The Fight for Freedom
Law and political economy in America’s Third Reconstruction
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Feb 2020

Note for Chicago Public Law Workshop participants –

Thank you for taking the time to engage with this (very rough) draft of my next book project. This draft below represents a first attempt at synthesizing the key themes and overview of the book. You’ll find that it covers a lot of ground and touches on (but does not flesh out) many key points. My hope is that this will give you a sense of the project as a whole. Since the project is still at a very early stage of development, I’m very much looking forward to suggestions, feedback, and comments.

A quick word by way of background:

Much of my scholarly work to date has revolved around three related topics: normative theories of domination and democracy as a way to understand contemporary problems of inequality and democratic failure; the construction of administrative and legal regimes that could remake economic relations in more equitable forms (for example, work I’ve done on public utility and anti-monopoly; and on public goods and the lived reality of citizenship); and institutional designs for more participatory democratic governance.

Over the last two years, I have had the privilege of serving as the President of Demos, a think-and-do tank working on issues of racial justice, democracy reform, and economic inequality. Through this work I’ve had the opportunity to engage deeply with a wide range of grassroots advocates, social movements, and reformers. I’ve been struck by how these social movements have conceptualized the normative visions of freedom and liberation that they are fighting for, and have a sophisticated analysis of the underlying structural roots of economic and political inequality that they are up against. But I’ve also been struck by how much these reformers tend to have questions around the mechanics of governing: what would a new institutional, regulatory, legal regime that makes good on these aspirations actually look like?

This book is an attempt to bring together these two areas of interest: the exciting and urgently needed demands for change from grassroots social justice movements, and the legal construction of (in)equality that can inform contemporary policy debates in the years ahead.

Thank you for your time and consideration. Looking forward to our discussion!

1 Associate Professor of Law, Brooklyn Law School; President, Demos.
2 See e.g., Rahman, DEMOCRACY AGAINST DOMINATION (2016); Constructing and Contesting Structural Inequality, Critical Analyses of Law; Domination, Democracy, and Constitutional Political Economy, Texas L. R.
3 See e.g., Rahman, The New Utilities; Cardozo L.R. (2018)
4 See e.g. Rahman, Constructing Citizenship, Colum. L. R. (2019)
5 See e.g., Rahman, DEMOCRACY AGAINST DOMINATION (2016); Rahman and Russon Gilman, CIVIC POWER (2019)
Introduction

In April 1865, while the Civil War raged to its conclusion, Congress passed the Thirteenth Amendment abolishing slavery. By the following December, the war had ended, and Republicans in Congress moved quickly to enforce the terms of the Amendment. Overriding the veto of the new (and hostile) President Andrew Johnson, Congress passed a major Civil Rights Act empowering courts to enforce anti-discrimination provisions. At the same time, Congress created a vast new federal bureaucracy under the rubric of Reconstruction, including a “Freedman’s Bureau” empowered to provide goods and services to freedpersons, including federal aid and land titles, while also mandating the federal creation of schools and social welfare services on occupied rebel land. Reconstruction represented a structural vision of inclusion: simply declaring an end to slavery and policing discrimination would not root out the “badges and incidents of slavery.” Rather, they knew that real equality required a dramatic change in the underlying political economy, massively redistributing land and property rights, and extending the franchise and political power through the right to vote. The backlash to Reconstruction was swift and brutal. It took the rise of violent paramilitary attacks on newly-freed and enfranchised Black voters, combined with a concerted judicial and legal strategy aimed at undoing the very capacity of the federal government to advance social and economic inclusion. Legal victories by former Confederates and opponents of Reconstruction barred future Congresses from regulating private action, or from promoting social and political rights, restraints that continue to undercut efforts to advance equality.

Fast forward century and a half, and the story of America in the Trump era is eerily similar. In Florida, a multiracial grassroots movement of reformers successfully amended the state constitution to restore voting rights for the formerly incarcerated, in what seemed to be largest expansion of the franchise since the Voting Rights Act of 1965. Yet the Republican state legislature, backed by the state Supreme Court has sought to undercut the Amendment’s implementation, raising questions about who can actually vote pending the repayment of punitive fines and fees. Elsewhere we see a similar street fight for political inclusion. In Georgia, then-Secretary of State Brian Kemp undermined the administration of the 2018 gubernatorial election, purging voters from the rolls and allegedly manipulating the supply of election machines themselves to Black neighborhoods. In North Carolina and Wisconsin, incoming Democratic governors found their powers restricted by opposing Republican legislators who attempted to stack state administrative and judicial appointments before losing office.

This fight for membership is not just a matter of political institutions. It is also a key question shaping many of the policy fights of the last few years. The problem of who counts is not just one of electoral rules; it is also a key question shaping many of the policy fights that took place behind the scenes in this administration—policies that limit benefits for some, while expanding them for others. From the rigging of the census, the public charge rule, the travel ban and immigration crackdowns to the gutting of food stamps, stopping environmental justice and labor enforcement, and disinvesting in affordable housing, many of the Trump administration’s policies can be best understood as an attempt to narrow the substantive scope and meaning of membership in our democracy, whether by explicitly barring membership and immigration, or implicitly by narrowing what public benefits and supports different groups—particularly workers, women, and communities of color—are able to access. This behind the scenes battle over the substantive reality of privileges

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6 Colfax massacre and the Cruikshank case.
7 See Fair Fight Action v. Kemp.
and immunities and public goods communities can access has been a key theme of legal and political battles over economic policy and the regulatory state for decades.

The common thread across all these legal and policy fights is one of membership. Who counts as a co-equal member of our democracy? More so than formal membership and citizenship, this question of effective membership is defined by the on-the-ground realities of who actually exercises political power, who can actually access public goods and benefits, and the protections of the rule of law. By dialing down the functional reality of political or economic empowerment, these background legal regimes effectively condition the scope and substance of citizenship.

This book is about the fight for membership and belonging in contemporary American politics, and the role of law in constructing an equitable (or exclusionary and extractive) political economy. We are in a moment where there is widespread anxiety about the potential collapse of American democracy under the pressures of the Trump presidency, and the erosion of Constitutional checks and balances. These concerns are no doubt justified, but in a sense they also sidestep a deeper set of questions at the heart of American democracy. Autocracy is not something that America “falls into”; rather, American autocracy has been alive and well for a long time—it is simply unevenly distributed. We can see autocracy in the way the workplace and the modern market constructs relations of power and extraction, or how communities of color face existential threats to our security and safety often from the agents of the state themselves. Law is central across all of these experiences. Through regulation, judicial doctrine, and the opportunistic application and erasure of statutes, law constructs these oases of inequity, and the conditional nature of citizenship. The lived realities of economic inequality, racial and gender exclusion, and the disparities of political power are often the product of legal regimes that are, for most Americans, hidden from view, an infrastructure that shapes our economic and political life behind the scenes.

Yet this is also a rare moment of deep questioning of the foundational institutions of American political economy. From grassroots social movements to presidential candidates, the combined shocks of a decade of financial and ecological crisis and the earthquake of Donald Trump’s election has created a window of radical openness where our politics is poised on a crossroads between wildly different (and in some cases, terrifying) possible futures. Like previous moments of radical regime change—from Reconstruction to the New Deal to the “Second Reconstruction” of the civil rights movement—we are in a period of radical political upheaval that carries with it the possibility of dramatic structural change. In these previous moments of reform, social movements and policymakers were able to create transformational, democratizing changes to our Constitution, our economy, and our political institutions. Can the same happen today?

Drawing on the real-time struggles and visions of contemporary social movements and reformers, this book explores the some of the central front lines in this fight for a more expansive and equitable vision of American freedom, one that seeks to dismantle the historical structures of extraction and exclusion, in service of the kind of democratic ideal that has informed these democratizing movements of past eras. This book offers both a normative account of what this idea of freedom consists of, and a political-institutional account of what kinds of structural reforms to the background rules of our contemporary economy and political systems might be needed. The goal of this book is not to offer a policy blueprint, but rather to situate today’s policy fights in

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8 See e.g. Huq and Ginsburg; Levitsky and Ziblatt.
context of these larger normative and historical stakes—and to highlight the grassroots movements and leaders who are advancing these ideas today.

The rest of this paper sketches in brief some of the key themes for the project.

I. The legal construction of American autocracy

This is not the first-time aspirations for a more inclusive democracy have been voiced. The reality of American history is that for all the advances of democratizing and egalitarian reform, hierarchies of wealth and power are persistent and durable.

The hydraulics of exclusion

Over a century and a half ago in the aftermath of the Civil War, we briefly saw what remains one of the most visionary efforts at expanding American democracy. Under the protections of the new Thirteenth, Fourteenth, and Fifteenth Amendments, and Congressional Enforcement Acts of 1870 and 1871, our constitutional democracy was radically transformed, and for the first time disavowed the founding-era origins of a democracy and economy premised on enslavement. Notably even this expansion was still limited; the question of women’s suffrage was still kept at arm’s-length by the Reconstruction Era constitutional debates, and it wasn’t until a half-century later that women would secure equal political rights. The Reconstruction era was nothing short of revolutionary. Across the country, for a short window, freed persons were able to organize independent political power, and win office as the state, local, and federal levels. During this time we saw the emergence of new multiracial coalitions of workers and farmers, challenging the old power structures in the South and North alike.

But this moment of democratic transformation was short-lived. The backlash was swift and furious, as a fusion of white elites and former Confederates deployed a systematic campaign of paramilitary violence to break these coalitions and intimidate black Americans. States passed “Black Codes” and enforced these new restrictions on people of color as a means to reassert racial subordination. This was also the first modern wave of mass construction of new prisons. This violent fight for emancipation was exemplified in the 1873 Colfax Massacre, where a paramilitary group of white residents killed over 150 black residents, storming the county courthouse in an effort to overturn the results of the 1872 local elections that saw black Americans gaining significant political power. The Supreme Court intervened in the case, ultimately dismissing the murder convictions for William Cruikshank and his co-conspirators—effectively giving a green light to further racial terror. The Court then continued on this trajectory, handing down a series of decisions in the 1870s and 1880s that systematically gutted the radical racial and economic justice potential of the Fourteenth Amendment. It was this period of violence and political struggle that ensured the Civil War would yield not transformative democratization but rather a century of Jim Crow autocracy in the South. That story itself was then erased by the narrative of North-South reconciliation in the 1880s, and to this day remains outside of most American’s knowledge of civics and history.

Reconstruction distills the reality of the fight for democracy in this country: real democracy requires political equality, racial equity, and a shift in economic power; efforts at advancing real democracy are actively resisted (or prevented) through a range of tactics involving violence, law, narrative
erasure. Indeed, a century later, the “Second Reconstruction” of the civil rights movement saw a similar pattern of revolutionary change met with multifaceted backlash. In the 1960s the civil rights movement built a new level of grassroots power which helped bring about major structural and legal change, from judicial decisions like *Brown v. Board of Education* to transformative legislation like the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and more. But here too, these advances were undermined—and racial and economic hierarchy reasserted—through means both blatant and subtle. Desegregation prompted a wave of “white flight” as wealthier and whiter communities retreated from cities, effectively restoring patterns of economic and racial segregation through means of “private” association, discriminatory zoning and urban planning policies, and more.

The same dynamics have driven more recent patterns of economic and racial inequality. The privatization and financialization of education, for example, has placed communities of color in particular into highly extractive conditions of debt with limited economic upside through the for-profit higher education machine—and not coincidentally accelerated at precisely the moment that schooling cohorts became more racially diverse. Geographically, the combination of municipal secession, privatized housing development, increased financial and economic wealth at the top has created a metastasizing crisis of housing unaffordability. The result is that Americans are now more segregated by race, geography, and economic opportunity than in the pre-*Brown* era, while birth ZIP code continues to have massive intergenerational effects on health, wealth, and mobility. Similarly, the privatization and dismantling of the safety net, accelerating in the 1980s, placed many working families and people of color into more precarious and predatory economic arrangements, workers of color bear the brunt of the new gig-ified and “fissured” workplace.

These reassertions of hierarchies of membership, opportunity, and dignity are not the product of monolithic and explicit forms of discrimination as in the Jim Crow era. Rather, they are the product of a wide range of interconnected ideas, policies, and systems: free market zeal driving privatization; discomfort with civil rights and racial equity leading to a gradual erosion of civil rights regimes; the broader attacks on government. And these combinations of policies can be found in the backdrop of almost every major policy crisis of the moment. Consider for example the water crisis in Flint, Detroit, Baltimore, and across the country: much of this poisoning of communities of color has its roots in the literally toxic combination of governmental failure, structural racism, the privatization of water systems, austerity budgets at the state and local level, and failures of democratic accountability.

Like the era of Cruikshank and Jim Crow, there are real policy choices that lie behind these forms of systemic inequality. These are policy choices that have been effectuated by officials of both parties, across every level of government. And, like with Cruikshank, these policies have been often vindicated by the courts. Indeed, as the conservative legal movement has gained greater control of the judiciary and the Department of Justice in recent decades, courts have increasingly weaponized the First Amendment to erode economic regulations and immunize corporations from laws that would mitigate the disparities of voice, power, and economic wellbeing between workers and firms—while the Supreme Court in particular has systematically shifted political power through its gutting of campaign finance regulations and its undercutting the Voting Rights Act resulting in a flood of big money dominance in politics and more vociferous forms of voter suppression.

This macro view of the fight for a more inclusive democracy highlights how exclusion is hydraulic: power, economic domination, and white supremacy all have a quicksilver quality to them. Advances for democracy and inclusion in one arena lead to corresponding reassertions of inequality and power.
in other arenas. While much of today’s commentary frames the crisis of American democracy as one of potential “backsliding” into authoritarianism, the reality is that democracy and authoritarian rule have coexisted in America for a long time. The question isn’t whether or not America is a democracy. The question is who is included in that democracy with the full and equal privileges and immunities of membership.

The exclusionary playbook

The second lesson of this history is that the “exclusionary playbook” of policies that undergird such systemic inequalities is vast, encompassing explicit and subtle forms of exclusion that can operate through means like privatization and deregulation, failures of government, and failures of democratic accountability. These different strategies of exclusion operate primarily to reassert racial inequity and to hoard economic and political power. And thus any agenda for advancing economic and racial equity will have to address not just formal political inequities but also these behind-the-scenes dynamics of economic and social extraction and exclusion. Across different policy domains, three clear shifts stand out: (1) the privatization of governance; (2) the constricting of democratic public power; and (3) the weaponization of administration.

The privatization of governance

An obvious effect of neoliberal thought and policy is the deregulation of the market. Consider for example how the Trump administration has focused on dismantling the Consumer Financial Protection Bureau while loosening labor, environmental, financial, and health insurance regulations. Nor is this a recent phenomenon: policy fights over deregulation have been a mainstay of both conservative and liberal policymakers especially since the Reagan era of the 1980s.

But these policies are about more than just undoing economic regulations. They represent rather a shift in power and governance away from public institutions towards private actors. Consider for example the Consumer Financial Protection Bureau’s “forced arbitration rule”. One of the central features of the modern economy is how companies increasingly deploy mandatory arbitration clauses in consumer and labor contracts, requiring consumers and workers alike to take any disputes to private arbitration, rather than to formal legal proceedings in court, or in administrative agencies. But arbitration is both costly and involves procedures that are highly limited, skewed to favor the interests of the business itself. In late 2016 through 2017, the CFPB issued a regulation barring these clauses from consumer contracts. After retaking the White House in 2017, the Trump administration with support from Congress overturned this rule—and in the following months, sought to defund and weaken the CFPB itself. This represents more than a policy a shift; it is rather a major change in who gets to govern and decide matters of economic unfairness, moving

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9 See e.g. Consumer Financial Protection Bureau, New protections against mandatory arbitrations. Available online at: https://www.consumerfinance.gov/arbitration-rule/.

that power away from public institutions like the courts and the CFPB to the private halls of arbitration.

Or consider how economic deregulation shifts the balance of power for workers and firms. The undoing of labor regulations and workplace protections has been a recurring pattern in both the Bush and Trump administrations. Without workplace protections for safety, dispute resolution, and pay equity issues, workers are essentially left subject to what Elizabeth Anderson has called the “private government” of managers, firms, and profit-maximizing boards. Similarly, the reduction of enforcement of antitrust laws starting with the Reagan administration in the 1980s and the undoing of financial regulations from 1980 through the 2009 financial crisis, and then again under the Trump administration, reflect a similar shift in power, a change in who is actually governing the economy.

As Brandeis and other antitrust reformers of the early 1900s noted, the problem with modern financial giants like J.P. Morgan and monopolists like the railroad, telecom, and oil titans of the era were effectively the decision-makers of the modern economy: through their control of these essential goods and services, they could decide which communities could bring their goods to market, what businesses would rise or fall, and what prices could be extracted in return. The same is true of today's financialized economy, as private equity and investor interests—and new forms of corporate concentration—increasingly govern the market to fuel their returns, rather than to serve overall public welfare.

Thus, while deregulation in a neoliberal era is often justified as a return to more efficient market allocation, and a celebration of market freedom, untrammeled by government interference, this is misleading. Markets are not intrinsically free; rather they are simply different institutional forms of allocating power and coming to collective decisions. And crucially, they represent a mode of governing and decision-making where property owners and wealthier interests are by definition more influential. The move to privatize, then, is not about freedom versus government; rather it is about transferring decision-making from public government to private government. This is not to say that public government is intrinsically good or virtuous; indeed, governments and public agencies can often themselves fail or become captured or corrupt under pressure from the same kinds of wealthy interests that dominate the economy. But the move to privatization and financialization do represent a clear attempt to allocate economic decision-making to spaces that are not subject to the checks and balances of the constitution, or to the public forms of accountability in democratic electoral politics.

Constricting emancipatory public power

Running in parallel to the push to privatize government is a second pattern in neoliberal statecraft: the constricting of what remains of public governmental power in the first place. This pattern is a product of legal and policy decisions that work to narrow the range of permissible activities that government can undertake in the first place—and to impose greater barriers and hurdles on the exercise of governmental authority. A century ago in the Progressive Era, as reformers seeking to build the modern social contract and labor movements, they faced a powerful counterreaction from business interests and a conservative judiciary, which in cases like the 1905 *Lochner v. New York*

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11 See e.g., Daniel Rodgers, *Atlantic Crossings*; Rahman, *Democracy Against Domination*, Ch. 3.
12 For a documentation of today’s corporate concentration crisis and the role of modern finance in reshaping market dynamics, see e.g. Rana Foroohar, *Makers and Takers*; Matt Stoller, *Goliath*; Tim Wu, *The Curse of Bigness*.
13 For a broader version of this critique of privatization see e.g. Jon Michaels, *Constitutional Coup*. 
struck down such reforms under laissez-faire conceptions of state and market.\(^\text{14}\) *Lochner* came to stand in the popular and political imagination of the era for both a narrow vision of market freedom that ignored the domination of workers and communities at the hands of new industrial corporations—and for the ways in which the law was being deployed through judicial decisions to kneecap attempts by democratic movements and legislatures to mitigate these excesses of industrial capitalism. In the modern era, this threat of “Lochnerism”, of the constricting of governmental power to preserve imbalances of economic power, has revived in a variety of forms.

First, a central project of the neoliberal and conservative legal imagination since the 1970s has involved a gradual narrowing of Congress’ constitutional powers to enforce its most transformative egalitarian provisions in the Fourteenth Amendment.

In the aftermath of the Civil War, the radical Republicans of the Reconstruction era passed the Thirteenth, Fourteenth, and Fifteenth Amendments, which, though not without faults, radically remade the Constitutional order, for the first time establishing a constitutional democracy in the United States no longer formally rooted in slavery. While the Thirteenth Amendment formally abolished slavery, it was the Fourteenth Amendment which sought to assure equal protection, due process, and the privileges and immunities of citizenship—and which allocated to Congress for the first time the power to legislatively enforce these goals. Yet right away, the more radically emancipatory potential of the Fourteenth Amendment was undercut. As Black Americans exercised political power and gained elected office at record levels in the 1870 and 1872 elections, a wave of white supremacist paramilitary violence violently attacked Black voters and leaders. The Supreme Court then intervened in a series of cases in the 1870s to gut the enforcement powers of Congress, render newly-passed civil rights legislation moot, and throw out the murder convictions for perpetrators of political violence against Black voters.\(^\text{15}\) It wasn’t until a century later that *Brown v. Board (1954)*, the Civil Rights Act (1964) and the Voting Rights Act (1965) renewed the promise of the Fourteenth Amendment’s protections for equality.

Though less blatant, the backlash to the civil rights movement operated in a similar fashion: the combination of a conservative Supreme Court and a Congress under pressure from neoliberal and anti-civil rights pressures gradually eroded the Constitutional and legislative provisions aimed at enforcing social and economic equality. This shift is particularly pronounced since the 1970s and the Supreme Court’s lurch from the liberal Warren court to a more conservative majority following Richard Nixon’s aberrational four Supreme Court appointments. For example, Fourteenth Amendment Equal Protection doctrine moved to a more restrictive intent requirement for proving constitutionally-invalid racial discrimination—effectively immunizing various forms of structural economic and racial injustice—like racialized criminal justice enforcement and zoning practices—from constitutional challenge.\(^\text{16}\) Under the Rehnquist and Roberts Courts of the 1990s and 2000s, the Court similarly moved to a more neutral, color-blind view of Equal Protection that effectively removed requirements for school desegregation.\(^\text{17}\) Similarly, the Fourteenth Amendment’s provisions of Equal Protection and Due Process are preemptively narrowed by a series of decisions spanning the Redemption era and the Rehnquist Court that imposed strict “state action”

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\(^{14}\) *Lochner v. New York* (1905)

\(^{15}\) See e.g. US v Cruikshank (1876); Civil Rights Cases (1883). See also Jim Pope, Snubbed Landmark: Why United States v Cruikshank Belongs at the Heart of the American Constitutional Canon, Harvard Civil Rights-Civil Liberties Review 49 (2014).

\(^{16}\) See *Washington v. Davis*

\(^{17}\) *Parents Involved.*
requirements, further immunizing various forms of private discrimination from constitutional challenge. The Court also restricted Congress’ powers under the Fourteenth Amendment to enforce inclusion, most infamously in John Roberts’ 2013 ruling gutting the Voting Rights Act—leading directly to the modern wave of voter suppression tactics across the country.

A second line of attack has involved the weaponization of the First Amendment to similar effect: the narrowing of the permissible scope of equality-enhancing governmental action. Consider for example how in recent years free speech and free association claims have been deployed by businesses seeking to excuse themselves from anti-discrimination protections for LGBTQ individuals, or from federal requirements to assure access to contraceptive care and reproductive health. Similarly, corporate free speech claims have been employed to dismantle restrictions on corporations and wealthy individuals flooding elections with private campaign expenditures that radically shift political influence upwards. At the same time, First Amendment claims for free speech and free association have ironically been deployed by the Supreme Court to weigh against the abilities of workers to organize and associate. This “First Amendment Lochnerism”—where economic regulations and labor organizing are both limited in the name of the free speech rights of corporations and individuals—serves a similar purpose: the neutering of public power especially as it is deployed to balancing economic power and inequalities.

These lines of attack—encompassing different Constitutional provisions—have a suffocating quality to them. Congressional power to enforce ideals of equality and inclusion have been constrained. Where Congress and courts have responded by grounding civil rights and economic inclusion measures under different provisions—such as moving from Fourteenth Amendment to Commerce Clause justifications for anti-discrimination and social welfare laws like the Civil Rights Act and the Affordable Care Act—those moves have also subsequently been narrowed by further Court rulings. Even where there are well-established regimes for inclusion and assuring the balance of democratic power like the Voting Rights Act, recent holdings have undercut those as well. The combined result is a constricting of public power—specifically those uses of public power that are designed to combat economic, social, or political domination.

Weaponizing Administration

The first two themes of privatized government and constricted public power both operate in the same fashion: reducing democratic public political power and shifting more control to (unchecked) private actors. But there is a third pattern to neoliberal statecraft that involves not the dismantling of state power, but rather its weaponization in the service of more exclusionary ends.

Take for example the pattern, especially since the 1980s, of increasingly punitive and aggressive requirements for enrolling in safety net programs, requiring applicants to be subjected to invasive inspections, mountains of paperwork, and often demeaning and arbitrary interviews before accessing social programs like food stamps, unemployment protections, or welfare. Scholars of the safety net

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18 See e.g. Civil Rights Cases; Jackson v. Metropolitan Edison Co.; Deshaney v. Winnebago County
19 Shelby County v. Holder
20 Masterpiece Cake; Hobby Lobby.
21 Citizens’ United.
22 See e.g. Janus.
have long noted how these policies, which accelerated under the Reagan, Bush, and Clinton years, have been designed to limit access to these benefits.\textsuperscript{25} of how the welfare bureaucracy has often been weaponized to dehumanize individuals seeking to gain access to benefits—and how these barriers to entry are themselves often a product of a combination of racialized and anti-government sentiment.

This weaponization of administrative regimes is also present even in context of those emancipatory protections nominally protected by the Constitution itself. Formally recognized Constitutional rights depend on a vast infrastructure of implementation in order to be realized. As Cary Franklin has argued in context of reproductive rights, attacks on the “infrastructure of provision”—the geographical dispersion of clinics, the kinds of hoops that doctors and clinics have to jump through to gain state licenses and approvals—can functionally reduce a constitutionally-recognized right in dramatic ways, even absent a frontal attack on the right itself.\textsuperscript{26} These types of attacks on the (public and private) bureaucracy of administration of reproductive rights led to corrective attempts like the expanded “undue burden” standard codified in \textit{Whole Women’s Health v. Hellerstedt}. A similar fight is now under way in context of voter suppression. Voting rights advocates have long raised concerns about how the very administration of electoral infrastructure—processes for voter registration, voter ID, the very placement and quality of voting machines, etc.—can have dramatic impact on who actually votes. These administrative apparatuses have been increasingly weaponized to deliberately undermine the access to the ballot, particularly for communities of color, particularly after the gutting of the VRA preclearance regime in \textit{Shelby County v. Holder}. Stacey Abrams’ lawsuit, \textit{Fair Fight Action v. Crittenden}, identifies a wide range of such abuses arising from the 2018 Georgia gubernatorial race which she narrowly lost to then-Secretary of State Brian Kemp. Like \textit{Whole Women’s Health}, this suit paints a broad picture of the administrative apparatus needed to make good on the constitutional right to vote—and the ways in which that apparatus can be weaponized to systematically and strategically undermine that right for particular communities.

There is another context where administrative institutions are essential to equal citizenship—and where they can be deployed systematically to instead create unequal forms of citizenship. This scenario involves the unshackling of administrative authority into unchecked, arbitrary state power that strips target communities of the protections and securities of citizenship. Consider for example, contemporary concerns over the weaponization of immigration enforcement in recent years, from the inhumane family separation crisis at the border to the increased use of ICE raids on immigrant communities, often falsely targeting legal immigrants in communities of color. These tactics represent administrative authority stripped of the checks and balances that nominally arise from administrative law—and deployed systematically to reassert a racialized conception of citizenship and membership, of who belongs and who doesn’t.

What these fights highlight is the dynamic interaction between formal Constitutional rights, and administrative infrastructures of provision. The experience of membership and inclusion depends greatly on how governance regimes, administrative institutions, and enforcement systems operate. But administrative agencies, once created, do not automatically or necessarily operate in egalitarian ways. The control and management of those infrastructures are critical to ensuring nominal rights are in fact realized. Absent that degree of control and accountability, these administrative systems

\textsuperscript{25} See e.g. Kathryn J. Edin & H. Luke Shaefer, \textit{$2.00$ a Day: Living on Almost Nothing in America}; Michael Katz, \textit{The Undeserving Poor}.

are likely to be used to undermine rights for particular communities, resulting in a de facto form of
tiered, hierarchical membership. The result is that even where the moral content of citizenship leads
to commitments to redress political, economic, and social forms of subordination or domination,
the very control and implementation of administrative systems can lead to a lived reality of tiered
membership, where some communities fully experience the benefits of citizenship and others do
not. This third challenge of weaponized administration is crucial to note, because it underscores that
the role of administrative authority in realizing citizenship is not just a matter of more government;
rather it is a matter of responsive and accountable government.

II. Freedom, Domination, and the problem of Neoliberalism

What is an alternative normative vision for an inclusive, equitable, multiracial democracy? In place of
the technocratic and chastened liberalism of earlier decades, this is a moment that calls for a more
full-throated and bold vision of emancipation—true liberation from the deep and systemic forms of
economic, racial, gendered, and political domination that lie beneath our current crisis of democracy.

It is this vision of emancipation that lay at the heart of the Radical Reconstructionists who
transformed the Constitution and sought to remake a slave society into a society of freedom in the
post-Civil War era, giving rise to a remaking of our Constitution through the Thirteenth, Fourteenth,
and Fifteenth Amendments—and an attempt to remake our political economy through the short-
lived experiments of economic redistribution through the Freedman’s Bank and Freedman’s Bureau.
This is the same vision of freedom that informed the labor activists and the progressives mobilizing
against the corporate overlords of the first Gilded Age, seeking to redress the violence and corporate
power of industrialization. For these reformers, the challenge was not one of economic efficiency
but one of liberty, as economic power loomed as a threat to freedom no less severe than the political
tyranny that had motivated the American Revolution itself. This led to the era of labor organizing, of
the first public utility commissions and the emergence of the modern safety net, eventually
culminating in the New Deal revolution itself. And it is the vision economic, social, and political
freedom that animated the Civil Rights Movement, the march for jobs and justice, and the welfare
rights movement, all of which envisioned a transformative revolution for both political and
economic citizenship, pioneering ideas like universal basic income, placing economic development
and safety net policymaking directly in the hands of working people and people of color.

This is freedom not as the narrow market freedom to engage in “free exchange” or the private
freedom of association that justifies racial and gender discrimination under the guise of ‘free speech’.
This is rather the deep freedom that comes from a dismantling of systemic inequities, that ensures
individuals and communities can access those foundational goods that make human flourishing
possible, that secures the political freedoms that make accountability, responsiveness, and genuine
democracy actually possible. Rather, this is an account of freedom as the freedom to thrive, the
freedom that comes with full belonging and equal membership in the polity; the freedom that
requires equal access to those goods and resources that make flourishing possible; the freedom that
requires equal political power and the ability to actually share in governance and policymaking.

This transformative vision of democratic freedom has not always been fully realized. Indeed, too often the aspiration to economic and political freedom has been accompanied by a limit on who is seen as a full member and citizen of that freedom. Progressive champions against financial, corporate, and monopoly power in the early twentieth century were too often supporters of an exclusionary vision of freedom that had made its peace with Jim Crow—and the freedoms of the New Deal’s social democracy cut workers of color and women out of the social compact emerging from the Great Depression. Yet at the same time, the vision of a multidimensional commitment to freedom that encompasses political, economic, racial and gender equity has also been a running theme as an aspiration and vision among radical visions of grassroots transformative change. And it is these visions of freedom that have helped drive some of the biggest transformations of our constitutional structure, economy, and deep narratives—however limited these changes may have been.

From domination to emancipation

Before we can understand what kinds of democratic, political institutions are needed to realize a more equitable political economy, we first need to understand the nature of the inequities we are looking to dismantle and overcome. The inequities experienced by subordinated groups encompass more than the directly visible and tangible forms of discrimination, exploitation, or exclusion. Often, conditions of subordination are a product not of an individual malefactor, but rather of a larger system of economic and political institutional arrangements, which combine to produce disparities of power, wealth, opportunity, and position. But a key challenge for justice and ultimately freedom is the degree to which these structural roots of inequity are often experienced by individuals as exogenous, “natural,” and beyond the scope of individual responsibility, will, or reform. One way to bring into relief, to conceptualize and diagnose, these structural inequities is through the lens of domination: the concentration of arbitrary, unchecked power and control. At its core, domination is about power, and the ways in which inequitable distributions of power preclude freedom and flourishing—even if that power lies dormant, or is at times used benevolently.

Consider for example the kinds of inhibitions on freedom and moral standing that arise in context of the unchecked “private government” of the workplace, where labor is at the mercy of corporate owners and managers, unrestrained by checks and balances. Or the ways in which monopolies and finance can, by virtue of their market power and control over firms and industries, set unfair and rent-extractive terms for consumers and workers alike. Even if these forms of control—in the firm, or by corporate titans—is deployed charitably and benevolently, the reality is that workers and communities remain at the mercy of the good will and good faith of those with economic power. We can think of these economic relationships as exemplifying a form of dyadic domination: a binary relationship between two visible and identifiable parties (workers and managers; producers and financiers) characterized by a severe power imbalance. This is precisely the kind of unfreedom that animates movements for worker justice and labor organizing. It also lies behind how historically progressive reformers have viewed concentrated corporate power as a threat to liberty and economic citizenship going back to what Louis Brandeis called the “curse of bigness”.

28 See e.g. Iris Young, Responsibility for Justice (Oxford University Press), 52-9.
29 See e.g. Elizabeth Anderson, Private Government
There is a second kind of domination, which we might call *systemic domination*. Systemic domination refers to conditions where the dominator is not a discrete actor. Rather, systemic domination arises from the cumulative effects of systemic practices and background rules—from racial and gender discrimination to structural economic inequities to the concentration of environmental and health harms on communities of color—constrain the lived reality of membership and inclusion. For example, systemic domination is one way to understand how the combination of historical disinvestment and redlining, predatory lending, and gentrification can combine to produce racially disproportionate harms on communities of color. Even if landlords, lenders, and policymakers may not always intentionally discriminate, the aggregate result of historical and current policy choices means that there will be a major racial disparity in wealth and opportunity.

The political realm is marked by the same background structural disparity of power and the problem of *political domination*. As a growing body of social science research has documented, this concentration of political power is often in direct relation to efforts to further concentrate economic wealth, and vice versa.\(^{30}\) As political power is concentrated in more unaccountable ways, the result is precisely the threat of domination that animate attempts to fragment, distribute, and hold accountable political power—whether through classic republican constitutional forms like the separation of powers, or democratic systems like elections, or other forms of democratic institutional design. Indeed, democracies don’t just “die”, they are dismantled, as interest groups seek to gain greater advantage, increasingly altering the background rules of politics—through voter suppression, gerrymandering, changes in campaign finance laws, and the like—to accumulate greater and greater political power.

In each of these three variations of dyadic, structural, and political domination, the common challenge is not just about economic shares of who gets how much; it is rather about agency and power. From the manager and monopolist to the background rules of economic and racial subordination to the hoarding of political power, each of these types of domination is driven by a kind of unequal, functional sovereignty, where one set of actors—private firms, unchecked political elites, policymakers—exercise power over individuals and communities, restraining their freedom and life opportunities, without sufficient contestation, accountability, or responsiveness. Absent checks and balances on—and outright ownership of—these forms of power, those individuals and communities affected by these actors are not truly free to flourish, thrive, and live lives of value.

Unlike “inequality”, domination as a conceptual framework points to a very different approach to remedies. The goal is not merely to redistribute income or wealth, but rather to build a political economy in which we limit those coercive powers and systems that are not subject to checks and balances. It also requires the affirmative investment in domination’s inverse: political agency, the capacities of communities to contest and check concentrated power, and to participate in the (re)shaping of political, economic, and social conditions. Structural justice, then, requires checks and balances on these various forms of domination. The degree to which democratic equality is realized in practice, then, depends on the degree to which these public, private, and systemic forms of domination are checked. This in turn suggests that the realization of inclusive and equitable democratic freedom requires a form of effective democratic governance—and in particular, administrative regimes that are capable of—and responsive to—those threats of domination.

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\(^{30}\) See e.g., Martin Gilens, Affluence and Influence; Larry Bartels, Unequal Government.
Neoliberalism and the battle over public power

A central challenge to this vision of democratic freedom—and a key driver of domination—is neoliberalism. While the term is often used widely, neoliberalism is not just a synonym for capitalism, nor is it simply about a policy agenda of unfettered markets and hostility to government regulation, though these are related concepts. Rather, neoliberalism is better understood as a worldview: an individualized, marketized notion of freedom and social structure that emphasizes the supremacy of market transactions and a hostility to collective social goods. And neoliberalism is also best understood as a political agenda, where specific interests have strategically and opportunistically driven institutional changes animated by, and validated under this worldview. While a full exposition of neoliberalism and its elements is beyond the scope of this paper, it is important to understand these two components of neoliberal political economy in order to ground our understanding of what kinds of political institutions need to be (re)built to overcome domination and realize a more liberatory and inclusive 21st century political economy.

As a worldview, neoliberalism seeks apolitical, economistic forms of social ordering. This vision of political economy evokes values of agency, freedom, and neutrality, but in ways that operate to evade or contain democratic politics. Consider, for example, Friedrich Hayek’s canonical account of market order. For Hayek, the freedom of market ordering stems from the abilities of the market to create spontaneous, welfare-maximizing order, free of the inevitable failures and corruptibility of political “central planning”. The outcomes of such a system are necessarily fair, and not subject to claims of “social justice” since markets are by their nature (for Hayek anyway) impersonal systems without moral will or discriminatory intent.31 Crucially, this worldview is not just about economics; rather it has a central political dimension as well. As a result, the political institutions needed to sustain social welfare, on this view, are simply those basic rules of property, contract, and physical security that enable markets to function.

Conceptually, this neoliberal worldview levels a dual attack on ideals of democracy and inclusion. First, by valorizing markets as self-correcting and welfare-enhancing, this framework erases from view the kinds of dyadic and structural domination that afflict economic realities for so many. Second, this worldview is skeptical if not outright hostile to various forms of governmental economic policy. Baked into this account is a vision of politics as inherently corruptible, inefficient, and ineffective. The effect of this critique is to cut off at the knees many well-intentioned policies for social justice: however admirable the goals of mitigating inequality or promoting opportunity, if government is more likely than not to be captured or to fail, then economic regulation and public policies are self-defeating.32

However, neoliberalism has a political dimension in another sense: not in its worldview as articulated by intellectuals, theorists, and academics, but in the way in which this worldview has fueled and justified a specifically political project of organized interests and policymakers, as an exercise of political power and political institutional change. Indeed, the idea of neoliberalism has helped

31 See e.g. Freidrich Hayek, “Social” or Distributive Justice,” in The Essence of Hayek (Chiaki Nishiyama & Kurt R. Leube eds., 1984).
32 This skepticism can be seen in the political science expounders of neoliberal thought, for example the rise of “capture theory” and public choice economics advanced by thinkers like George Stigler, James Buchanan, and Gordon Tullock. See S. M. Amadae, Rationalizing Capitalist Democracy. For an account of how this skepticism of government animated many political narratives against social reform, see Albert Hirschman’s classic book, Rhetoric of Reaction.
animate and legitimize the efforts of particular constituencies to remake economic and political institutions in ways deeply inimical to democracy, and conducive to domination. As recent scholarship in history has documented, key constituencies seized upon neoliberal concepts to advance their policy agendas. The business community organized more effective lobbying and advocacy vehicles through the Chamber of Commerce, the Business Roundtable, and other coordinating systems, backed in part by the parallel formation of a validating ideas infrastructure as funders like the Olin Foundation helped produce a generation of lawyers and economists who could develop and validate these policy changes. A similar story has been traced in context of civil rights and racial inequality. Indeed, many of these same funders and interest groups backing the rise of big business under the rubric of free market / anti-government ideas also deployed these tropes to push back against federal commitments to civil rights following the 1954 landmark school desegregation ruling of Brown v. Board of Education and the passage of the Civil Rights and Voting Rights Acts in 1964 and 1965. This is not to say that all of these thinkers, interest groups, and elected officials moved in lockstep. Rather, neoliberal concepts of markets, individual free choice, and skepticism of government formed a common conceptual resource and glue across these different interests—business interests, social conservatives seeking to restore ‘traditional’ roles and orderings after the upheavals of movements seeking to advance racial and gender justice, and those more openly hostile to desegregation.

This combination of interests and ideas produced a set of neoliberal institutions, remaking economic and social policy. These efforts were successful in undoing much of the New Deal social contract, moving economic policy away from its prior focus on Keynesian macroeconomic management and a robust safety net. The result was a significant shift in public policy towards deregulation of finance and corporate power, the undermining of organized labor, and the undoing of the social safety net. These shifts originated in the 1970s, but accelerated through the Reagan and Bush eras—including often gaining adherence among centrist liberal policymakers like during the Clinton Administration. This in turn exacerbated the lived realities of economic domination for many communities. Similarly these efforts at neoliberal policy change yielded a gradual erosion of civil rights protections, and a recreation of patterns of racial segregation and inequality everywhere from urban planning to predatory lending, to the exclusions of women and communities of color from much of the modern safety net. Consider, for example, how neoliberal concepts of freedom of choice are deployed to justify white flight or the resistance to desegregation or legal claims by corporations to resist economic regulations and protections for reproductive rights under the guise of freedom of association.

Yet despite this reallocation of power from public to private hands, the politics of this neoliberal era have also amplified the excesses of governmental coercion that serve to preserve inequality and the hoarding of wealth and opportunity: the rise of mass incarceration, crackdowns on labor, and the like. Neoliberalism, then, is not really an abandonment of the state, but rather a strategic use of public policy to encase existing economic, racial, and gender inequities, immunizing them from contestation. The net result is a systematic exercise of state power that has opportunistically

33 See Kim Phillips-Fein, Invisible Hands; Angus Burgin, The Great Persuasion; Jacob Hacker and Paul Pierson, American Amnesia; Lawrence Glickman, Free Enterprise.
34 See Nancy Maclean, Democracy in Chains.
35 See Felicia Wong, Building Post-Neoliberal Institutions, Democracy: A Journal of Ideas (Summer 2019).
37 See e.g. Richard Rothstein, Color of Law; Merhsa Baradaran, Other People's Money.
38 See Quinn Slobodian, The Globalists.
dismantled key democracy- and equity-enhancing institutions, concentrating control and hoarding wealth and opportunity for the few, all validated by an appeal to free markets and ineffective government as cover. Indeed, it is easy to cast contemporary battles over “big government” and “free markets” as a continuation of long-running philosophical debates between laissez-faire and libertarian political economy and more egalitarian conceptions. But these contemporary fights take place in context of an already-existing democratic institutional context where institutions—like labor law, economic regulation, civil rights enforcement regimes and more—are already in place, thanks to the state-building efforts of prior waves of social reform. As a result, the threat to dismantle or repurpose these institutions has a very direct implication for the perpetuation of structural injustice, by altering a set of instrumentalities and tools whose existence makes possible the contestation and mitigation of structural forms of injustice.

Highlighting the political-institutional dimensions of neoliberalism as worldview and as policy agenda is critical for informing our approaches to structural justice. If the problem of inequality and injustice is a structural one rooted in domination—the concentration of unaccountable economic and political power—then it follows that freedom and inclusion require democracy—the institutionalization of accountability and agency of communities over these forms of power. But neoliberal thought and policies operate to both erase the idea of domination (through appeals to frictionless markets) and the institutions built to counteract domination (through economic and social policies for regulating corporate power, providing public goods and a safety net, and enforcing civil fights and inclusion). The challenge, then, lies in constructing new democratic institutions capable of realizing inclusion—and undoing the legal-institutional changes brought about in the neoliberal era.

### III. Institutionalizing equality

In the modern context, this means that the project of structural justice requires building and expanding public power in ways that secure the authority, capacity, and accountability to address the kinds of structural inequities that animate 21st century capitalism. Administrative institutions are central to redressing private and systemic forms of domination. Through administrative institutions (whether federal, state, or local) we have innovated institutional structures to redress forms of concentrated and unchecked private power—from antitrust to labor law to corporate law and more. Even as battles for formal socioeconomic rights have fallen short in Constitutional jurisprudence, arguably those moral claims have driven the creation of a modern administrative apparatus charged with securing broad protections for social and economic citizenship, through administrative regimes governing concerns like consumer protection, environmental justice, labor rights, anti-discrimination law, disparate impact, and more. These administrative systems enforce ideals of equality outside of the courts, through (legislatively authorized) administrative processes.39

This linkage between administrative institutions and moral citizenship suggests a theory of social change that centers the need to construct and defend equality-enhancing governance regimes, and by embedding them in the kinds of popular constitutionalist movements that articulate a more

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39 For a longer version of this argument, see Rahman, “Constructing Citizenship,” Columbia L.R. (2019)
expansive vision of social and economic citizenship. As the recent revival of interest in “constitutional political economy” and “administrative constitutionalism”\(^{40}\) suggests, the moral appeals to membership, inclusion, equality—and against forms of economic and social domination—requires more than formal textual Constitutional change to be realized. And indeed, the central battles for this fight for inclusion may not even involve the courts or the Constitutional text so much as it requires popular movements, public debates over values, and then legislative and regulatory implementation of those values. This view of social change moves the terrain of contest away from formal Constitutional law to the broader domain of small-c constitutional public law infrastructures, encompassing legislation, regulation, state and local administration, and more. This view of social change also elevates the moral and political stakes of administrative law, legislation, and public policy design. While legislation, regulation, and public policy are often viewed in technical, technocratic terms of optimizing policy efficiency, this approach suggests a much broader, moral and political orientation towards policy. The stakes of policy design, on this view, are not well captured in concepts of economic efficiency or cost-benefit analysis, but rather in terms of the moral implications for citizenship—and the very real questions of political power and accountability as they play out in the often-overlooked domain of administration.

As noted earlier, past historical moments of expanding the reach and substantive meaning of membership have been accompanied by significant moments of state- and institution-building. The upheavals of industrialization helped drive the development of the modern safety net and administrative state in the late nineteenth century. The civil rights movement not only helped secure major legislation like the Voting Rights Act and Civil Rights Act, but they also led to the formation of new institutions of public power imbued with the authority and capacity to enforce these new moral commitments: a Department of Justice enforcing preclearance requirements and overseeing voting rights; a federal bureaucracy monitoring issues of discrimination, and the like.

A wide range of grassroots movements and reformers are actively reimagining the political and economic institutions that would be needed to institutionalize a more equitable and expansive vision of freedom. There are three arenas in particular where these debates are of particular significance for the long-term political economy.

A. Structural democracy reform

From the movement to advance Amendment 4 and the restoration of voting rights in Florida to debates about the structural reform of the Electoral College and Senate to the grassroots efforts to institutionalize more direct forms of community control over public institutions from the police to the zoning board, this is a moment for structural democracy reform.

Our democracy today functions more in name than in reality. Political institutions systematically favor wealthier, whiter communities, while interest groups have deployed increasingly brazen strategies of actively rigging political rules, from pervasive voter suppression, gerrymandering, and the massive influx of big money into politics, to the more blatant power grabs that conservative lawmakers have deployed in places like Wisconsin, Michigan, and North Carolina to undercut the powers of offices once they change hands. At the same time, our Constitutional structure itself

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\(^{40}\) See e.g. Gilian Metzger, “Administrative Constitutionalism”; Texas Law Review 2016 symposium on constitutional political economy; Fishkin and Forbath, etc.
encodes pervasive disparities of political power built to maintain hoard political power in a
democracy built to accommodate the institutions of slavery. This is the backdrop for institutions
that continue to cripple our democracy, from the Senate and Electoral College to the Constitutional
carve-outs permitting expansive stripping of rights for those the incarcerated. Each of these attacks
on democracy requires a robust structural response. Bills like HR1 in the Congress would help
address the toxic combination of voter suppression, gerrymandering, and money in politics. But we
also need Constitutional responses to problems like the Senate (for example assuring Statehood for
the District of Columbia and independence for the territories like Puerto Rico) as well as structural
changes to reinvigorate Congress, establish real checks and balances in Washington, and imagine a
politics that breaks free of our big money, two-party duopoly.

While these debates are taking on greater prominence, there are also new concerns about underlying
infrastructures that shape the terrain of political context itself. The growing call for judicial reform
and “Court packing” stems from an increasing concern of the countermajoritarian power of a
reactionary judiciary, recreating tensions between reform aspirations and judges akin to the Lochner
era. The new reform movements around “Big Tech” and online digital platforms like Facebook are
in part motivated by the reality that our democratic possibilities are shaped by the background rules
that govern our digital public sphere, as algorithms optimizing for attention help spread
misinformation and are easily weaponized to advance polarization and racialized attacks on
communities of color.

At the same time, democracy is made real not just in Washington but on the ground, and the reality
is that even when we get the policies right in DC, the day-to-day decisions of governing are often
still concentrated in the hands of wealthier and whiter interests. We need a vision of democracy
reform that goes all the way down, empowering frontline communities in day-to-day governance.
Consider for example how the climate justice movement has increasingly pushed not only for
accountability for private actors profiting from climate disaster and the environmental harms that
fall disproportionately on Black and brown communities, but also on the need to directly empower
those communities in the often obscure yet powerful bureaucratic decisions about infrastructure,
planning, and rebuilding at the local, state, and federal levels. Similarly, efforts to dismantle mass
incarceration increasingly involve calls from communities to be centered in more democratic and
bottom-up ways in holding public safety institutions accountable. The urban justice movement has
often emphasized the importance of empowering affected communities in land use decisions. These
are all examples of a common trend and a larger policy and institutional design challenge: how do we
build new governance institutions empower to the communities most affected—and how do we
ensure these democratic bodies have the powers needed to actually enforce equity-oriented policies?
Here too, these fights imply the need for a distinctive approach to policymaking, institutional design,
and movement strategies to address these underlying issues. By remaking governance bodies in
ways that embed greater representation, participation, and co-governance models, we democratize
policymaking and ensure that policies themselves serve goals of inclusion and equity.

B. Concentrated private and financial power

The second big fight is over the vision, narrative, and structure of our economy—and in particular,
how we have legitimatized and encouraged the concentration of economic power at the top.
Beneath many of our day-to-day crises of economic inequality and racial inequity—from the persistence of economic segregation in our cities to the precarity especially of workers of color in today’s fissured workplace and gig economy—lies a deeper set of business interests who directly profit from (and therefore are incentivized to defend and deepen) the policies, practices, and systems leading to these forms of inequality. We cannot achieve democracy or racial equity without dismantling these roots of concentrated economic power.

One key driver here is the financialization of the economy, and the role of financial firms in particular. Consider, for example, how the rise of shareholder and investor power after financial deregulation of the 1980s helped fuel the shift to increasingly precarious and contracted-out forms of labor. Or how the flows of financial capital play an outsized role in spiking housing prices leading to the affordability crisis. Or how the role of private equity in taking over privatized public infrastructure from water utilities to parking meters accelerates the extractive use of fines and fees.

A second key element is the broader trend towards corporate concentration in the economy. As a range of scholars and policymakers have increasingly documented, we are in a new era of monopoly capitalism, where industries are increasingly less competitive, and instead oriented around the control and influence of dominant firms. For example, corporate concentration in the pharmaceutical sector is a big part of why drug prices are so extractive, while monopoly power in big tech plays a major role in the debates over online platforms, speech, and the retail dominance of firms like Amazon.

A third key frontier on the economic power front lies more specifically in the realm of new data and technology. Increasingly the mechanisms for exclusion, extraction, and control operate through digital and automated systems: algorithmic bias and discrimination; platforms that structure the future of work, the flow of commerce, and the flow of information and speech; the proliferation of more sophisticated forms of data, surveillance, and control, all built on a business model that weaponizes the collection and monetization of data. Just as policy changes in the 1980s unshackled the financialization of the economy that now undergirds much of the problem of economic and racial inequity today, these fights over emergent use of data and technology represent a critical turning point, with decades-long implications for how power, wealth, and control will operate over the next several decades. And at the heart of these fights is the power and influence of a handful of tech giants who are driving the innovation and proliferation of these systems: Facebook, Amazon, Alphabet, and the growing proliferation of third party corporations dealing in the commodification and weaponization of data and surveillance.

Tackling these roots of economic power requires a particular approach to ideas, institutional and policy design, and movement-building. Think for example of the recent campaign to get financial firms and investors to defund private prisons, or the efforts to reduce the spread of white nationalism through online platforms like Facebook or Amazon. Or campaigns that target the financialization and corporate control of our cities and our public infrastructure. Or policies to reinstate limits on corporate concentration, curb the power of shareholders and investors, and finally

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41 Rahman, Contesting and Constructing Structural Inequality, Critical Analyses of Law; Rahman, Rise of Vulture Capitalism, Boston Review
42 Rahman, Monopoly Men, Boston Review; The New Octopus, Logic; The New Utilities, Carodozo Law Review; Rahman and Thelen, Broken Contract.
43 Rahman, The New Octopus, Logic; [Rahman and Teachout, forthcoming]
“break up the banks”. These campaigns and policies would not only dismantle a key concentration of economic power and wealth; they also would cut to the heart of the coalition of business interests profiting from and deepening the inequities of the current moment—and which, left to their own devices, will continue to fracture and dismantle efforts at transformative progressive change. Building a new democracy requires the kinds of policies and movement strategies built to dismantle these new forms of concentrated power.

These movements need to be complemented by an administrative and institutional strategy for restraining corporate power. Any administrative and institutional regime for protecting against domination and advancing a more equitable and inclusive vision of democracy will need to establish and enforce structural limits on concentrated economic power through bright-line rules and prophylactic limits. Think for example about how antitrust law imposes restrictions on the size and concentration of mega-firms, or how following the 2008-9 financial crisis, policymakers considered but failed to enact policies to “break up” financial conglomerates and severely restrict the types of financial transactions that modern firms could engage in. In place of such structural and prophylactic rules, contemporary economic regulation over the last few decades has tended to favor a more “managerial” approach: leaving market concentration and actors in place, but using regulation to encourage better firm conduct, or mitigate market failures. By contrast, a structuralist approach to regulation would instead consider preemptive restrictions on firm size, powers, and behaviors as a way to preclude problematic conduct, and to limit in advance the undue concentration of economic—or for that matter, political— influence on the part of megafirms. Structural limits represent a much more robust and effective protection against domination in the economic arena. Such a structuralist approach to regulation would in many ways hearken back to the aspirations of Progressive Era antimonopoly reforms, and to the kind of more transformative and egalitarian reform visions arising from the most recent financial crisis.44

C. The political economy of inclusion and exclusion

A third key frontline in the fight for freedom and democracy lies in who has access to those goods and services that enable human flourishing. The Constitution guarantees all members of the polity access to the “privileges and immunities of citizenship”, and yet so much of our economic and social structure is premised on the deliberate and systematic exclusion of communities—particularly communities of color and working families—from those public and collective goods that are needed for freedom, safety, security, and wellbeing. Consider, for example, how the desegregation of public schools and the advances of the civil rights movement were undermined by a wave of privatization, deregulation, and financialization which over time recreated a modern form of economic segregation, where wealthier and whiter communities can access one set of goods—from education to healthcare to clean air and water to physical safety—while communities of color face a very different reality.

Dismantling these exclusionary structures requires a wholesale remaking of our social and economic institutions: dismantling those premised on enforcing hierarchy and exclusion, and building anew institutions charged with enforcing and advancing equity. This requires a political economy and

racial equity approach to traditional matters of social and economic policy: paying attention in particular to how political institutions structure the terms of access to social and economic goods, and how that access is especially premised on reinscribing racial disparities.

Specifically this arena of social change involves three interrelated policy fights.

First, expanding access to public goods. This means reimagining the safety net to build truly universal public goods that supply the basic necessities for human and communal flourishing from clean water to universal healthcare to tackling the student debt crisis. Battles over healthcare, education, water, and over reinventing a universal safety net no longer tethered to employment status are about “public goods” in two sense of the word: first, these are the goods needed for wellbeing and flourishing, and who has access to these goods indicates our sense of who actually has full and equal standing as a member of the demos; and second because of how critical these goods are for membership and inclusion, their governance must be public in the sense of being accountable and responsive to the demos—particularly to frontline communities historically excluded from access. By fighting to make the provision of vital goods public and universal, we assert our commitment to a broadly inclusive ‘we.’

In the late nineteenth century, the upheavals of industrialization created new forms of economic precarity, exploitation, and immiseration—a kind of systemic domination in the form of the new rules of the unequal industrial economy. This experience fueled new social movements for worker power and for economic freedom from this new form of economic dislocation. But this was also a period of dramatic institutional innovation. Reformers for the first time created new administrative bodies and oversight bodies, enforcing requirements for nondiscrimination, fair pricing, and consumer protection. The linchpin of these efforts was the idea of public utility regulation: that essential goods and services could not be left in the hands of unchecked private actors; that these goods and services needed to be publicly provided and subject to public accountability; and that the mechanism for ensuring access and accountability would be administrative entities that combined democratic responsiveness with new forms of expert public administration. These public utility and administrative bodies were first pioneered at the municipal and state level, encompassing everything from milk to transport to telecommunications, and formed the foundation for the emergence of the federal New Deal regulatory state in the 1930s. These efforts also involved the formation of the first social insurance programs which would become the foundation for the New Deal safety net and the rise of economic citizenship protections like Social Security and the protections of the New Deal era.

Second, reconstructing and reorienting the exercise of public power. Equity and inclusion is not a fact of nature; it is actively produced by an institutional context—as is its opposite of exclusion. Building a more inclusive economy and society then requires a dramatic remaking of our institutions of public governance and public power. While we are used to a familiar left/right clash between advocates of “big government” and proponents of the “free market”, the reality is more muddled. In practice, both liberals and conservatives have opportunistically deployed government and markets in ways that reassert racial and economic hierarchies. Thus, conservatives might deregulate and privatize

47 See e.g. David Moss, When All Else Fails.
federal programs for environmental justice, housing affordability, and the social safety net, while at the same time unshackling the unchecked coercive power of immigration enforcement, the police state, and other tools of coercion that fall primarily upon black and brown communities. The result is a (private) mode of segregation and inequity. At the same time, liberals might look to expand funding for social programs, but absent robust mechanisms for inclusion, enforcement, and the direct empowerment of black and brown communities, these measures are unlikely to put a dent in chronic racial and economic inequities. What is needed, then, is a more radical approach to dismantling institutions of exclusion and domination—such as the mass incarceration regime—coupled with an active invention of institutions charged with enforcing and defending the ideal of inclusion. Just as the civil rights movement produced powerful, decades-long institutional regimes for enforcing civil and voting rights—think of the creation of Title VI, VII, and IX, or the preclearance regime of the VRA—so too must today’s reformers think about the new institutional structures that need to be built to last.

Another historical administrative innovation can be found in the attempts to address systemic forms of racialized and gendered bias and discrimination. Rather than relying just on individualized enforcement against specific malefactors—although that remains a mainstay of civil rights and tort law—the administrative dimensions of civil rights involved attempts to create more systemic protections against racial and gender inequality. Think for example of how regimes like the Voting Rights Act system of “preclearance” designed to mitigate attempts at voter suppression. Similarly, the Obama administration experimented with new regulatory approaches to reduced economic segregation, through its “Affirmatively Furthering Fair Housing” program that set out goals of equality to be achieved through regional urban planning procedures that took desegregation as a key objective and stakeholder consultation as a primary requirement. Or consider how the EPA’s Office of Environmental Justice designed to address the racially-disparate concentration of environmental harms arising from pollution and racially-inequitable urban planning.

Conclusion

The inequities of our 21st century political economy are at their core problems of domination, of the concentration of unaccountable power and the systemic reinscription of relationships of subordination and unfreedom. The response to this moral challenge requires not just new policies for economic inclusion, but a more thorough remaking of our economic and social order to dismantle systemic economic, racial, and gender inequities. Furthermore, achieving this end requires the construction of effective and powerful forms of public power, which must itself be democratically responsive and accountable. Neoliberalism, however, poses a further challenge to this aspiration, as a worldview, a political agenda, and a mode of statecraft that has focused particularly on erasing domination from view, and dismantling those institutions built in prior generations to contest domination. A central challenge then for a more inclusive and emancipatory political economy is to rebuild (or build anew) institutions of governance capable of counteracting and undoing systems of domination.

48 Rahman, Reconstructing the Administrative State in an Era of Economic and Democratic Crisis, Harvard Law Review.
49 See Olati Johnson, Equality Directives in Public Law.
50 For a longer version of this argument, see Rahman, Reconstructing the Administrative State, Harvard L. Rev.
This is partly a matter of policy and institutional design. We need a new generation of administrative bodies, civil rights enforcement regimes, regulatory restraints on private corporate power and on financialized and monopolistic interests. It is also a matter of mobilization, organization, and advocacy: today’s social movements are demanding transformative change to address questions of inequality, worker justice, racial justice, gender justice, environmental justice, and much more. Like the transformative movements of the Reconstruction era, the Progressive era, or the Civil Rights era, we are in a movement moment where the boundaries of the possible are being renegotiated.

But this challenge of building new institutional mechanisms for advancing an inclusive political economy also represents an ideational and conceptual challenge. This vision of inclusionary administration and state power represents a direct challenge to decades of neoliberal presumptions. It means reconceptualizing freedom not as a narrow property of individuals and “free markets” but rather as a result of deep commitments to equity, human flourishing and dignity—and a rebalancing of economic and political power. It means reconceptualizing equality not as the surface equality to transact on the market, but the deep equity to stand in relations of equal moral worth and standing in the polity. And it means reconceptualizing politics not just as the domain of power or the realm of capture and corruption, but rather as a democratic space of collective participation and shared self-governance.

These shifts represent a challenge to conventional conservative and neoliberal politics. But it also represents a challenge to some long-held presumptions within liberal thought. Focusing on power and domination is a more radical orientation that liberal thought emphasizing values of consensus, of good governance, of equality of opportunity narrowly construed. This emphasis on both robust and participatory democratic governance means stepping outside of familiar “good governance” models of reform—which tend to emphasize transparency, rationality, and civility as ideals—to instead thinking about institutional design as a project of power: first, of empowering those most affected and most marginalized, and second of exercising state power to dismantle systemic forms of domination and inequity. This also means rethinking familiar legal liberal fascination with courts, judges, and technocratic expertise, to imagine more transformative, bottom-up, democratic forms of governance and social change. These shifts will not always be easy or even universally acclaimed. But if we are to overcome the inequities of the current moment, we must imagine new forms of administration, governance, and public power that can rise to the task. Anything less will be not enough to fulfill the aspirations for an inclusive, equitable, multiracial 21st century democracy.

**Tentative chapter outline**

Chapter 1: The fight for freedom
- Hydraulics of Exclusion
- Theorizing freedom and domination
- Institutionalizing equality

Chapter 2: Power, social change, and the Three I’s
- Four faces of power

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52 See e.g. K. Sabeel Rahman and Hollie Russon Gilman, *Civic Power* (2019), pp. 18-27,
• Institutions, interests, and ideas

Chapter 3: Democracy all the way down

Chapter 4: Contesting concentrated private power

Chapter 5: The political economy of inclusion and exclusion

Chapter 6: Conclusion