. Let the colleague receive a trivial raise that makes his salary higher than the professor's own, and the professor is far more likely to feel aggrieved. After all, the goddess of chance, as of justice, is blind. The salary raise was a deliberate judgment of relative merit.

FRIEDMAN, *supra* note 51, at 198.

261. *See generally* ERIC HOBSBAWM, THE AGE OF EMPIRE: 1875-1914, at 254-55 (1987); HOFSTADTER, *supra* note 21; WHITE, *supra* note 21; Bryan Stevenson, *A Presumption of Guilt*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 3, 6-7 (Angela J. Davis ed., 2017) (noting that for two centuries, "[a]dvocates of slavery argued that science and religion supported the fact of whites' racial superiority: white people were smart, hardworking, and more intellectually and morally evolved, while black people were dumb, lazy, childlike, and in need of guidance and supervision"). Arguments that African Americans are somehow innately inferior to whites continue to be repeated even by prominent elite voices in the contemporary United States. *See, e.g.*, Eric Turkheimer, Kathryn Paige Harden, & Richard E. Nisbett, *Charles Murray Is Once Again Peddling Junk Science About Race and IQ*, VOX (May 18, 2017) (describing Charles Murray's argument that racial differences in IQ scores are at least partly genetic).

262. *See, e.g.*, ROBERT H. FRANK, SUCCESS AND LUCK: GOOD FORTUNE AND THE MYTH OF MERITOCRACY (2016) (describing and criticizing the myth of meritocracy); *supra* note 246. In fact, the social mobility that one might expect to result from fair competition does not occur in the United States. *See, e.g.*, HACKER & PIERSON, *supra* note 5, at 28-29 (stating that "[c]ompared with other rich nations . . . U.S. intergenerational mobility is suprisingly low," and presenting evidence that upward social mobility declined during the Reagan era).

263. *See supra* note 250; *see also* Martin Gilens, *Racial Attitudes and Opposition to Welfare*, 57 J. POLITICS 994, 994 (1995) (concluding that "racial attitudes are in fact the most important source of opposition to welfare among whites"); Eric D. Knowles, Brian S. Lowery, & Rebecca L. Schaumberg, *Racial Prejudice Predicts Opposition to Obama and His Health Care Reform Plan*, 46 J. EXPER. SOC. PSYCH. 420 (2010).

264. JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA 165 (2019).

265. Darity et al., *supra* note 251.

growing library of social science scholarship supports the notion that many white Americans view economic policy through the lens of race, and in particular through the "belief that undeserving groups are getting ahead while your group is left behind."[266] The phenomenon is not an invention of the Reagan era. Nearly a century ago, in *Black Reconstruction in America*, W.E.B. DuBois had already identified this basic dynamic.[267] He explained why economically insecure whites might support a white elite political coalition rather than allying with Blacks to achieve policies that could improve all their material circumstances.[268] DuBois's answer was that "white laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage," a "psychic benefit" that would be lost if Blacks obtained equal social status with lower-status whites.[269]

The persistence of the myth of just deserts can be seen even in the most recent economic policy debates in the United States. Consider the rhetoric used to justify the massive, if temporary, expansion of federal safety-net programs during the COVID-19 pandemic, an expansion that caused U.S. poverty to fall to an all-time low.[270] In the words of a reporter covering poverty: "What explains such a large safety-net expansion in a country resistant to it?"[271] He concludes:

> [T]he pandemic removed the usual argument that people in need have themselves to blame. Promoting the $1.9 trillion rescue plan that the Democrats passed earlier this year, Biden hailed the "millions of Americans who, *through no fault of their own*, have lost the dignity and respect that comes with a job." After the bill passed the Senate, he again cited Americans "out of work *through no fault of their own*," and added, "I want to emphasize that: *through no fault of their own*." Politicians as different as Maxine Waters on the left and Josh Hawley on the right used the same words.[272]

The rhetoric suggests that the United States ordinarily chooses policies that result in exceptionally high poverty levels in part because we assume that those living in poverty do so *through fault of their own*—that is, as a

266. SIDES ET AL., *supra* note 251, at 175; *accord* HOCHSCHILD, *supra* note 251, at 137-38. As Hacker and Pierson note, racial resentment has for decades been a pervasive subtext of U.S. political rhetoric expressing hostility to "government." *See* HACKER & PIERSON, *supra* note 234, at 123-25; *see generally* HANEY LÓPEZ, *supra* note 257.

267. Darity et al., *supra* note 251, at 41.

268. *Id.* at 41.

269. *Id.* (quoting W.E.B. DuBois).

270. *See* Jason DeParle, *A Historic Decrease in Poverty*, N.Y. REV. BOOKS (Nov. 18, 2021).

271. DeParle, *supra* note 273.

272. *Id.* During the 1990s, even liberals who favored more generous social policies often did so based on the "conviction that the federal government had a responsibility to advance the rights and entitlements of *deserving* people." Patterson, *supra* note 5, at 322 (emphasis added).

result of their own failings.[273] If one begins with the assumption that the economic status quo is the product of just deserts, or an approximation of just deserts mollified by benevolent handouts, then it may seem natural to conclude that the unemployed and materially insecure must have done something to deserve their unemployment and insecurity.[274]

Expressions of this perspective are not difficult to find among the prominent economic and political voices of the Reagan era. An especially striking series of examples can be found in Jane Mayer's account of the billionaires and multimillionaires who funded the rise of the plutocratic "conservative" movement that helped set the terms of economic debate in the Reagan era. Nearly all of the largest funders of the movement inherited wealth, with some receiving vast fortunes. Yet the movement they funded opposed public spending on social programs, and often justified this opposition based on the idea that wealth should go instead to those who have *earned* it.

Charles Koch, whose brother joked about inheriting $300 million from their father, "has often lauded the virtuous habits it takes to succeed, publishing a book on the subject in 2007 called *The Science of Success*."[275] Joseph Coors, an heir to a brewery fortune, "regarded organized labor, the civil rights movement, [and] federal social programs . . . as existential threats to the way of life that had enabled him and his forebears to succeed."[276] Art Pope, the multimillionaire funder of the right-wing undermining of democracy in North Carolina,[277] "attended a private boarding school," and then, after law school at Duke, "joined his

273. *See* Ian Prasad Philbrick, *Why Isn't Biden's Expanded Child Tax Credit More Popular?*, N.Y. TIMES (Jan. 5, 2022) (summarizing evidence that Americans have "deep-seated beliefs about who deserves government help and who does not," and noting that "[c]riticisms of unconditional benefits often stigmatize poorer Americans and single parents, or are influenced by racist tropes, as with the stereotype of the 'welfare queen'"). On high poverty levels in the United States, see DeParle, *supra* note 273 ("As a share of GDP, France, Austria, Denmark, and Finland all spend at least 50 percent more than the US to help people of modest means and their poverty rates are roughly half as high."); *see also id.* (noting that in a pre-COVID study of twenty wealthy countries on four continents, the United States had "the highest poverty levels of all twenty countries reviewed").

274. Not surprisingly, when West Virginia Senator Joe Manchin used his effective veto on Democratic legislation in 2022 to block the extension of the child tax credit, he reportedly did so based on concerns that recipients would use the money to buy drugs. *See* Rebecca Shabad et al., *Manchin Privately Raised Concerns that Parents Would Use Child Tax Credit Checks on Drugs*, NBC NEWS (Dec. 20, 2021). After the child tax credit lapsed, child poverty in the United States increased by 3.7 million. CTR. ON POVERTY & SOC. POL'Y, 3.7 MILLION MORE CHILDREN IN POVERTY IN JAN 2022 WITHOUT MONTHLY CHILD TAX CREDIT (Feb. 17, 2022).

275. MAYER, *supra* note 24, at 59. Mayer notes that David Koch made less pretense of being self-made. *See id.* at 59-60.

276. *Id.* at 95.

277. "States like North Carolina and Wisconsin [were] among the most democratic states in the year 2000 but by 2018 they were close to the bottom." Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, AM. POL. SCI. REV. 1, 7 (2022).

family's discount store business,"[278] a chain that began by targeting "neighborhoods with median incomes of less than $40,000 a year, and populations that were at least 25 percent African-American."[279] Pope often insisted he was "'not an heir,'"[280] and in an interview with Mayer, explained that "[i]n the tradition of John Locke . . . he just believed that society functioned best when citizens were rewarded with the wealth that their hard work produced."[281] "The poor, he argued, were largely victims of their own bad choices."[282]

Richard Mellon Scaife, an heir to the Gilded Age fortune of the Mellon family,[283] became one of the largest backers of both the American Enterprise Institute and the Heritage Foundation.[284] These organizations would later help to develop "what the *Wall Street Journal* described as the 'new orthodoxy' of the Republican Party" by 2011—the notion that the less-wealthy half of Americans were "'Lucky Duckies' freeloading off the rich."[285] This view would be memorably articulated by the 2012 Republican presidential nominee Mitt Romney, himself the son of a former chief executive of American Motors,[286] who was secretly recorded at an event for wealthy donors deriding the "47 percent" of Americans who were "dependent upon government, who believe they are victims, who believe government has a responsibility to care for them, who believe they are entitled to health care, food, to housing, you name it."[287]

As Charles Koch's political advisor Richard Fink explained to another group of wealthy donors in 2014, in another secret recording, the "middle third" of the country tended to view big businesses as "greedy." "'What do people like you say? I grew up with pretty much very little, okay? And I worked my butt off to get what I have. So,' he went on, when he saw people 'on the street,' he admitted, his reaction was, 'Get off your ass and

278. MAYER, *supra* note 24, at 423.

279. *Id.* at 325.

280. *Id.* at 423.

281. *Id.* at 422.

282. *Id.*; *cf. id.* at 423 (quoting a researcher at one of the nonprofit groups funded by Pope stating that poverty in North Carolina is "woefully overestimated," and where it does exist, "it largely resulted from 'self-destructive behavior'").

283. *See id.* at 76; *see also id.* at 87-88.

284. *See id.* at 93-94.

285. *Id.* at 398. Skocpol and Williamson found that "[a] well-marked distinction between workers and nonworkers—between productive citizens and the freeloaders—is central to the Tea Party worldview and conception of America." SKOCPOL & WILLIAMSON, *supra* note 24, at 65.

286. Michael Barbaro, Binyamin Appelbaum, & Trip Gabriel, *Romney and His Money*, N.Y. TIMES (Jan. 20, 2012).

287. MAYER, *supra* note 24, at 398. Romney also helpfully advised college students to "[t]ake a risk. . . . Borrow money, if you have to, from your parents. Start a business." Felicia Sonmez, *Romney to College Students: Pursue Your Dreams, Even If You Have To Borrow To Do So*, WASH. POST, Apr. 27, 2012.

work hard, like I did!'"[288]

Some Republican leaders attributed joblessness to laziness more publicly, as when former House Speaker Newt Gingrich speculated in 2011 about the possibility of turning public school students in "poor neighborhoods" who have "no habit of work" into "assistant janitors" whose job would be "to mop the floor and clean the bathroom" at their schools.[289] Similarly, in 2014, House Speaker John Boehner told an audience at the American Enterprise Institute that a "record number of Americans" are "stuck" outside "the mainstream of American society," thinking: "You know, I really don't have to work. I don't really want to do this, I think I'd rather just sit around."[290]

The myth that existing distributions of wealth and employment are the natural and just results of individual competition in "the market" can also be found in the writings of ostensibly more sophisticated economic thinkers whose ideas shaped the Reagan era. The Austrian libertarian economist Ludwig von Mises, for example, argued that wealth was "always the result of a consumers' plebiscite."[291] In the "consumer's democracy" of the marketplace, "the greater voting power which the disposal of a greater income implies can only be acquired and maintained by the test of election."[292] How did different individuals end up with such different "voting power" (wealth)? Perhaps, von Mises suggested, because "men are endowed differently by nature."[293]

If one assumes that one's wealth is simply the fruit of one's virtuous labor, and that those without wealth must bear the moral responsibility for their poverty, it may seem intuitively obvious that social spending, and taxation in service of social spending, is "unfair." Why, the reasoning goes, should the government take money from a person who worked for it and give it to another who did not? Why, in other words, should the government "redistribute" hard-won earnings from the *deserving* to the

288. MAYER, *supra* note 24, at 440. Fink would later explain, in Mayer's paraphrase, that government programs such as the minimum wage "caused dependency, which in turn caused psychological depression," which historically "led to totalitarianism," such as "the rise and fall of the Third Reich." *Id.* at 442; *cf. id.* at 312 (quoting billionaire Wall Street executive Stephen Schwarzman's comparison of the closing of the carried-interest tax loophole to "when Hitler invaded Poland in 1939").

289. ISENBERG, *supra* note 249, at 319-20.

290. Jonathan Weisman, *Why Is Unemployment High? Lazy Americans, Boehner Says*, N.Y. TIMES (Sept. 22, 2014).

291. SLOBODIAN, *supra* note 158, at 45.

292. *Id.*

293. *Id.* In a strange inversion of von Mises's defense of wealth-weighted voting in the consumer marketplace, Milton Friedman would later criticize the political practice of one-person-one-vote for being "highly-weighted" in favor of "special interests." *Id.* at 178-79. Friedman made the critique of equal voting rights during a speech in apartheid South Africa in 1976, around the same time that he published an editorial opposing sanctions against Rhodesia and criticizing the prospect of majority rule there. *See id.* at 178.

undeserving—or, in the public economic discourse of the Reagan era, from the "makers" to the "takers"[294] and "moochers"[295]?

Against this background, it becomes possible to see the potential political significance of a legal institutionalist reframing of economic debates.

Once the view of markets as legal constructions is accepted, it is much harder to defend current distributions of wealth and opportunity simply as just deserts for individual effort, much less to excuse existing inequalities as merely the product of individuals being "endowed differently by nature," or to claim that economically subordinated groups have "no one but themselves to blame." Once it is accepted that the legal rules that structure markets are inevitably the product of political decisions that could have been made differently, and that "the market" can take many forms with different effects on the growth and distribution of wealth and opportunity,[296] it becomes harder to deny that political choices in market design bear responsibility for today's unequal economic outcomes.[297] Attention shifts away from the individual as the focus of causal explanation and moral blame.

Because the state bears significant responsibility for any market outcome, it becomes harder to assume that those who have fared better are more "deserving," or that those who have fared worse are "undeserving"—whatever "undeserving" might mean in a world where inequalities accumulate across generations. In a country whose laws have

294. *See, e.g.*, Jake Miller, *Why Paul Ryan Stopped Referring to "Makers" and "Takers,"* CBS NEWS (Jan. 9, 2016).

295. Koppelman, *supra* note 76 (quoting Rand and observing that "[t]he producer/moocher dichotomy has a prominent place in contemporary American politics"); *accord* MAYER, *supra* note 24, at 398. The political scientist Elizabeth Suhay has recently described the Republican Party's arguments for its economic agenda as "insisting that the status quo is fine: inequality is minimal; inequalities that do exist are 'just deserts'; and, even if one wished to help, government intervention in fact undermines individual and aggregate prosperity." Thomas B. Edsall, *How We Think About Politics Changes What We Think About Politics*, N.Y. TIMES (Aug. 10, 2022).

296. Part II.B, above, has already described some of the many general ways in which legal rules structure market outcomes. Countless books and articles have been written about the ways in which specific economic policies, and not only policies of market design, have favored some and disfavored others over the course of American history, including over the last several decades. For some of the examples already cited above, see APPELBAUM, *supra* note 47; BARADARAN, *supra* note 65; HACKER & PIERSON, *supra* note 5; ISENBERG, *supra* note 249; KATZNELSON, *supra* note 67; MCGHEE, *supra* note 26; PIKETTY, *supra* note 116; ROTHSTEIN, *supra* note 68; WHITE, *supra* note 21.

297. How much responsibility? In a simple but unsatisfying sense, the fact that the government defines property rights could be taken to mean that the government is always "entirely" responsible for economic outcomes. To say anything further, however, could lead in the direction of disputes over the meaning of individual free will, responsibility, and blame in relation to the conditions that shape human behavior. For the purposes of this article, all that matters is that a legal institutionalist reframing of economic debate will likely tend to shift discussion, relatively speaking, away from explaining economic outcomes based on individual responsibility and toward explanations based on policy decisions.

approved of the owning and breeding of human beings as slaves,[298] the ethnic cleansing of indigenous lands,[299] other forms of conquest,[300] the denial of the vote to women,[301] the exclusion of immigrants based on race,[302] the violent suppression of organized labor,[303] the detention of citizens in concentration camps,[304] and ongoing mass human caging at a rate unmatched by any other country in the world,[305] the meaning of "just deserts" in the present day is, to say the least, far from clear.

In sum, the greatest advantage of legal institutionalism from an egalitarian perspective lies in the potential for legal institutionalism to undermine the myth of just deserts.[306] Once this myth has lost its plausibility, it becomes much easier to make the case not only for egalitarian policies of market redesign, but for egalitarian fiscal policies as well. A contemporary liberal, progressive, social democrat, or democratic socialist who favors currently radical fiscal policies such as a Green New Deal, a job guarantee, or a guaranteed minimum income has as much reason to support a legal institutionalist reframing of economic debate as someone who primarily seeks to achieve egalitarian ends through the redesign of markets.[307]

Instead of assuming that "freedom" must forever consist of submission to a mythical natural order of market rules, legal institutionalism opens the door to the realization of a more fundamental and enduring liberal

298. *See* Dred Scott v. Sandford, 60 U.S. 393 (1857); BAPTIST, *supra* note 62.

299. *See* BANNER, *supra* note 141, at 244.

300. *See* GRANDIN, *supra* note 104; DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019).

301. *See* Minor v. Happersett, 88 U.S. 162 (1875).

302. *See* Chinese Exclusion Act of 1882, 22 Stat. 58.

303. *See* WHITE, *supra* note 21, at 345-55, 534-36, 542-44.

304. *See* Korematsu v. United States, 323 U.S. 214 (1944).

305. *See* Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021).

306. This claim contrasts with earlier egalitarian arguments for legal institutionalism that focused on the potential to promote economic equality through the redesign of markets. *See, e.g.*, DEAN BAKER, THE END OF LOSER LIBERALISM (2011); REICH, *supra* note 99.

307. For an argument in favor of fiscal experimentation, see Adam Tooze, *What If the Coronavirus Crisis Is Just a Trial Run?*, N.Y. TIMES (Sept. 1, 2021) (stating that through the response to the COVID crisis, "[t]he world discovered that John Maynard Keynes was right when he declared during World War II that 'anything we can actually do, we can afford'"). From the perspective of the rhetorical or conceptual concerns at the center of this article, Keynes's language raises the possibility of a transformation in the public discussion of fiscal policy that resembles in some ways this article's proposed transformation in the discussion of markets. If money is, no less than the market, a creature of the state, and if the assumption that federal spending must be funded by taxes is no less of a myth than the laissez-faire myth of a "natural" market order, then does it still make sense in all cases to speak of federal spending on social programs as "transfers" or "redistribution"? For example, if the federal government somehow creates money and gives it to someone, without as a result reducing anyone else's real wealth through, for example, future taxation, inflation, or any other mechanism, in what sense has "redistribution" taken place? Redistribution from whom?

ideal: the democratic and experimental reconstruction of our world, without predetermined end. Freed from illusions of false necessity and arbitrary ideological constraints, legal institutionalism invites us simply to ask, in a pragmatic spirit: what rules will best realize our freedom as we, democratically, define it?

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APPENDIX: LEGAL INSTITUTIONALISM TODAY

In contrast to the "neoliberal thought collective" surrounding the Mont Pèlerin Society, one of the remarkable features of contemporary legal institutionalist thought is the extent to which various writers have often made related arguments without, apparently, being aware of one another's work. The purpose of this section is simply to bring together some of the most notable strands of legal institutionalist thought in recent years.[308] For convenience, this appendix simplifies by sorting the writers into four groups: legal scholars, economists, public intellectuals, and writers at think tanks. As was the case with the economist-lawyer Robert Hale during the first flourishing of institutionalist thought, many writers have a foot in more than one camp.

A. Legal Scholars

Legal institutionalist ideas play a significant role in mainstream contemporary legal scholarship. Beginning in the late 1970s, law professors associated with the Critical Legal Studies ("CLS") movement brought renewed attention to the legal realist critique of classical legal thought—including the critique of the public/private distinction, which in many ways is isomorphic with the government/market distinction of the Reagan era discussed above in Section II. Indeed, CLS-affiliated scholars

308. I have only included legal institutionalist works that focus on economic policy. It is possible to imagine legal institutionalist perspectives in any number of other areas, such as international relations, or criminal justice. For my own tentative attempt to consider the relevance of legal institutions to strategies of conflict, see Gregory Brazeal, *Law, War, and Four Modes of Conflict*, 20 OR. REV. INT'L L. 531 (2019), and for a brief consideration of the relevance of legal institutions to police surveillance, see Gregory Brazeal, *The Legal Construction of Discriminatory Mass Surveillance*, LPE BLOG (Mar. 17, 2022).

It may also be worth noting that legal institutionalism does not imply a crude legal determinism. It does not assert a grand unified theory of the social sciences in which legal institutions are the *only* factor that shapes human history, or in which legal rules *necessarily* lead to deterministic results, regardless of any other circumstances. Legal institutionalism is simply a convenient label for a family of arguments that draw attention to the causal significance of legal institutions. If legal institutionalism makes any metatheoretical claim, the claim would simply be that focusing on the causal role of legal institutions can sometimes be useful in developing explanations and predictions in the social sciences, especially with regard to economic phenomena. *See* Deakin et al., *supra* note 16.

such as Duncan Kennedy and Joseph Singer have often articulated the ways in which markets are constructed through changeable legal rules even more clearly and explicitly than the legal realists had done.[309] In particular, for decades, Unger has been a vocal advocate for the legal institutionalist ideas at the heart of this article.[310]

More recently, a new generation of progressive or Left legal scholars including David Singh Grewal, Amy Kapczynski, Jedediah Purdy, and K. Sabeel Rahman have launched a Law and Political Economy ("LPE") movement that self-consciously builds on the legal realist and CLS traditions.[311] The LPE movement is partly defined by the assumption that "[l]aw gives shape to the relations between politics and the economy at every point," and that there is an "interplay between the ways the state creates 'the market' and the ways market power feeds back into . . . politics."[312]

309. *See, e.g.*, Justin Desautels-Stein, *The Market as Legal Concept*, 60 BUFF. L. REV. 387 (2012) (calling for a revival of CLS insights, and offering historical background for "the notion that markets are literally sets of legal rules"); HORWITZ, *supra* note 20; DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 172-217 (2016); Kennedy, *supra* note 129; Kennedy, *supra* note 40, at 1352 & n.10 (citing Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923)); Kennedy, *supra* note 105; Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PENN. L. REV. 1358, 1415 (1982) (reiterating some "some old Legal Realist lessons, namely that 'private ordering' presupposes that public power has established a regime of rules and enforcement agencies, that the 'unregulated' market is a fiction, and that private ordering is itself a mode of public regulation"); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (offering an account of the successes of legal realism in twentieth century legal thought); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION (2015); ROBERTO MANGABEIRA UNGER, FREE TRADE REIMAGINED 81–85, 143–44, 183–84 (2007) (suggesting "that a market economy can take alternative institutional forms" and that "[t]here is no single system of contract and property that can rightly be said to be implicit in the idea of a market economy"). More recently, Unger has distanced himself from certain aspects of the CLS movement, and has called for greater emphasis on "institutional imagination." *See* UNGER, *supra* note 27, at 24-32.

310. To the extent that there is anything like a network of legal institutionalist thinkers, Unger would appear to be one of its primary nodes. His name repeatedly surfaces in unexpected places, such as a book-length attempt to popularize the view of markets as legal constructions, or in a syllabus for a course that Unger co-taught with the economist Dani Rodrik, "Political Economy After the Crisis" (Spring 2018). *See* ALEX MARSHALL, THE SURPRISING DESIGN OF MARKET ECONOMIES 21-22 (2012); Dani Rodrik, *"Political Economy After the Crisis"*, DANI RODRIK'S WEBLOG (Feb. 12, 2012).

311. For more on the origins of LPE, see Angela P. Harris & James J. " Jay" Varellas, *Introduction: Law and Political Economy in a Time of Accelerating Crises*, 1 J. LAW & POL. ECON. 1 (2020). A map of legal institutionalist intellectual networks might note that several of the legal scholars most associated with CLS, such as Unger, Kennedy, Singer, and Mark Tushnet, were teaching at Harvard Law School by the 2000s, while several of the legal scholars most associated with LPE, including Purdy, Kapczynski, and Grewal, teach or have taught at Yale Law School, where the LPE Project blog is based.

312. Jedediah Britton-Purdy, Amy Kapczynski & David Grewal, *Law and Political Economy: Toward a Manifesto*, LPE BLOG (Nov. 6, 2017); *see also* Jedediah S. Britton-Purdy, David Singh Grewal, Amy Kapczynski, & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020). For an interdisciplinary survey of recent approaches to "law and political economy" by two scholars at the London School of Economics who are

Since its creation in 2017, the LPE Project's blog has hosted contributions by a wide range of legal scholars who have emphasized the construction of markets and much more through changeable, politically determined legal rules.[313] To note just a few, the many posts emphasizing legal institutionalist themes include: Yochai Benkler on the legal construction of technological change,[314] Christine Desan on money as a creature of changeable state design,[315] Angela P. Harris on how the state constructs both racial and economic inequality through forms of "slow violence" in the criminal justice system,[316] Robert Hockett on the historical origins of the legal construction of corporations,[317] and Sanjukta Paul on how current policy debates naturalize coordination within firms but not among workers.[318] The blog also hosted symposia on several book-length works reflecting legal institutionalist themes, including Mehrsa Baradaran's *The Color of Money*, already mentioned above,[319] and Katharina Pistor's *The Code of Capital*, one of the most significant book-length contributions to the current renewal of interest in legal institutionalist thought.[320]

In 2020, the LPE Project created a *Journal of Law and Political Economy*, which has, like the LPE blog, featured arguments related to legal institutionalist premises.[321]

Numerous legal scholars outside of the CLS and LPE orbits have, of course, also made significant contributions that could be characterized as belonging to the legal institutionalist tradition. Cass Sunstein, the prolific legal scholar who is best known today for his work on regulatory design using behavioral "nudges" and technocratic cost-benefit analysis, earlier in his career wrote *The Partial Constitution* (1993), a work that drew attention to the politically determined legal construction of markets and

not affiliated with the LPE Project, see Michael A. Wilkinson & Hjalte Lokdam, *Law and Political Economy*, LSE Legal Studies Working Paper (2018), https://ssrn.com/abstract=3144723.

313. *See* L. & POL. ECON. PROJECT, LPEProject.org.

314. Yochai Benkler, *The Role of Technology in Political Economy: Part 1*, LPE BLOG (July 25, 2018).

315. Desan, *supra* note 183; Christine Desan, *The Impact and Malleability of Money Design*, LPE BLOG (Mar. 25, 2019).

316. Angela P. Harris, *Criminal Justice and Slow Violence in Keilee Fant v. City of Ferguson Missouri*, LPE BLOG (May 2, 2018); *see also* Angela P. Harris, *Where Is Race in Law and Political Economy?*, LPE BLOG (Nov. 30, 2017) (critiquing the separation "in several disciplines, including law, between the study of economics and the study of race").

317. Hockett, *supra* note 142.

318. Sanjukta Paul, *The Constitutional Role of Economic Coordination Rights*, LPE BLOG (Oct. 25, 2019).

319. *See* BARADARAN, *supra* note 65.

320. PISTOR, *supra* note 125.

321. *See* Harris & Varellas, *supra* note 305. The South Atlantic Quarterly also recently dedicated an issue to LPE themes. *See* Corinne Blalock, *Introduction: Law and the Critique of Capitalism*, 121 S. ATLANTIC Q. 223 (2022).

critiqued the appeal to laissez-faire market rules as a neutral baseline.[322] Barbara Fried's study of the thought of Robert Hale constitutes a clarifying restatement of legal institutionalist ideas in its own right.[323] As its title suggests, Bernard Harcourt's *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (2011) offers a critique of the myth of markets as natural economic orders rather than politically determined legal constructions.[324] The legal journal *Law & Contemporary Problems* even published a special issue in 2020 dedicated to the theme "The Market as Legal Construct."[325] Clearly, legal institutionalist thought is alive and well in Anglophone legal academia.

It might also be noted that there is a long tradition of anthropologists writing on the construction of markets by states, sometimes with reference to legal institutions—including Karl Llewellyn, who, in addition to sometimes being associated with the legal realist movement, was a founder of the field of legal anthropology.[326] Karl Polanyi, the economic historian who is known today in part for the quasi-institutionalist argument that "[l]aissez-faire was planned,"[327] was trained in law but also worked in anthropology.[328] The anthropologist David Graeber's *Debt* (2011) is above all an argument for viewing money as a state creation,[329] but also presents markets as creatures of the state, noting that "[s]tates created markets. Markets require states. Neither could continue without the other, at least, in anything like the forms we would recognize

322. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 3-7 (1993). For a critique of Sunstein's later work as a neoliberal-technocratic turn toward what Hayek (approvingly) called the "dethronement of politics," see Aaron Timms, *The Sameness of Cass Sunstein*, NEW REPUBLIC (June 20, 2019); *cf.* 3 F. A. HAYEK, LAW, LEGISLATION, AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 128 (1982).

323. FRIED, *supra* note 32.

324. HARCOURT, *supra* note 34.

325. *See* 83 LAW & CONTEMPORARY PROBS. 2 (2020).

326. *See, e.g.*, E. ADAMSON HOEBEL & KARL LLEWELLYN, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

327. POLANYI, *supra* note 34, at 147. There are affinities between Polanyi's thought and traditional institutionalist economics. *See, e.g.*, J. Ron Stanfield, *The Institutional Economics of Karl Polanyi*, 14 J. ECON. ISSUES 593 (1980). But ultimately, Polanyi's repeated invocations of "the self-regulating market" as a determinate and coherent if politically doomed set of institutions places some distance between his thought and the legal institutionalist view of markets as legal constructions. *See, e.g.*, POLANYI, *supra* note 34, at 71, 148.

328. *See* WOOD, *supra* note 140, at 21.

329. *See* GRAEBER, *supra* note 146, at 47-48, 54, 405 n.12 (citing, among other sources, the work of the German historical economist Georg Friedrich Knapp, and John Maynard Keynes's 1930 *Treatise on Money*). The "chartalist" tradition of viewing money as a creature of the state continues in more recent works such as, for example, CHRISTINE A. DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM (2014), and the "Modern Monetary Theory" (MMT) recently popularized by STEPHANIE KELTON, THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE'S ECONOMY (2020). For the phrase "money as a creature of the state," see Abba P. Lerner, *Money As a Creature of the State*, 37 AM. ECON. REV. 312 (1947).

today."[330]

B. Economists

A second, far more dispersed source of legal institutionalist thought in recent decades has been the work of professional economists. To begin with, although the "institutionalist" movement in early twentieth century academic economics was sidelined after World War II,[331] it never entirely went away. John R. Commons's students at the University of Wisconsin trained a more recent generation of institutionalists including Warren J. Samuels and his students Steven G. Medema and Nicholas Mercuro.[332] Contemporary institutionalists are heterodox economists who often focus on the evolutionary nature of the economy and belong to the Association for Evolutionary Economics.[333]

The University of Utah economist Marshall Steinbaum has also drawn attention to the institutionalist critique of neoclassical economics through appearances in various popular publications.[334] Two recent books written for popular audiences, Ha-Joon Chang's *Economics: The User's Guide* (2014), and Robert Skidelsky's *What's Wrong with Economics?* (2020), also summarize the institutionalist position while describing pluralist methodological alternatives to neoclassical economics.[335]

One of the leading contemporary proponents of the institutionalist tradition is Geoffrey Hodgson, who coined the phrase "legal institutionalism."[336] Hodgson has dedicated much of his career to reviving institutionalism, from his 1988 book *Economics and Institutions: A Manifesto for a Modern Institutional Economics*, to a 2017 article he co-authored with several other scholars, including Katharina Pistor, "Legal Institutionalism: Capitalism and the Constitutive Role of Law."[337] The 2017 article may be the single best introduction to the idea of legal institutionalism and how it relates to other theories in the social sciences.

330. GRAEBER, *supra* note 146, at 71.

331. *See* MALCOLM RUTHERFORD, THE INSTITUTIONALIST MOVEMENT IN AMERICAN ECONOMICS, 1918-1947, at 9 (2011).

332. *See* Steven G. Medema, Nicholas Mercuro & Warren J. Samuels, *Institutional Law and Economics*, *in* 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 418, 430 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

333. *See id.* at 423; *see also* LANDRETH & COLANDER, *supra* note 36, at 470, 477-78.

334. *See, e.g.*, Marshall Steinbaum, *Games Economists Play*, BOSTON REV. (Sept. 9, 2019); Luke Savage, *How the Right Won a Postwar Counterrevolution in Economics: An Interview with Marshall Steinbaum*, JACOBIN (Feb. 8, 2021). Earlier, Steinbaum was a researcher at the Roosevelt Institute, discussed below in the text accompanying notes 357-360.

335. *See* SKIDELSKY, *supra* note 211; HA-JOON CHANG, ECONOMICS: THE USER'S GUIDE (2014).

336. HODGSON, *supra* note 105, at ix.

337. GEOFFREY M. HODGSON, ECONOMICS AND INSTITUTIONS: A MANIFESTO FOR MODERN INSTITUTIONAL ECONOMICS (1988); Deakin et al., *supra* note 16.

The authors make the case that social scientists, including economists, should pay greater attention to "the role of law in constituting the economic institutions of capitalism."[338]

Hodgson's *Conceptualizing Capitalism* (2015) offers a remarkably comprehensive legal institutionalist account of the nature of capitalism.[339] Hodgson also edits the *Journal of Institutional Economics*, which was founded in 2005.[340]

Although Katharina Pistor has written for and had her work reviewed in the LPE Blog,[341] there otherwise seems to have been little dialogue between LPE-affiliated legal scholars and contemporary institutionalist economic work such as Hodgson's.

No discussion of the legacy of institutionalism in professional economic thought would be complete without noting the existence of the so-called "New Institutional Economics" ("NIE"), a general label sometimes used for an extremely diverse group of thinkers including Oliver Williamson, Ronald Coase, Douglass North, Mancur Olson, and Elinor Ostrom.[342] But as Hodgson and others have noted, these thinkers tend to use neoclassical assumptions to explain the development of "institutions," such as the firm or the modern state, rather than using legal institutions to explain economic outcomes.[343] To the extent that this characterization is accurate, the economists associated with NIE do not fit comfortably within the legal institutionalist tradition, despite their shared interest in legal institutions.[344]

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338. Deakin et al., *supra* note 16, at 188.

339. *See* HODGSON, *supra* note 105; *see also id.* at 3-16 (contrasting legal institutionalism with alternative intellectual traditions including libertarianism, Marxism, mainstream economics, other forms of heterodox economics, and "law and economics"). Of course, there are a variety of definitions of "capitalism" and "socialism" in circulation. For example, Ellen Meiksins Wood famously defined capitalism as a system of "market-dependence" in which "all individuals must in one way or another enter into market relations in order to gain access to the means of life." WOOD, *supra* note 140, at 7. It might be objected that, based on this definition, any state whose social safety net provides sufficient resources for the physical survival and reproduction of its population has, to that extent, ceased to be "capitalist." In light of the fact that almost no "capitalists" argue for the complete abolition of the social safety net, and almost no "socialists" make the classical socialist case for the complete abolition of private property, a case could perhaps be made that "capitalism" and "socialism" have outlived their usefulness as political categories. *Cf.* Moyn, *supra* note 121, at 55 (calling for a legal scholarship that recognizes "there are no general laws of capitalism to explain . . . , because there is no such thing as capitalism").

340. *See* Journal of Institutional Economics, joie-blog.net.

341. *See* Samuel Moyn, *Law as the Code of Inequality of Wealth*, LPE BLOG (May 3, 2019); Katharina Pistor, *Liberal Property Law Vs. Capitalism*, LPE BLOG (Jan. 27, 2021).

342. *See* HODGSON, *supra* note 105, at 15.

343. *Id.* at 15; SKIDELSKY, *supra* note 211, at 112-17; LANDRETH & COLANDER, *supra* note 36, at 489-90.

344. Hodgson makes the same point regarding mainstream "law and economics." *See* HODGSON, *supra* note 105, at 12. For more detailed critiques of law and economics from a legal institutionalist perspective, see, for example, Britton-Purdy, et al., *Framework*, *supra* note 306, at 1795-1800 (criticizing mainstream law and economics); Duncan Kennedy, *Law-and-Economics from the Perspective of Critical*

Yet some contemporary economists with ties to NIE have explicitly rejected neoclassical assumptions. For example, Barry Weingast, a frequent collaborator of Douglass North's, echoes the legal institutionalist criticism of the distinction between "government" and "the market" when he attacks what he calls "the neoclassical fallacy," "namely, that markets can exist without government."[345] As Weingast notes, other contemporary economists with ties to NIE have also emphasized the foundational role of state-backed rules in markets, including, notably, Daron Acemoglu and James Robinson, development economists whose 2012 book *Why Nations Fail* argues that "[e]ach society functions with a set of economic and political rules created and enforced by the state and the citizens collectively," that "politics and political institutions . . . determine what economic institutions a country has," and that these economic institutions "are critical for determining whether a country is poor or prosperous."[346]

In fact, development economics seems to be the rare area of contemporary economic thought where concerted attention to the politically determined variability of market design has entered the mainstream. In *One Economics, Many Recipes* (2007), for example, the trade and development economist Dani Rodrik claims to apply "neoclassical economic analysis" in the sense of focusing on "purposeful behavior by individuals"[347] and assuming, for example, that entrepreneurs respond to price signals.[348] But he also rejects the neoclassical tendency to ignore legal institutions, emphasizing that "in the background" of standard macroeconomic models, "there exist institutions that establish and protect property rights and enforce contracts," and that this "implies

Legal Studies, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (Peter Newman ed., 1998); Listow, *supra* note 162; Martha McCluskey, *Economic Human Rights, Not Tough Policy Tradeoffs*, LPE BLOG (Apr. 5, 2018) (countering the orthodox law and economics slogan "*all rights have a cost*" with the legal institutionalist rejoinder: "*all costs have a right*").

As someone who attended law school in the late 2000s, at what may have been the peak influence of the law and economics movement, I recall the choice between private law legal rules being debated in the classroom in terms of which rule would be more Kaldor-Hicks efficient, whether or not that phrase was used. Students learned the assumption "that distributional consequences of efficient policies were inconsequential because taxes and transfers either should or do address distributional concerns." Listow, *supra* note 162, at 1653. Of course, those who suffer from Kaldor-Hicks efficient policies obviously are *not* always or even usually compensated. *See id.* at 1654; APPELBAUM, *supra* note 47, at 189, 245; *see also, e.g.*, Autor et al., *supra* note 186 (concluding that "[a] surge in imports from China as it modernized its economy during the 1990s and early 2000s caused job and income losses in U.S. manufacturing communities that persisted for years after the import shock plateaued around 2010," resulting in "painful and long-lasting economic scarring and social problems").

345. Barry R. Weingast, *Exposing the Neoclassical Fallacy: McCloskey On Ideas and the Great Enrichment*, 64 SCANDINAVIAN ECON. HIST. REV. 189 (2016).

346. Weingast, *supra* note 339, at 192 n.4; DARON ACEMOGLU & JAMES ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 42-44, 468 (2012).

347. DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 3 (2007).

348. RODRIK, *supra* note 341, at 4.

a legislator and a police force."[349] Echoing institutionally inclined theorists such as Unger,[350] Rodrik writes that "first-order economic principles—protection of property rights, market-based competition, appropriate incentives, sound money, and so on—do not map into unique policy packages."[351] Rather, such principles can be "creatively packaged" into any number of different "institutional designs."[352]

More recently, Rodrik, along with economists Suresh Naidu and Gabriel Zucman, helped to create the Economics for Inclusive Prosperity network. In the spirit of legal institutionalism, their manifesto notes that basic market principles "are compatible with an almost infinite variety of institutional arrangements," such that "institutional indeterminacy pervades all . . . policy domains."[353]

C. Public Intellectuals

A third contemporary source of legal institutionalist thought, and one that rarely receives attention in the two academic conversations discussed above, is popular writing on economic policy. In particular, the heterodox economist Dean Baker, who received a Ph.D. in economics from the University of Michigan in 1988, has published several works arguing for the progressive redesign of markets, especially *The End of Loser Liberalism: Making Markets Progressive* (2011), and *Rigged: How Globalization and the Rules of the Modern Economy Were Structured to Make the Rich Richer* (2016).[354] As the books' titles suggest, they could hardly be more explicit in adopting a progressive legal institutionalist perspective, yet as of this writing no reference to Baker has ever appeared, for example, in the dozens of posts on the LPE Project's blog, nor does Hodgson cite Baker's work in his *Conceptualizing Capitalism*.

Similarly, former labor secretary Robert Reich wrote a popular 2015 book that is dedicated to attacking the "notion of a 'free market' existing

349. *Id.* at 155. Implicitly acknowledging some distance between his own approach and that of orthodox neoclassical economics, Rodrik notes that the study of institutions is not a part of most economists' training. *Id.* at 155.

350. In fact, the two co-taught a class in 2018. *See supra* note 305. For more of Rodrik's internal critiques of neoclassical economics, see DANI RODRIK, ECONOMICS RULES: THE RIGHTS AND WRONGS OF THE DISMAL SCIENCE (2015).

351. RODRIK, *supra* note 344, at 6.

352. *Id.* at 6.

353. Suresh Naidu, Dani Rodrik, & Gabriel Zucman, *Economics After Neoliberalism*, BOSTON REV. (Feb. 27, 2019). For another recent example of a mainstream economist recognizing the relevance of market design, see DIANE COYLE, COGS AND MONSTERS: WHAT ECONOMICS IS, AND WHAT IT SHOULD BE 158 (2021) (suggesting that economic policymakers might benefit from thinking more "about designing the rules of the game . . . rather than incentivising behaviour within a specified game").

354. BAKER, *supra* note 300; BAKER, *supra* note 95.

somewhere in the universe, into which government 'intrudes.'"[355] Although Reich, who was trained as a lawyer rather than an economist, makes no reference to Hale, Unger, Hodgson, or other figures in the institutionalist tradition, his book clearly reflects a legal institutionalist understanding of economic policy. "Markets are made by human beings," he writes, and "there are many alternative ways markets can be organized."[356] Reich describes in detail how market rules are determined by "[l]egislatures, agencies, and courts" that have fallen under the influence of "large corporations and the wealthy," with the result that "widening inequality has become baked into the building blocks of the 'free market' itself."[357]

Reich and Baker also show how a legal institutionalist critique of the "government versus market" distinction can be rhetorically used to advance progressive policy reforms. Reich, for example, emphasizes the "*pre*distribution upward" of wealth resulting from the current legal rules of intellectual property, antitrust, bankruptcy, finance, corporations, labor, and contracts (such as mandatory arbitration provisions), as well as the lack of enforcement of many potentially useful rules.[358]

The phrase "predistribution" is often associated with the political scientist Jacob Hacker, another scholar whose popular and academic writings might be seen as reflecting legal institutionalist thought.[359] Together with Paul Pierson, Hacker has produced a series of popular books that draw attention to the centrality of government policy in constructing unequal economic outcomes in the United States, against the widespread Reagan-era claim that growing inequality primarily resulted from non-policy factors such as "skill-biased technological change."[360] In line with a legal institutionalist perspective on markets, Hacker and Pierson emphasize that "[g]overnment rules make the market, and they

355. REICH, *supra* note 99, at 3-5; *see also id.* at 153. Reich has acknowledged that his new emphasis on the government role in setting the rules of the economic game is a departure from earlier work. *See, e.g.*, Robert Reich, *The Political Roots of Widening Inequality*, AM. PROSPECT (Apr. 28, 2015). In a welcome sign of interaction between the assorted currents of contemporary legal institutionalism, a recent issue of the LPE project's academic journal featured a review of a book by Reich. *See* Daimeon Shanks, Book Review, *Robert B. Reich, The System: Who Rigged It, How We Fix It (2020)*, 1:2 J. LAW & POL. ECON. (2021).

356. REICH, *supra* note 99, at 81.

357. *Id.* at 82-83.

358. *Id.* at 154-55 (summarizing preceding chapters); *see also, e.g.*, BAKER, *supra* note 300, at 30 (using the similar phrase "upward redistribution of before-tax income"). A search for popular expressions of legal institutionalist ideas uncovers other voices attempting to draw attention to the fact that our markets depend on government rules. *See, e.g.*, DOUGLAS J. AMY, GOVERNMENT IS GOOD: AN UNAPOLOGETIC DEFENSE OF A VITAL INSTITUTION 122-42 (2011) (explaining that capitalism requires government, in part because government rules make markets and capitalism possible).

359. *See* Predistribution, WIKIPEDIA.COM (attributing the term "predistribution" to Hacker and describing its use by the Labour Party in the United Kingdom).

360. *See, e.g.*, HACKER & PIERSON, *supra* note 5, at 34.

powerfully shape how, and in whose interests, it operates."[361] They emphasize that government "has enormous power to affect the distribution of 'market income,' that is, earnings before government taxes and benefits take effect."[362]

D. Think Tanks

A fourth contemporary source of legal institutionalist thought that is worth mentioning separately, although it overlaps with many of the sources above, can be found in think tanks and other non-governmental organizations focused on economic policy. For example, in 2015, the Roosevelt Institute released a report co-authored by economist Joseph Stiglitz,[363] *Rewriting the Rules of the American Economy*.[364] The report offers a detailed list of economic reform proposals, starting from the legal institutionalist premise that "[m]arkets are shaped by laws, regulations, and institutions," and that "[t]he rules determine how fast the economy grows, and who shares in the benefits of that prosperity."[365] In a later report, *Rewrite the Racial Rules*, the Roosevelt Institute drew attention to the often-hidden rules, many of them legal in nature, that perpetuate racial inequality in the economy and society of the United States.[366]

Demonstrating the capacity of legal institutionalist discourse to accommodate a range of ideological positions, the Niskanen Center—a market-focused think tank named after one of President Reagan's economic advisers[367]—recently published writing that reflects a legal institutionalist diagnosis of stagnating growth and rising inequality, including a 2017 report by Brink Lindsey and Steven M. Teles, *The*

361. *Id.* at 44. Hacker and Pierson draw attention to the similarities between their argument and early twentieth century Progressive thought. *See id.* at 80-82 (discussing Brandeis and the legal realists, and concluding that "[t]he debate should not be over whether government is involved in the formation of markets," but "over whether it is involved in a manner conducive to a good society").

362. *Id.* Who could disagree with such a claim? Hacker and Pierson quote leading economists from the Clinton and George W. Bush administrations, including Gregory Mankiw, who insisted that "'policymakers do not have the tools to exert such a strong influence over pretax earnings, even if they wanted to do so.'" HACKER & PIERSON, *supra* note 5, at 43.

363. Stiglitz achieved renown as an internal critic of neoclassical economics, producing works that highlighted potential sources of inefficiency such as imperfect information. *See, e.g.*, Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information*, 71 AM. ECON. REV. 393 (1981). For Stiglitz's distance from legal institutionalism, at least until fairly recently, see above notes 104, 126.

364. STIGLITZ, *supra* note 170.

365. *Id.* at 7.

366. *See* ANDREA FLYNN, ET AL., REWRITE THE RACIAL RULES: BUILDING AN INCLUSIVE AMERICAN ECONOMY (2016); *see also* THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY (Andrea Flynn, et al., eds., 2017) (collection of essays that grew out of the 2016 report).

367. *See* APPELBAUM, *supra* note 47, at 116-17; About, Niskanen Center, niskanencenter.org/about/.

Captured Economy.[368]

The ideological capaciousness of legal institutionalism should be understood as a strength, not a weakness. The framing of public economic debate in terms of a distinction between "government" and "the market" might not have been able to achieve its dominance if it had only created room for one political orientation to argue in favor of its preferred economic policies. It is likely that displacing the "government versus market" distinction will require a similarly ideologically flexible vocabulary. Legal institutionalism provides such a language, while at the same time tilting the rhetorical playing field of economic policy argument in favor of policies that benefit the many rather than the few.

368. BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY (2017). As noted above, Lindsey has attacked the opposition between "government" and "the market" even more directly in a recent essay for Niskanen. *See* Lindsey, *supra* 102. Perhaps not surprisingly, Lindsey is a graduate of Harvard Law School, the home of CLS. *See* Brink Lindsey, Niskanen Ctr., https://www.niskanencenter.org/author/brink-lindsey/. For other examples of legal institutionalist thought that tilts to the Right, at least in the sense of showing less concern for social equality than most contemporary progressives would, see DE SOTO, *supra* note 210; ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY (2018).