



Margaret Somers, Departments of Sociology and History, University of Michigan*

Legal Predistribution, Market Justice, and Dedemocratization: Polanyi and Piketty on Law and Political Economy

Abstract: In the face of today's twin crises of inequality and threats to democracy, many are turning to the work of Karl Polanyi and Thomas Piketty. Both have written magisterial volumes on the historical dynamics, social depredations, and risks to democracy endemic to market capitalism. This and a companion article look at each individual thinker and put the two into dialogue, with the goal of generating principles of a new democratic political economy. The dialogue has two axes of inquiry. First, how to explain and deconstruct the social exclusions and dedemocratization institutionalized in the heart of the existing market economy. Second, how to use legal redistributive institutionalism to upend the deep structures of market justice and the outsized legal powers of property and political economic domination. This article addresses these issues by constructing a neo-Polanyian law and political economy and exploring four Polanyi-inspired themes: (1) a bifurcated capitalist order; (2) market justice as capitalism's moral economy; (3) the economy as a redistributive "instituted process" of law and coercion; and (4) market capitalism's anti-democratic infrastructure.

Keywords: Karl Polanyi; legal predistribution; law and political economy; inequality; dedemocratization; capitalism; market justice; legal institutionalism; commodification

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This article is dedicated to the memory of the late Richard Lachmann.



I. Introduction

As inequality has morphed into plutocracy¹ and assaults on democratic rule and rights have lurched into realistic fears of impending autocracy (Boese et al. 2022; Calhoun et al. 2022; Freedom House 2022; Kuttner 2018; Kuhner 2014; Streeck 2014; Wilkinson 2019; Judis 2016; Guriev and Papaioannou 2020),² many are searching for a new political economy to explain and point to ways out of these crises. In this search, Karl Polanyi and Thomas Piketty have emerged as two of the most sought-after resources. This is not surprising; each has written paradigm-changing treatises on the savage social exclusions and relentless threats to democracy wrought by capitalism. Yet Polanyi and Piketty are an odd couple, whose lifeworks have different explanatory purposes. Piketty's is inequality and its political consequences. Polanyi's is the "murderousness" of market society—not its specific distributional effects but its dehumanizing forms of commodification, its inherently anti-democratic structures, and its threat to the "reality of society," indeed, to human freedom overall.

Polanyi, a Hungarian born in 1886 who spent much of his life as a refugee from war, authoritarianism, fascism, and McCarthyism, was an economic historian, anthropologist, social theorist, and public intellectual who wrote his masterpiece, *The Great Transformation* ([1944] 2001, hereafter *GT*) almost eighty years ago to explain the triumph of fascism in Europe and to issue a warning about the dangers posed by market capitalism to humanity. At the time of its publication in 1944, Polanyi thought that the ideological reign of the self-regulating market had been routed by the devastations of two world wars, a global depression, and fascism. His hopes were quickly dashed (Polanyi [1945] 2018b; [1947] 2018c; Dale 2016a), but unlike most other books long in print, Polanyi's is now recognized as one of the most influential works of twentieth-century social science.³ Indeed, it becomes ever more indispensable: *GT* did not predict the Lazarus-like rebirth of laissez-faire in neoliberalism, but the extraordinary accomplishment of the work is that its historically driven theory accounts for it—and its consequences—with remarkable acumen.

By contrast, Piketty, a conventionally-trained French economist and a master of data, became an instant superstar in 2014 with the publication of his blockbuster *Capital in the Twenty-First Century* (2014, hereafter *C21*),⁴ a highly accessible economic and social history that assembles data since the eighteenth century to document the rise, fall, and, since the 1970s, rise again of (primarily wealth) inequality to reveal the increasingly oligarchic nature of the US and the UK, with parallel but weaker trends in other developed market societies. Piketty's work represents a return to political

¹ At the start of 2007 in the US, the bottom half of the wealth distribution held 2.1 percent of the nation's riches, compared to 29.7 percent for the top 1 percent. By the start of 2020, the bottom half had 1.8 percent, while the top 1 percent held 31 percent. <https://www.nytimes.com/2021/04/23/business/economy/biden-inequality-monetary-policy.html?referringSource=articleShare>. It would take an average Amazon worker 3.8 million years, working full time, to earn what CEO Jeff Bezos now possesses, and the country's wealthiest 20 people own more wealth than 152 million others (<https://inequality.org/facts/income-inequality/>; see also World Inequality Lab 2022; Vogel 2021; Savage 2021; Saez and Zucman 2021; Stiglitz 2012; Sutch 2017; Alvaredo et al. 2020; 2018; Roser and Ortiz-Orspina 2016; Piketty 2014; 2020; Lachmann 2013).

² Masha Gessen argues that the US is in the first stage of an autocratic transformation (Heffner 2020).

³ The economic historian Deirdre McCloskey (a vociferous critic of Polanyi) writes about *GT*: "No work of economic history except *Capital* and *The Protestant Ethic and the Spirit of Capitalism* has had more influence" (Hejeebu and McCloskey 1999, 286).

⁴ Since then, Piketty has published three more books, including *Capital and Ideology* (2020; hereafter *CI*), *Time for Socialism* (2021), and *A Brief History of Equality* (2022).

economy's historical concern with distributional equity and change, and its broad impact has increased public awareness of the complicity of mainstream economic ideas with rising plutocracy, and of the pressing need for heterodox alternatives.

Polanyi's name does not appear in *C21*, but in many ways it picks up where *GT* left off. It confirms that for the “*trentes glorieuses*” (1945-75), Polanyi's initial post-New Deal/postwar optimism was justified, as throughout these years lower levels of income and wealth inequality were maintained in the major market economies, growth was high but more evenly distributed, unions flourished, and Cold War politics paradoxically motivated greater Western egalitarianism.⁵ *C21* also demonstrates that this postwar political economy proved fragile and temporary, as it has been brutally displaced over the last four decades by a “hypercapi-talism” that has returned inequality to piteous, nineteenth-century levels.

Despite their different purposes, *GT* and *C21* complement each other in their approaches to contemporary crises through the *longue durée*, in their shared skepticism towards mainstream economics, and in the heterodox and methodologically eclectic nature of their analyses. Both are works of political economy that warn us of the dangers accompanying the high status of economists and economics. Polanyi believed that it was precisely the naturalistic pretenses of classical political economy and neoclassical economics that contributed so mightily to the global calamities of the first half of the twentieth century: not only fascism, but also the brutal “restrictions of freedom” bestowed on the working classes by punishing degrees of social and political exclusion. Piketty, with a PhD in economics, goes to great lengths to distance himself from his own credentials (see, for example, *C21*, 41, 749). Both Polanyi and Piketty use history to *denaturalize* the hollow claim of neoclassical economics to be analyzing “natural” market forces, and they instead construct a history-driven approach to political economy and economic constructs. Where they especially converge is in their devotion to a “problem-driven” approach to explanation (see Paidipaty and Savage 2021; Prasad 2021; Somers 1998) rather than a methodologically fetishistic one as they scavenge boldly through history and ideas to find answers (see, for example, *GT*, 4; *C21*, 42).

Given these commonalities, it is surprising that to date there has been no major study looking at the two in tandem (but see Somers and Block 2020). To this end, in this and a forthcoming companion article I examine the two thinkers, both on their own terms and in relationship to each other. Here I focus on constructing a neo-Polanyian⁶ legal institutionalism; in the next, I turn to Piketty and explore his work through the lens of the argument developed here. Together, the two articles join with other efforts currently underway in numerous venues, including this journal, to build a new Law and Political Economy that can deal with the overwhelming crises of our times (Fishkin and Forbath 2022; Britton-Purdy et al. 2017; Britton-Purdy et al. 2020; Harris and Varellas 2020; Fligstein and Vogel 2020; Deakin et al. 2017; Fishkin and Forbath 2014; Guinan and O'Neill 2018; McCluskey et al. 2016; Rahman 2016a; 2016b).⁷

⁵ This all-too-facile observation must be seriously qualified in the case of the US by recognizing the economic, political, and legal apartheid of Jim Crow America, which—thanks to the racism built into New Deal legislation, redlining, and finance—prevailed throughout much of the so-called egalitarian interlude of the “*trentes glorieuses*” (Temin 2022; Baradaran 2017; Katznelson 2013; Rothstein 2017).

⁶ “Neo” because I am writing and thinking in a Polanyian tradition without claiming that all these ideas are his.

⁷ As a sociologist and historian, one could say I'm accepting the invitation issued by the editors of this journal to expand the “conversation” about Law and Political Economy beyond legal scholars (Harris and Varellas 2020, 5).

This first article focuses on those aspects of Polanyi's work⁸ of interest to a Law and Political Economy (LPE) audience by considering how a Polanyi-inspired⁹ political economy can help explain the twin crises of inequality and the authoritarian threat to democracy, especially in the US. While many are familiar with *The Great Transformation* and its most recognizable concepts, and the work is ubiquitous in citations and references to markets and market society, Polanyi has not been a subject of focused attention in LPE's new interdisciplinary research arena.¹⁰ A possible reason for this relative neglect is that his work has rarely been associated with the study of law.¹¹ This is unfortunate, for while he never developed an explicit theory of law, contending definitions of justice and competing legal powers are at the heart of Polanyi's analysis of market society's deadly social exclusions and its destructive advance toward fascism. As a set of background assumptions, Polanyi's work undoubtedly informs many of the manifestos and theoretical statements that outline the contours of the new Law and Political Economy project. Tacit knowledge, however, is no substitute for direct engagement, as it can mean neglecting valuable but lesser-known aspects of the work, or can paper over assumptions that may be worthy of challenge and reconsideration—even more reason for bringing Polanyi's arguments into the light where they can be explored explicitly.

This article thus concentrates on those aspects of Polanyi's work that theorize capitalism and market society through contested claims to justice, the powers of law, and legal predistribution. It is organized around four Polanyi-inspired themes that fall under the rubric of legal institutionalism:

- Capitalism can be analyzed as bifurcated between a narrative fiction of a pre-political market and an empirically grounded analysis of a legally and politically structured economic institutionalism.
- Capitalism is as much a moral economy as a political economy, as it is buttressed by a moral regime of *market justice*, which justifies inequality and social exclusion, defines redistribution as theft, sustains the legal powers of property rights and freedom of contract, and delegitimizes—even criminalizes—democratization beyond its narrowest market-conforming limits.
- Contra its narrative of a pre-political and self-activating economy, markets are legally constituted institutions organized by power, coercion, and predistribution.

⁸ Most, though not all, of the explicit references to Polanyi in this essay are to *The Great Transformation* (2001) and his essays on institutionalism (1957; 1977; 2014), as those are the works with which most readers will be familiar. But in characterizing Polanyi's approach I draw from a much larger conspectus of his writing and thought, much of which has been captured in recent collections (such as Polanyi 2014 and Polanyi 2018), as well as writings drawn from the Karl Polanyi Institute of Political Economy Archives, Concordia University, and especially in the pathbreaking contributions of Gareth Dale (2010; 2016a; 2016b), Michele Cangiani, and Claus Thomasberger (Polanyi 2018a).

⁹A "Polanyi-inspired" approach, it should be emphasized, is the opposite of a claim to textual scripturalism. Like all canonical works, Polanyi's are full of ambiguities and complexities and are subject to multiple interpretations. My reading does not claim to pronounce what Polanyi *really* meant, but rather develops a conceptual vocabulary and usable analytic approach inspired by his work that can produce a useful way of looking at and explaining the world. For the dangers of seeking a Polyanian orthodoxy, see Somers and Block (2021).

¹⁰ In their wide-ranging and illuminating introduction to *JLPE*, for example, Harris and Varellas (2020, 7) cite numerous influences from multiple disciplines on the new political economy, including Marx, Weber, Durkheim, Keynes, Minsky, Commons, and Veblen, yet Polanyi's name is not among them.

¹¹ Very little has been written on Polanyi and the law (exceptions include Joerges and Falke 2011; Joerges 2021; Klein 2020; Frerichs 2011; 2019; and Catanzariti 2014).

- Dedemocratization is built into the institutional infrastructure of market society as capitalism from its inception has been dedicated to its freedom from a democratic citizenry.

Combined, these add up to a tranche of principles of legal institutionalism that should be part of any new democratic Law and Political Economy. Legal institutionalism, in its most highly compressed form, stipulates that capitalism cannot be understood independently of the constitutive role of law (Deakin, et al. 2017). But law's role in constituting capitalism must be understood in its most capacious sense, to include legal discourses, normative concepts of justice, and legal constructs, as well as legal powers of coercion and the violence entailed in acts of legal predistribution.

Economic liberalism invented its own moral economy, a normative apparatus that justifies specific economic arrangements on the grounds that they produce morally superior outcomes. The moral economy of capitalism is that of *market justice*, which I define by its stipulation that distributional outcomes produced by legally voluntary market transactions operating in a neutral price system are by definition morally just. Market justice laid the original predicate for a formidable regime of social exclusion and dedemocratization, which in the name of market neutrality, efficiency, and freedom from power justifies radical market inequalities and dictates the suppression of popular sovereignty.

In fact, market outcomes rest on a market economy that is constituted by a phalanx of institutional mechanisms of political and legal engineering. For Polanyi, effacing the infrastructural place of power, politics, social commodification, and law *inside* the economy is the foundational deceit at the core of classical political economy, modern neoclassical economics, and by implication, today's neoliberalism. The economy is not simply influenced by outside pressures from politics and power; rather, the economy is "an instituted process," a thoroughly social and political institution legally and politically engineered from the inside out.¹² *Predistribution* is a Polanyian-inspired concept that is especially useful for diagnosing the flaws in naturalistic conceptions of a market economy, as it explains how the market's distributional outcomes (wages and earnings) are engineered by government policies and legal institutional powers. It also serves as a guide to Polanyi's alternative theory of political economy, which dissolves the fictive division between a nonpolitical neutral economy allegedly free of power, and the idea that the state is the exclusive site of power. For Polanyi, markets are not merely "embedded" in government, law, and social relations; they *are* allocative institutions of power.

Claims that the market economy is free from government power are thus utterly fictitious. *Freedom from the power of democracy*, however, has been a structural constant of capitalism from its inception. Identifying capitalism's moral economy brings a sobering recognition of how a powerful morality of market justice can be mobilized to dictate the silencing of democratic voices in both the public and private spheres. Legal predistribution can address the dedemocratization built into the structure of market capitalism and help us understand the crisis of democracy we face today.

In the end, both Polanyi and Piketty demonstrate how market maldistribution and social exclusions are both cause and effect of ever-greater constrictions on democratic citizenship. For Polanyi more than Piketty, dedemocratization is foundational to the structural calculus of marketization, making the silencing of the demos not merely a consequence but a causal agent in modern market dynamics and social exclusion. But Piketty's own conclusions imply a similar understanding. It is thus all the more

¹² No one has done more recently than Pistor (2019; 2020) to demonstrate that the market economy is constituted by (private) law, which is reciprocally enforced by state power.

remarkable that Piketty and Polanyi, despite almost eighty years between their reflections and without clear explanations for their expressed optimism, are so similar in their persistent faith in the power of democratic reason and social solidarity. Their shared faith, pitted against their exquisitely rendered warnings of the social/political exclusions and dedemocratizing processes in their respective times, is the moral tension that propels the work of both thinkers.

There are three sections to follow. Part II explores the four themes of Polanyi's legal institutionalism: capitalism as a bifurcated order, the moral economy of market justice, the economy as an instituted process, and the dedemocratization built into market capitalism. Part III returns to the crises of inequality and democracy and asks what are the implications of these four Polanyian theses and what can they teach us about our current crises. Part IV concludes.

II. Polanyi's Legal Institutionalism

Karl Polanyi's masterwork, *The Great Transformation*, shares with Piketty's *C21* and *CI* a political, analytic, and moral purpose in alerting us to the threats posed by capitalism. Whereas Piketty documents, seven decades later, the perduring and escalating rates of inequality, *GT* explains how the capitalist economy, working exactly as it was designed to, imperils the very fabric of society by its "murderous" despoliations¹³ and by relentlessly commodifying and consuming what he calls the foundational "substances" of society—human beings, the natural world, even money (*GT* 41, 75). Writing in the early 1940s while Europe was still engulfed in war, Polanyi addresses in real time the existential threat to democracy posed by fascism, explaining why the decimation of society by the gold standard led to greater (social) democracy in a few cases, but to fascism in far more. His final chapter is a warning that foretells two possible futures—a democratic or an authoritarian one—depending upon political choices made at the time. While Polanyi did not accurately predict the future of market society—he assumed the myth of the self-regulating market had been killed off by the Depression—he nonetheless gave us a social theory that accounts for much of how our present market economy evolved, especially its crisis of plutocracy veering into autocracy.¹⁴

Although *GT* deals extensively in fascism's proximate causes, including World War I, the gold standard, and the political impasse brought on by the Great Depression, his explanatory argument is deeply historical. To understand the roots of fascism and the defeat of democracy, *GT* insists we must return to "Ricardian England" in the late eighteenth and early nineteenth centuries, for it is then and there that classical political economy invented the utopian idea of a self-regulating market and the myth of the stateless economy. *GT* recounts the content, course, and devastating consequences of that idea over time—especially how its violent use of the law to impose freedom of contract and

¹³ Polanyi's reference to capitalism's consequences as "murderous" is cited in Dale (2016a, 168).

¹⁴ Burawoy (2021) calls this predictive failure "Polanyi's paradox"—having demonstrated that the collapse of civilization could be attributed to the world-historical destruction wrought by market utopianism, Polanyi convinced himself that humanity would never again allow itself to be so irrational, clearly "a mistaken idealistic response to a materialist diagnosis" (2021, 214). Burawoy's convincing explanation for the failure is that Polanyi's rejection of Marxism blinded him to the inexorable logic of capital accumulation, which eventually broke through the mid-century social democratic compromise. The result was re-marketization with a vengeance, catalyzing the 1970s era of neoliberalism, which Piketty appropriately dubs as "hypercapitalism." At the same time, it must be acknowledged that whereas Marx's thesis of the accumulation of capital led him to predict the inevitability of a liberatory social revolution, Polanyi more accurately points to advanced capitalism's future not as liberation, but as right-wing populist authoritarianism or worse.

enforce the “natural law” of property rights came close to destroying the foundations of human life and sociality, even while triggering counter-movements for both fascism and social democracy.

Unlike Piketty’s volumes, *GT* makes little explicit mention of inequality of goods and income in the traditional economic sense. Polanyi is not a theorist of distribution or even of distributive justice per se; he is less concerned with quantifying wage differentials than with the “brutal restrictions of freedom” (*GT*, 266) exacted on human communities by the poverty, unemployment, and social and political exclusion that marketization inflicts. Stripping people of their humanity by forcing them to sell themselves on a cheap labor market, assaulting their moral worth, and wreaking cultural devastation and community dissolution loom large among the harms of this institutional dynamic. In this more sociological approach to capitalism’s effects, the social “annihilation” in the years of the early industrial revolution (which Polanyi likens to African colonialism) was far more destructive than could possibly be compensated for by the wage increases that sometimes accompanied it.¹⁵

In the sections that follow, I discuss four components of Polanyi’s legal institutionalism that are essential to make sense of our contemporary crises of inequality and looming autocracy: (1) capitalism’s bifurcated political order; (2) the moral economy of market justice; (3) the market as an instituted process; and (4) capitalism’s internal anti-democratic mechanisms.

A. *Capitalism’s Bifurcated Political Order*

The most common reading of *GT* is that Polanyi attributes the ills of modern market society to the nineteenth-century economy’s “disembeddedness” from politics and society. This is understandable, as the book does often characterize that century’s laissez-faire regime as marked by the separation of the market from social relations. But as Polanyi also makes clear, this splitting was conjured by classical political economists to claim that the sphere of commercial exchange was organized by laws of nature, and thus had no more need for an artificial human government than would goats and dogs on a desert island.¹⁶ For Polanyi this idea of a self-governing market was an impossible “stark utopia” (*GT*, 3), remarkably potent as a legal construct but not an empirical or structural accomplishment. As he stated retrospectively, “The utopian nature of a market economy explains why it never could be really put into practice. It was always more of an ideology than of an actual fact...the separation of economics and politics was never carried completely into effect” (Polanyi 2014, 218).

Instead, the essence of market capitalism is the state-constituted legal and coercive institutionalism at its core. From its contractual relationships to its so-called “natural” price mechanisms, the economy operates through a structural complex of rules, thick with state-enforced laws and selectively allocated rights, that Polanyi calls “an instituted process” (Polanyi 1957). One of the central throughlines of *GT* is thus its repeated unmasking of the deadly illusion that capitalism is what it appears to be—a self-correcting market, characterized by economic laws driven by natural market forces. It is the story of how, with the rise of market society over the eighteenth to early nineteenth centuries, economic life

¹⁵ Polanyi (2001) anticipated by several decades E. P. Thompson’s cultural and social criticism of the “economic interpretation” of the industrial revolution initiated by the neoclassical economic historian, J. H. Clapham—or what Polanyi called the “case against what might be called the institutionalist approach to economic history such as Engels, Marx, Toynbee, Cunningham, Mantoux, and, more recently, the Hammonds, represented” (*GT*, 288). This became known as the debate among economic historians over the “optimistic versus the pessimistic” reading of the industrial revolution.

¹⁶ Polanyi (*GT*, ch. 10) begins his discussion of classical political economy by reflecting on the “Fable of the Goats and the Dogs.”

was bifurcated into two parallel dynamics. Classical political economy developed a new ideational regime of laissez-faire organized around the idea of a self-activating market modeled on the laws of nature, driven by economic imperatives (laws of supply and demand) and pivoting on the price mechanism. On a parallel but empirical plane, however, the market is in fact constituted and reconstituted by the very institutional processes and legal dynamics demonized by classical political economists (*GT*, 59-70, 145-47, 155-57, 171, 216-17; Polanyi 1957; 2014, 53-106; Block and Somers 2014, 98-113). In this second dynamic, the currency of economic life is not nature, but power.

The real division, then, was not between economy and government but between the *idea* of the self-regulating market separated from politics, power, and social relations, and the structural *reality* of a politically and legally engineered market capitalism. *GT* reconstructs how this dual institutional process worked over time.

It would be a grievous mistake, however, to assume from this argument that Polanyi dismissed the idea of the self-regulating market as nothing more than a flimsy ideological distraction. Exactly the opposite is true: Polanyi demonstrates that what matters is *not* whether the self-regulating market is empirically “true” (it isn’t, [*GT*, 277; Polanyi 2014, 218]), but whether it has *causal powers* to affect the organization of social life. In this he is unequivocal: Through mobilizing political and legal powers, political economists and economic liberals transformed the utopian ideal of a self-regulating market into a functioning legal reality, an institution with *social facticity*. The social facticity of the self-regulating market as a legal construct was achieved by political economy’s ability to impose a dominant definition of reality, regardless of its empirical veracity. Polanyi called this kind of ideational weapon a “conceptual instrument.” It can, in effect, bring into being a normative or ideational claim by using the law. Economic liberals used the stipulated imperatives of the market’s productive needs as a conceptual instrument to justify using freedom of contract to compel people to self-commodify. As humans and nature were commodified into labor and land, as demanded by the market, society appeared to be remade in the Procrustean shape of the self-regulating market.

For Polanyi, the political economy of the self-regulating market was a social scientific “discovery” of greater consequence in changing the world than were the scientific discoveries of technology and machinery: “[C]lassical economics [was] the most formidable *conceptual instrument of destruction* ever directed against an outworn order” (*GT*, 231, italics added). His analysis of political economy as an engine of history, rather than an empirical reflection of the world, anticipated by decades what came to be called the “performativity of economics,” the dynamic through which certain economic fictions can “make themselves true” (Bourdieu 1998; Callon 1998; MacKenzie 2006; MacKenzie, Muniesa, and Su 2007; Block and Somers 2014, 107). For Polanyi, classical political economy may have been ideology, but its performative effects enabled it to “destroy” an “outworn order.”

B. *The Moral Economy of Market Justice*

Where did the idea of a self-regulating market come from, and what are its implications for our current understanding of inequality and rising authoritarianism? In this section, I trace its origins to classical political economy’s invention of market naturalism—the claim that the economy is subject to the same laws of nature as those of the natural world—and demonstrate how market naturalism, in turn,

produced a new moral economy of capitalism.¹⁷ Capitalism is usually conceived of as an economy *absent* moral and normative strictures, contrasted with a yearned-for moral economy that would counter the market's crude "cash nexus." Polanyi, however, disabuses us of the sentimental delusion that morality has a progressive heart. He reminds us instead that market apologias have always been drenched in moral sentiments.¹⁸ Extreme inequality, economic domination, and dedemocratization are not symptoms of the absence of morality; rather, they are signature expressions of the dominant neoliberal moral economy. Those who fail to reckon with its moral justifications will fail to understand the power of capitalism.

1. Market Naturalism as Capitalism's Ideational Regime

That such a thing as "laws of capitalism"—regularities and dynamics internal to an economic system—could even be imaginable is the result of market naturalism. Classical political economy¹⁹ invented the idea of a self-regulating market through a thought experiment: How could the propertied classes be free of a tyrannical government coercively extracting wealth from them in the form of taxes to support the poor? The answer required inventing a separate sphere of social life that property could call all its own, one capable of governing itself independently of state control and immune from taxes. This was, of course, radically at odds with seventeenth- and eighteenth-century mercantilism, in which managing wealth and creating prosperity was the work of nations and states, not of the monied classes (Lindenfeld 1997; Heckscher 1935; Cunningham 1903).

To imagine such autonomy possible, classical political economy invented market naturalism, the claim that the economy operates according to natural laws and regularities, similar to the laws of nature, which tend toward maximum efficiency when left autonomous from government and politics.²⁰ Under this conception, the natural and the social worlds are subject to the same self-regulatory biological laws.²¹ Market naturalism scientifically justified the market's capacity to self-manage outside the state. By conflating the economy with nature, moreover, it "disinfected" the market "of intrusive moral imperatives" (Hont 2005, 406), privileging instead nature's impersonal, objective moral neutrality. Market naturalism implied the superiority of a property-based private economy, sanctioned by nature as free of power.

Market naturalism thus laid the fundamentals for the ideational order of laissez-faire capitalism, which in turn set the tracks for modern economics and law. Most foundational was the "great dichotomy"

¹⁷ The term "moral economy" famously comes from E. P. Thompson (1971). On the influence of Polanyi on Thompson's idea of a moral economy, see Block and Somers (2014, 44–72). On Polanyi and the idea of a moral economy, see Somers (2020). In law, see Paul (2021), Boyd (2018), and the vast literature on the "just wage" and the "fair price." For an alternative view of Polanyi's moral economy, see Rogan (2019).

¹⁸ This would hardly surprise those familiar with forty years of revisionist scholarship on Adam Smith. Polanyi, however, attributes the origins of classical political economy not to Smith, but to Malthus and Ricardo.

¹⁹ When attributing agency to "classical political economy," I am referring to the central intellectual figures in the justificatory work of making a market system, first and foremost Malthus, but also Ricardo and Nassau Senior, with lesser roles played by Burke and Bentham. Unless otherwise stated, I do not include Adam Smith in this appellation.

²⁰ As I have argued elsewhere, market naturalism was not a *de novo* invention but a distorted appropriation of Locke's master narrative of social naturalism and contract, itself built on a conflation of nature, property, and civil society (Somers 1995b; 2008, 254–288).

²¹ Polanyi explains classical political economy's invention of the economy as an autonomous naturalized entity in ch. 10 of *GT* (Block and Somers 2014, 150–92). Grewal (2017) and Harcourt (2011) each have illuminating accounts of economic naturalism.

(Bobbio [1989] 2006) dividing the social universe into separate spheres of market and government, private and public, economy and state (Somers 2008, 254-88). In this conception, an impersonal, quasi-biological organism, innately tending toward equilibrium, exists in existential conflict with a hierarchical, coercive state that arbitrarily imposes moral imperatives.

The great dichotomy was not merely a spatial divide, but also a temporal one. Building on Locke's contract theory, private property was deemed to exist prior to government, thus allowing market naturalists to dethrone the authority of government and establish instead the *primacy of the economic*. Whereas under mercantilism the economy served as a handmaiden to the priorities of state power ("trade follows the flag"), under market naturalism the economy became the arbiter of policy. The imperative to shield the market from politically imposed distortions of self-regulation now trumped all competing goals. Legislation that neutralized potential threats to market autonomy was justified, but legislation aimed at reducing economic insecurity through social provisioning was dismissed as politicizing natural processes.²²

In an incoherent mix of naturalism and voluntarism, market naturalism melded objective "natural laws" of the market, disobeyed at one's peril, with contract theory's voluntaristic, egalitarian, horizontal relations of the *doux commerce* (Hirschman 1977). The result was a series of binary oppositions between economy and government, the most significant of which pitted the market's scientifically objective "laws of nature" against government's arbitrary, artificial, and coercive "laws of man," illustrated in Figure 1.

Figure 1. The Market Naturalist Binary

THE MARKET NATURALIST BINARY	
ECONOMY	STATE
Pre/non-political Objective natural entity	Political Coercive entity
<ul style="list-style-type: none"> • Laws of Nature: Impersonal/unbiased • Freedom from power • Horizontal relations of equal exchange • Natural law: Property rights 	<ul style="list-style-type: none"> • Arbitrary (biased) "Laws of Man" • Controlled by power • Vertical relations of domination and extraction • Positive law: State power

This fictive, binary universe set the terms for modern economics' Rubicon-like divide between a voluntary, contractual, nonpolitical site of objective neutral market processes and a vertically dominated, artificial, and arbitrary political site of governance. Among the most consequential attributes of the market naturalist divide is the dichotomization of the site of power. Power—the enemy of property, voluntary contract, and natural rights; the enabler of coercion, domination, and predation—is here exclusively sited in government, making government a chronic threat to property,

²² On the origins of the "great divide" of private and public in the metanarrative of Anglo-American citizenship theory, see Somers (1995b; 2008, 254-288); Weintraub and Kumar (1997).

prosperity, and thus to liberty itself. In lieu of power and the confiscatory coercions of government, economic behavior entails voluntary contractual transactions and quid pro quo exchange between legal equals operating on neutral territory. Defining transactions between workers and owners as exchanges between legal equals with equal power eliminates power from the private sphere altogether, relegating the employment relationship to a putatively nonpolitical status.²³

2. Capitalism's Moral Economy: The Invention of Market Justice

At this point, however, a subtle act of remarkable epistemic cunning occurs: Having shifted the center of ontological gravity away from the morality-laden coercions of government to the supposedly impersonal neutrality of nature, political economists were not content to abandon all moral capital to abhorred acts of government "compassion." Instead, they reconceived the binary's normative order by smuggling in under the cloak of nature a novel metric of morality, this one measuring moral superiority by the degree of conformity to the laws of nature. But note how this violates their original postulate: Recall that in conceiving of the economy as a natural system, market naturalists deemed it superior to a government-managed economy because it was alleged to exist independently of morality, reflecting the unbiased regularities of the natural world. It was the ice-cold laws of nature that conferred scientifically grounded privilege to the market, not loftier values, ethics, or morality. How then does this site of freedom *from* morality transform into one of moral privilege?

By sheer chicanery: In a dizzying ethical and epistemic brain twister, market naturalism not only dethroned government. Because conformity to nature was now celebrated as the site of freedom and autonomy from human bias, naturalism also endowed the market with a privileged new moral authority. This in turn set the predicate for the invention of a new kind of justice, which I call the moral economy of market justice. A moral economy is a normative apparatus that justifies specific economic arrangements on the grounds that they produce morally superior outcomes. Under the moral economy of market justice, the market's adjudications and distributional outcomes are just and fair because they are impartial, produced by voluntary transactions operating in a morally neutral price system, unimpeded by human capriciousness and untouched by political power. Morally neutral laws of nature are thus effortlessly converted into morally superior processes.

With the moral economy of market justice, a critical turn in theories of law and justice develops. Whereas justice used to be a property exclusively of government and the courts, market naturalism turns justice into a category of economic morality by transposing it onto the market, where it will be free from the biases of arbitrary governance. Once so transposed, the language of justice, morality, and fairness naturalizes, sanctifies, moralizes, and ratifies market distributions. As Polanyi put it:

The laws of commerce were the laws of nature and consequently the laws of God. What else was this than an appeal from the weaker magistrate to the stronger, from the justice of the peace to the all-powerful pangs of hunger? To the politician and administrator laissez-faire was simply a principle of the ensurance of law and order, at minimum cost. Let the market be given charge of the poor, and things will look after themselves (*GT*, 122).

²³ Thanks to Dan Hirschman for reminding me that neoclassical economics violates its own fidelity to the binary in explaining why the state must be contained and limited. Both Virginia's public choice theorists (especially James Buchanan) and Chicago's Law and Economics scholars (especially George Stigler) argue that because politicians are invariably motivated by selfish market considerations, the exercise of state power is inexorably corrupt.

a. Marginal Productivity Theory, Meritocracy, and Inequality

Market justice, a wholly owned subsidiary of market naturalism, so became the scaffolding of market society's moral economy. Comprised of justifications for unequal market outcomes, mandates for appropriate structural arrangements, and policy blueprints, we can catalog its most significant accomplishments and diktats.

First, market justice produced the original justification for social exclusion and inequality, which laid the predicate for the theory of marginal productivity: Market outcomes—the wages and income levels produced by the labor market—are morally just because they are the product not of the biased hand of “man” (i.e., government) but rather by abstract natural market forces that operate free of human bias and political power. As anticipated by Thomas Malthus ([1803] 1992, 249 *passim*) *avant la lettre*, poverty and riches alike are the result of nature's distributional processes and thus cannot be subject to social, moral, or political judgment (Somers and Block 2005). Precisely because market distribution is a product of natural, not human laws, the suffering of the hungry is morally unimpeachable and cannot be “disobeyed” without enormous risk:

A man who ... cannot get subsistence ... [because] society does not want his labour, has no claim of right to the smallest portion of food ... At nature's mighty feast there is no vacant cover [seat]. She tells him to be gone, and will quickly execute her own orders. We disobey these laws at our peril (Malthus [1803] 1992, 249).²⁴

As for the economic suffering that ensued, classical political economy had an answer for that: Just as nature's predator/prey relationships are not judged to be just or unjust, so too must economic conditions be judged not by the biased magistrate but by the majesty of nature, free of moral sentiments and sanctions.²⁵

Decades later, Malthusianism found an echo in neoclassical economics' keystone concept of marginal productivity theory, which posits that because the market is a self-equilibrating naturalistic system, its distributional incomes precisely reflect different degrees of effort and contribution. As John Bates Clark ([1899] 2001) put it:

It is the purpose of this work to show that the distribution of the income of society is controlled by a natural law, and that this law, if it worked without friction, would give to every agent of production the amount of wealth which that agent creates.

Marginal productivity theory was arguably neoclassical economics' most significant ideational achievement,²⁶ as it fully transformed market naturalism into a morally privileged theory of market justice. It did so by augmenting naturalism with voluntarism: Because it is the result of natural law shorn of the pity and perversities of human morality and passions, the existing distribution of income and wealth, however unequal, is objectively and scientifically fair. At the same time, as popularized in

²⁴ Malthus conflated the laws of nature with the laws of God, attributing them with inherent moral content.

²⁵ “Essentially, economic society was founded on the grim realities of Nature; if man disobeyed the laws which ruled that society, the fell executioner would strangle the offspring of the improvident. The laws of a competitive society were put under the sanction of the jungle” (*GT*, 131).

²⁶ Cook (2018) convincingly argues that the dominance of marginal productivity theory is one of the “three central theoretical pillars” responsible for the “great marginalization” of inequality from twentieth-century economics.

the precept of *meritocracy*,²⁷ market outcomes are morally just because whatever the market produces in the way of income, wage, or wealth inequalities reflects “the amount of wealth which that agent creates,” whether through labor or investing capital. In justifying market outcomes as fair and objective, marginal productivity theory declared wages to be scientific reflections of workers’ worth and market value. Skills and market worth make high earners deserving of their success, while low earners and the hungry are equally deserving (or “undeserving,” as they came to be known) of their travails and sufferings. Rewards are thus the product of *just deserts*; earnings are morally deserved as measured by the “amount of wealth” created.

More than a century later, little has changed under the reign of market justice. Referring to the stagnant wages of American workers, corporate apologists explain it as “the tough but fair” result of market forces: “People will get paid on how valuable they are to the enterprise,” John Snow, the economist then serving as treasury secretary under President George W. Bush, explained in 2006 (*New York Times* 2020, n.p.). Thanks to new technologies and increased foreign competition, “most Americans just aren’t [economically] worth what they used to be” (*ibid.*). The conservative playbook thrives on this diktat, and even celebrates inequality for its fair reflection of merit-driven market justice, unlike the politicized distortions of social justice, which are deemed arbitrary and driven by envy of the rich. In a world of market justice, market naturalism is the foundation for both moral and economic worth.

b. Redistribution as Theft

From the claim that market outcomes are deserved and morally just, it follows that alleviating need through redistributive social provisioning is nothing less than theft. Murphy and Nagel (2002, 15) give the name “everyday libertarianism” to the popular belief that because pretax income is “presumptively just” (reflects fair earnings), it is “owned” by the earners, and income taxes constitute nothing less than government larceny. The welfare state—and what T.H. Marshall (1950) famously called social citizenship—is even more odious to market justice, because it entails appropriating from the meritorious to give to the undeserving (Somers and Block 2005). Although it has been empirically demonstrated that over the last four decades tax policy has overwhelmingly redistributed *from* the have-nots *upwards* to the highest earners (Saez and Zucman 2019; 2021; Baker 2016; Vogel 2021; Teles 2015), the everyday language of redistribution is associated exclusively with the transfer of income from “hardworking taxpayers” to the “lazy poor.”²⁸ In the popular jargon of neoliberalism, the state illegitimately taxes “makers” to give to “takers” (Feroohar 2016), subjecting private property to the predatory excesses of unearned entitlement (Buchanan and Tullock 1962).²⁹

²⁷ There is an elective affinity between market justice and meritocracy, but they are not the same. The latter addresses individual input and outcomes, whereas market justice, while it has implications for micro-justification or “just deserts,” is a macro-generated normative claim about structural market forces. For powerful recent critiques of meritocracy, see Markovits (2019) and Sandel (2020).

²⁸ According to a 2020 RAND study (Price and Edwards 2020), the upward redistribution of wealth over the past 40 years has shifted \$50 trillion from the bottom 90% to the top 1%, and that \$2.5 trillion is redistributed from the bottom 90% of Americans to the wealthiest 1% of Americans *every year*.

²⁹ Ange-Marie Hancock (2004) and Somers (2017) emphasize how the first step to destroying redistributive social programs is to define the beneficiaries as morally undeserving, worthy of what Hancock calls “public disgust,” and thus deploying what Somers (2017) calls a “political economy of moral unworth.” In the US from the 1970s–early 1990s, this kind of disgust was successfully targeted at women of color receiving AFDC, setting the stage for the “end of welfare as we know it” in 1996 under the Clinton presidency, the most significant undermining of the welfare state since the New Deal (Somers

c. Democracy as Moral and Mortal Threat

From the triumph of market naturalism and the rise of market justice, it follows inexorably that popular sovereignty becomes a mortal threat to property. It turned on the dangers to market justice and economic liberties posed by the “politicization” of the economy and the assumed predatory redistributive instincts of the masses. Since market justice was born of the conceit of the market’s necessary autonomy from politics and power, the democratic polis—especially its association with the working classes—was a menacing source of political power. In the face of popular demands for greater distributional equity and regulative protections, market justice legitimated property owners’ demonization and criminalization of democratic rights-claims as existential threats to the natural rights of property.³⁰ Taking refuge behind the purported firewall between the economy and government, property owners drew on the moral and legal authority of market justice to claim that the market’s very survival—indeed, economic freedom itself—depended on the right to be free of what Polanyi would characterize as democracy’s “sins of inflation, protectionism, and neglect of the currency” (cited in Dale 2016a, 105). Conservative statesmen used political economy to denounce democratic rights-claims as stealth designs to violate market justice by plundering private property.³¹ Nineteenth-century advocates for a democratic franchise enlarged beyond the propertied, such as the British Chartists, were criminally prosecuted and ruthlessly suppressed by the violent force of state power.

Capitalism’s “hatred of democracy” (Rancière [2005] 2014) proved untenable over time. In the face of the need for the services of working people in war and industry, elites eventually conceded to a widening of the franchise, and outright criminalization of democratizing social movements gave way to property restrictions, putting at the center of elite debate the question of just how much popular sovereignty would be permitted. The compromise was a *market-conforming democracy*, in which the actualization of popular preferences through legislative or collective action would be legitimate only insofar as its scope was restricted to the public sphere and prohibited from touching the property regime.³² With the overriding goal of public policy protecting the economy from political “interventions,” a constricted market-conforming democracy preserves the veneer of market justice

and Block, 2005). This in turn became the vector for delegitimizing the already fragile and short-lived rights-bearing status of marginalized African Americans in the current onslaught of voter suppression and participatory exclusion in 2022.

³⁰ The interest of political liberals in protecting property from the Crown or the government and that of economic liberals’ in protecting property from the People converged in their mutual need to control the bodies and economic value of enslaved people who, because they were for so long defined as the property being protected, were subsequently never fully incorporated as legitimate members of the People. Thanks to Leah Bassel for urging me to include this point.

³¹ Polanyi writes: “Inside and outside England, from Macaulay to Mises, from Spencer to Sumner, there was not a militant [economic] liberal who did not express his conviction that popular democracy was a danger to capitalism” (Polanyi [1944] 2001, 233). Elizabeth Anderson reminds me that James and J.S. Mill, indeed even Adam Smith, were “liberals” who were less hostile to the idea of the People. Dale (2016a; 2016b, 55–79) masterfully reconstructs Polanyi’s thesis on the incompatibility of capitalism and democracy. See Streeck (2014; 2016), Kuhner (2014; 2017), Kuttner (2018); and Somers (2021) on the fundamental conflict between democracy and capitalism, and Block (2018) for a critical view of their incompatibility.

³² Thanks to Angela Harris for reminding me that for the US, this argument would have to be modified slightly. American property law has a subordinate tradition of the public trust doctrine which protects natural resources for the benefit of the people and accordingly limits the rights of private property owners. In some states, substantial limitations on the rights of private property owners obtain when public improvements such as mills and dams are proposed; a line of cases to this effect exists going back to the nineteenth century. At the federal level, the Takings Clause of the fifth amendment permits the government to take property outright from owners for public purposes, as long as due process is provided.

as impartial, apolitical, morally neutral, universally beneficial, and free of the “special interests” of democratic constituencies (Crouch 2004).³³

These precepts took on new prestige in the 1920s with von Mises’ and Hayek’s injunctions that the preferences of voters in democratic politics must be ignored when they conflict with the requisites of market imperatives (Block and Somers 2014, 40-43).³⁴ And despite the relatively egalitarian era of the New Deal through the Great Society, the diktat of a constricted market-conforming democracy came back turbocharged in the 1970s, when centrist intellectuals sent out alarms that the Sixties had produced way too much democracy and not enough capitalism. Embodied in the Trilateral Commission’s famous attack on “an excess of rights” (Crozier, Huntington, and Watanuki 1975), and reflected in the doctrinal elevation of public choice theory (Buchanan and Tullock 1962; MacLean 2017), the newly named “crisis of democracy” (along with Great Society policies) was blamed for the economy’s ills in the 1970s. Responding to the purported dangers of “politicizing” the economy, Law and Economics emerged in legal theory, proclaiming that democratically driven redistribution policies must be subordinated to the requirements of market “efficiency” (Harcourt 2011; Crouch 2011; Britton-Purdy et al. 2020; Teles 2012; McCluskey 2003; McCluskey et al. 2016; Posner 1983). Increasingly deemed too troublesome to capitalism to endure, the only form of democracy acceptable to the emerging neoliberal consensus was the depleted and disempowered age-old American tradition of “negative rights,” what Polanyi called “neo-democracy”—defined by its proscriptions, rather than by affirmative social and political rights (Streeck 2014; 2016). Market naturalism, in short, used the efficiency/prosperity and freedom it attributed to an autonomous market to justify keeping the economy unaccountable to its citizens, thus paving the way for oligarchy.³⁵

d. The Legal Powers of Property and Contract

As we have seen, the thought experiment that enabled classical political economy to graft the laws of nature onto a separate sphere of commerce and invent the idea of a self-regulating market also produced the fictive claims of market justice. But the *effects* of market justice were anything but fictive; rather, they had enormously far-reaching legal consequences. Market justice mandated the repeal of centuries-old legislation mitigating the suffering of the poor, and it cemented for decades (although less so in the US) property-based restrictions into the franchise on the grounds that broader access would lead to the plunder of property.

Nothing was more instrumental to this process than the legal powers of private property and freedom of contract crafted by economic liberalism. Economic liberalism, borrowing from the moral authority of political liberalism, deployed the rhetoric of liberty to demand freedom from the tyranny of

³³ If space permitted, it would be essential in this discussion of property, democracy, and sovereignty to discuss the Indian conquest and Atlantic slavery (see Bhandar 2018; Moreton-Robinson 2015; Ince 2014; Wolfe 2006).

³⁴ Hayek’s strenuous anti-democratic injunctions continued through his life’s work (Hayek ([1939] 1980; Mirowski and Plehwe 2009; Burgin 2012; Stedman Jones 2012; Streeck 2014).

³⁵ As Krugman (2014, n.p.) observes, “American politicians don’t dare say outright that only the wealthy should have political rights—at least not yet but if you follow the currents of thought now prevalent on the political right to their logical conclusion, that’s where you end up.” Thus, Steven Moore, one of the leading pundits of conservative economics: “Capitalism is a lot more important than democracy, I’m not even a big believer in democracy. I always say that democracy can be two wolves and a sheep deciding what to have for dinner” (Harwood 2019, n.p.). And Senator Mike Lee of Utah in 2020, during a vice-presidential debate: “Democracy isn’t the objective; liberty, peace, and prosperity [sic] are. We want the human condition to flourish. Rank democracy can thwart that.” <https://www.reuters.com/article/us-usa-election-lee-democracy-idUSKBN26T2YX>. Democracy, in short, is the enemy of freedom. See also Slobodian (2018).

government, and extended to “economic liberties” the dire warnings of political theorists against arbitrary and coercive power. But whereas seventeenth-century political liberals had opposed monarchy in the name of citizens’ rights, eighteenth and nineteenth-century economic liberals described the rights of the poor as coercive and sought to reserve economic rights for property holders alone. To facilitate that process, they pilfered from the natural law tradition to create what would become the lifeblood of the market economy and the medium of all commercial life: the idea of property as a private natural right acquired prior to positive law and government,³⁶ and the idea of freedom of contract as the private right to voluntary exchange between legal equals, free of the weight of social status and political power (Atiyah [1979] 1985; Hale 1923; 1943). Instead of any meaningful democratic citizenship rights in the sphere of livelihood, contractual equality and the primacy of property rights became the prevailing definition of freedom (from the state)—rights enforced by the state, of course, since without government backing, they would not be worth their metaphysical weight.³⁷

Firmly grounded in the putative pre-political neutrality of the private sphere, private property and freedom of contract were essential in granting market distributions ultimate authority in the domain of human livelihood. Market justice had already appropriated the mantle of justice from state governance and the rule of law. Property and contract, alleged to be products of natural rather than positive law and thus free of political bias or coercion, helped turn the idea of the self-regulating market into a legal reality.

Freedom of contract in particular was an essential accomplice of market justice. In the name of freedom from coercion, judges and legislators in the Anglo-American common law tradition prohibited a variety of state-imposed restrictions on employment. In the first half of nineteenth-century England, democratic efforts to restrict the hours that women, children, and men were forced to work in factories were quashed on the grounds that such “state interventions” into freedom of contract violated the “free agency” of workers choosing to “freely” sell their labor to the highest bidder (Driver 1946; Ward 1962; Somers 1997). In the reasoning of twentieth-century American judges, freedom of contract prohibited minimum wage laws, limits on hours of labor by “free agents,” and the rights of workers to unionize and collectively bargain. Such measures were proscribed because they were said to “introduce” *external* political coercion into the voluntary world of private exchange. This legal fiction reached its apex in decisions of the US Supreme Court in the so-called *Lochner* era, which wrote market justice into the federal Constitution (Bagenstos 2020; Klare 1978; Sunstein 1987; Hale 1923; 1943).³⁸ For the disciples of market justice, striking down worker protections was the perfect instantiation of market justice, since no one was forcing anyone else to accept or remain in

³⁶Again, this incoherent mix of the impersonal systemic laws of nature with subjective voluntarism reflects the appropriation of Locke by the self-styled scientism of the political economists (Somers 2008, 254-88). For a pre-Lockean but enduring competing understanding of the “misteries” of property as associational rights rooted in the history of guilds and proto-trade unions, see Somers (1995a).

³⁷ See Pistor (2019) on the primacy of subjective legal rights in capitalist economies and their necessary backing by the state.

³⁸ The “*Lochner* era” is named after *Lochner v. New York*, 198 U.S. 45 (1905). In that case, the US Supreme Court struck down, on constitutional grounds, a state law that barred bakers from working more than 60 hours a week. The Court held that individual workers were free to agree or to refuse to work 60 hours a week, and that a “protective” labor law overriding such individual agreements violated that contractual freedom. For the Court, economic freedom depended on the absence of coercive political “intervention” into voluntary contractual agreements; if workers “chose” to work 60 hours a week, or if children “chose” to work in waged labor, it was coercive and anti-constitutional to legislate otherwise (Sunstein 1987; Bagenstos 2020).

employment. It was simply the noncoercive natural market law of supply and demand that “attracted” and held the laborer, just as her marginal productivity fairly determined her remuneration.

With freedom of contract, political economy easily dissolved the “artificial” (because “man-made”) rule of law in the liberating acid of nature’s own “laws of the market,” and lauded the results as putatively fair distributional outcomes—wages and incomes—that only market justice could produce. Labor leaders, Socialists, proponents of “protective” legislation for working women and children, and communities that had systematically been starved of capital and denied access to property ownership—such as African Americans—were met with assurances that existing distributions of wealth simply reflected the just deserts endowed by nature, once again comprising the strange mélange of voluntaristic natural law and scientism embodied in the inviolable principles of market justice.

The perception that economic activity is volitional and free of power, taking place between equals prior to any state involvement, is the most significant and long-lasting consequence of the legal powers of freedom of contract. As Polanyi concluded, this “market view of society...equated economics with contractual relationships, and contractual relations with freedom...*Society as a whole remained invisible. The power of the state was of no account, since the less its power, the smoother the market mechanism would function*” (GT, 266, italics added).

3. Market Naturalism and Market Justice Today

Market justice has successfully endured (in the guise of marginal productivity theory) relatively unscathed over two centuries, continuing to give solace to the apologists of inequality, to the ridiculers of redistribution, to the subverters of democracy, and to the sanctimonious juristocrats of property and contract. Today the concept of market justice is found primarily in the rhetoric of meritocracy, a development unsurprising in the modern philosophical preference for reducing systemic processes—even specious ones like market naturalism—to individualistic accounts of moral worth and economic fate. But as marginal productivity theory makes so clear in its conjoining of natural law and individual merit, whether framed in systemic terms as “natural market forces” or in agential ones as meritocracy, both require grounding in the original concept of market naturalism.³⁹

Over time, the pseudo-biological foundations of market justice have been discarded in favor of a more social-constructionist story of voluntary exchanges equilibrated by the law-like fulcrum of the price mechanism. What endures, however, is a sustained commitment to some version of the natural market. Without it, the idea of the market’s benign system of incentives that operate freely without the exercise of power is implausible, as is the self-regulative capacity of the price system and the market’s capacity to function without politically imposed distortions. A “free” market must be rooted in some version of naturalistic ontology, and *efficiency* is a perfectly serviceable modern replacement—to wit, the recognizably market naturalist roots of Law and Economics (Harcourt 2011; McCluskey et al. 2016).

³⁹ For those who think market naturalism is no longer a serious ideology, consider the words of former President Bill Clinton in 2005: “Globalization is “the economic equivalent of a force of nature, like wind or water,” https://gbr.economist.com/articles/view/5843e056ffe2d66b72610f2d/en_GB/zh_CN, and former prime minister Tony Blair’s comment on the globalization debate, “You might as well debate whether autumn should follow summer.” September 12, 2005, Conference Speech to Labour Party, <https://www.theguardian.com/uk/2005/sep/27/labourconference.speeches>.

C. *Denaturalizing the Economic Order: From the Myth of the Stateless Market to the Economy as “Instituted Process”*

Against the metaphysics of market naturalism and market justice, Polanyi (1957) defines actually-existing markets as rule-driven institutions internally constituted by politics, power, and law. He called his political economy the “institutional approach to the economy,” and used it to demonstrate that the “economy is [an] instituted process.”⁴⁰ Polanyi’s most counterintuitive and paradigm-changing argument is this: Market naturalism is a normative ideal of freedom from power, which to be realized depends upon the very political power and legal engineering it claims to abhor. Free markets do not exist in the wild, but are *engineered to appear so*. Free market doctrine claims an economy made efficient and free by its liberation from government “interference,” but government action cannot interfere in the economy because government rules, rights and legal powers are what constitute the economy in the first place, so to speak of interference makes little sense.⁴¹ In fact, there simply is no economy without its legally constructed infrastructure, legal coding of invented wealth (Pistor 2019), institutions, and coercive power. In an echo of Polanyi, markets are, in the words of Steven Vogel (2019), organized through “marketcraft,” the apropos term he devised to capture the equivalence between the governance of markets and that of the more familiar “statecraft.”

Power is the essence of Polanyi’s institutionalism—what appears to be natural is in fact institutionalized and engineered exercises of power, a reality that is obscured by the putative freedom and voluntarism associated with laws of nature and the legal fictions of property and freedom of contract. Power is the internal engine of market outcomes, making the market itself an institution of allocated powers.

1. Regulation and Deregulation

To fully appreciate the significance of an institutionalist political economy, it is important to put it in contemporary political and intellectual context. One of the great triumphs of neoliberalism is successfully defining its project as one of *deregulation* and small government. Alas, even much of the left tends to attribute decades of rising inequality to “unfettered” and “deregulated” markets and the retreat of the state. In so doing, they are partaking in the long tradition of accepting at face value market naturalism’s own self-styled binaries—*laissez-faire* versus protectionism, deregulated markets versus regulated markets, or simply market freedom versus government intervention (Desautels-Stein 2012; Kennedy 1985; Klare 1978).

The conceit of deregulation derives from market naturalism’s original deceit—that there is a pre-political economy in nature that, if not for exogenous political interference, would self-regulate efficiently like an organic entity. Deregulation from this perspective becomes a project of *restoration* that frees the market to return to its natural state. But since there is no natural market, then there is no such thing as a pre-political market to be restored, and deregulation is an impossibility.

⁴⁰ On Polanyi’s institutional analysis, see Polanyi (1977; 2014, 53-106; 2018a, 241-298); Cangiani (2021).

⁴¹ On institutionalism in political economy more generally, see Hodgson (2001; 2015); Whalen (2021); Yonay (1998); Novak (2010; 2019). There are, of course, multiple forms of institutionalism, including that associated with Douglas North. Polanyi’s institutionalism, by contrast, is in the line of Veblen ([1904] 1978; 1908), Legal Realism, and the institutional economists associated with John Commons (1924; [1934] 1990).

Once we accept that all economies are instituted processes, a more appropriate formulation is that neoliberal policies do not deregulate but *reregulate* (or reinsitutionalize) the economy, by substituting one legal-regulatory regime for another (Block and Somers 2014, 8-11, 150-92). This makes clear that the current use of the term “deregulation” is actually code for the use of political and legal power to replace relatively egalitarian regulations with distinctly inegalitarian ones. Put slightly differently, deregulation is the word that neoliberalism (and laissez-faire before it) uses when state power is used to redistribute wealth *upwards* (Somers 2018). Under the rhetorical fiction of financial deregulation, for example, neoliberalism in the 1990’s replaced old New Deal rules designed to protect the public from financial fraud and excessive risk-taking, and imposed new rules that enabled financiers to engage with little or no risk in predatory lending and dangerous speculation (Block 2018). From this point of view, “deregulation” amounts to a grant of power to the most powerful businesses and business groups to impose regulations *on their own terms*. Amazon, for example, unilaterally imposes the very complex regulations of its market on consumers and third-party sellers.⁴² Thus, Stiglitz (2020, n.p.) writes:

[T]he neoliberal deregulation agenda was never really about deregulation per se. The point has always been to regulate in a way that will advance certain interests at the expense of others. At the same time that the big banks argued against regulations that could have stopped the financial crisis, they were advocating bankruptcy provisions that favored them over other creditors; and while they argued for smaller government, they were more than receptive to the hundreds of billions of dollars in bailouts.

There’s a reason, of course, for the deceptive vocabulary: It hides the political engineering behind the seductive fantasy of a space “in the wild” free of all outside interference, tyranny, and coercion. When left progressives adopt the misleading vocabulary, they use deregulation to mean inflicting injustice by removing restraints on the market. Whether deployed by the political right or left, however, the language of deregulation leads inexorably to an “alchemy of misrecognition” by which we stare brute power in the face and are convinced we are seeing the free market at work (Somers 2018).

In short, the question is never whether markets are constituted by institutional powers, nor whether there is more market or more state, but *what kind* of internal market powers are at work? Thus, the important questions are: What institutional arrangements are organizing the market internally? In what ways and to what effect do they allocate power and rights? And to what outcome and to whose benefit does that market governance work? Does it advance the interests of capital and wealth by redistributing market rewards dramatically upward, as over the last four decades? Or can it once again be a force for relative equalization and a larger middle class, as in the mid-twentieth century? It is these questions about different regulatory *effects* that must be asked, not *whether* markets are internally institutionalized. The great advantage of the theory of institutionalism, with its assumption that all markets are structured internally by power, is that it points us to these urgent empirical inquiries.⁴³

2. Predistribution, Law, and Political Economy

The term “predistribution” conveys the institutionalist insight that the market’s distributional outcomes (wages and earnings), while assumed to be caused by impersonal, voluntary, and free market

⁴² Thanks to Elizabeth Anderson for this point about Amazon.

⁴³ For an important statement of how the British Labour Party is articulating a new institutionalist political economy along these lines, see Guinan and O’Neill (2018).

forces (whether the price mechanism, automation, or globalization), are in fact engineered by government policies and legal institutional powers, which entail structures of rule and domination internal to the market.⁴⁴ The concept plays on the contrast with the more familiar one of redistribution: Whereas redistribution focuses on public sector policies that tax and *redistribute* income and profits after they have been earned and distributed in paychecks, *predistribution* exposes how government policies and legal powers produce those (usually unequal) pretax incomes and profits in the first place.⁴⁵ Predistribution thus demonstrates that both primary market outcomes and post-tax incomes are determined by political and legal power, making the market itself no less a political, legal, and social entity than the government and the law. Predistribution thus underlines the institutionalist proposition that markets are not “impinged” upon by power and law; they *are* legal and political institutions from the inside out.

Jacob Hacker et al. (2021, 8) remind us that political and economic power may be most consequential where it is least visible. Thus, it is not surprising that a key feature of predistributive practices that push wealth and income upwards is that they are designed to occlude the exercise of political or legal power inside the economy and to instead make inequality appear simply in the nature of things. Unlike tax-driven redistributive social programs, which are aggressively contested in public debate and in demonizing the Internal Revenue Service, predistribution operates inside the black box of the market, and is fiercely shielded from public scrutiny.⁴⁶ Indeed, the very novelty and unfamiliarity of the term “predistribution” testifies to the successful depoliticization of primary market inequalities. As Hacker et al. (2022, 8) put it:

Powerful actors and coalitions often seek to organize governance in ways that effectively remove important issues from direct political contestation . . . The fact that some matters receive limited or highly constrained attention in national legislatures or in election contests, for example, should not be taken as a sign that the matter is of marginal importance or removed from politics. It may mean quite the opposite: that powerful interests have successfully insulated preferred practices from popular or legislative challenge.⁴⁷

Market justice tells us that inequality is the product of impersonal economic laws (such as the supply and demand of labor) or one’s marginal productivity contribution. Predistributive analysis debunks these as fictions built on the idea of a nonpolitical baseline of economic neutrality. Predistributive mechanisms of power operate as both cause and effect in a sequence of steps that shape the market’s

⁴⁴ Predistribution should not be confused with the more familiar concept of embeddedness, which as a metaphor is too easily interpreted as the self-regulating market being “surrounded,” “pressured,” and influenced from without by external political and social forces, while not fundamentally changing or restructuring the actual market contract. For analyses of the Polanyian roots of predistribution, see Somers (2018); Somers and Block (2020).

⁴⁵ The term predistribution is usually attributed to political scientist Jacob Hacker (2011; 2013), and for having been put into currency by Ed Miliband (2016) in 2012, then leader of the UK’s Labour Party. But it was identified with John Edwards’ anti-poverty-focused US presidential campaign as early as 2007, in a prominent *New York Times* article (Bai 2007). Other early adopters of the term were O’Neill (2012; 2020a) and O’Neill and Williamson (2012); see also Chwalisz and Diamond (2015); Thomas (2017); Somers (2018; 2021); Somers and Block (2020). Although Vogel prefers “marketcraft” and “market governance,” he was among the very first to introduce the term “predistribution” in public (Vogel 1996; 2018; 2019) in support of Elizabeth Warren’s 2020 presidential campaign (Vogel 2019).

⁴⁶ Pistor’s (2019) analysis of how legal coding works to turn assets into wealth thanks to the invisible hands of lawyers is a perfect case study of how legal predistribution works inside the economy where its work is often undetectable.

⁴⁷ Hacker et al. (2021, 8) continue this line of thought: “Resourceful and long-lasting political actors prefer not to have to fight constantly for their interests; far better to embed imbalances of power in durable arrangements within the political economy.”

distributional outcomes. Predistributive laws and policies first structure the rules of market processes (Stiglitz 2015; Reich 2015; Vogel 1996; 2018). These in turn determine the distribution of market power in the bargaining contestations between and among the basic market participants—labor and capital, consumer and business, debtor and creditor (see Vogel 2021 on these relationships of power). So, for example, it is the relative balance of power between potential employees and employers that determines the wage contract and hence market outcomes. But this balance of negotiating power is itself a result of predistributive laws and policies, such as those crippling labor unions, or the policies of the Federal Reserve that set interest rates according to their relative obsession with inflation over unemployment.⁴⁸ Predistributive judicial antitrust doctrine also has an enormous impact on the rate of profit of large corporations. When antitrust policies are nonexistent or weakly enforced, established firms can extract monopoly profits by arbitrarily bidding up their prices.

Among the predistributive rules and practices that create radical asymmetries of power and thus unequal outcomes are:

- The Fed’s rules that determine rates of unemployment and thus the bargaining power of labor and capital (Block 2018). All modern economies have central banks whose job it is to manage the supply of money and credit. And the specific policies chosen by the central bank, such as the Fed’s bias towards fighting inflation over full employment, have had enormous consequences for the bargaining power of labor and thus for the distribution of income. Hence former director of the Fed, Alan Greenspan, famously justified his anti-inflationary policies by stressing the importance of maintaining a continuous level of job insecurity among workers to prevent them from becoming overly confident about their bargaining power over wages (Woodward 2001, 168).
- Employment contracts founded on “employment at will” (Anderson 2017; Bagenstos 2020).
- Intellectual property laws (copyright and patents) that favor Big Tech and Big Pharma and obstruct fair competition, practices that Dean Baker (2021; 2018; 2016) has quantified as among the greatest drivers of spiking inequality (see also Kapczynski 2014).
- Crippling anti-union and other “equal power” judicial rulings in employment law that Bagenstos (2013; 2020) and the EPI (2020) have documented as sources of wage depression and radical asymmetries of power in the workplace.
- Vigorous reconceptualization of anti-trust law by Chicago Law and Economics since the 1970s, leading to massive corporate consolidation, monopolies and monopsonies (Paul 2020; 2021; Khan 2017; Khan 2018; Khan and Vaheesan 2017; Rahman 2016b; Crouch 2011; Lynn 2010; Reich 2015; Teachout 2020; Vaheesan 2019; Wu 2018).
- Financialization and financial instruments that create wealth out of legal technologies, directed almost exclusively to asset holders (Pistor 2019), and which control supplies of money and credit (Pistor 2020; Krippner 2011).

⁴⁸ Although he does not use the term predistribution, few have labored harder than Baker (especially 2016 and 2020) to convey that it is government policy and law, not the “free market” that is responsible for driving incomes upwards over the recent decades.

- Bankruptcy laws written by the financial sector (Reich 2015).
- Defanged regulatory enforcement agencies such as the NLRB (Klare 1978), the SEC, etc. (Reich 2015).

a. Polanyi and Legal Predistribution

Distributive justice was not Polanyi's primary subject, but the concept of predistribution is clearly rooted in Polanyi's institutionalist tradition. Like institutionalism, predistribution shines light on how power operates inside the economy to make and shape markets, thus upending the binary that attributes politics, power, and governance to the public sphere, and freedom from power to the private, thus putting an end to the myth of the stateless market. A focus on distributional outcomes, moreover, does not need to be restricted to the narrow category of income or even wealth. For Polanyi, the coercive workings of the market—channeled through law and power—produced outcomes that occasionally raised wages (such as in colonized Africa and early industrial England), but at the cost of annihilating communities and destroying civil society—and these outcomes too can be explained by distributional power. Normative arguments about distributive justice pertain not only to quantitative calculations, but also to the market's distribution of democracy and freedom—or of dedemocratization and unfreedom—and of the moral worth or the moral degradation that social exclusion and withholding recognition through material and social deprivations brings in its wake.⁴⁹ This is an appropriately capacious conception of predistribution.

Once expanded this way, we can recognize that the idea behind predistribution is hardly new. Progressive Era Legal Realists (Hale 1923; 1943; Fried 1998) famously argued that legal rules shape the relative bargaining power of labor and employers through laws affecting the rights and capacities of workers and unions. Institutionalist economists (Commons 1924; [1934] 1990) demonstrated how the outcome of political battles over the contract influences the way that market exchanges provide different rates of return to employees and employers, tenants and landlords, consumers and firms through mechanisms of predistribution that are able to move wealth and income upward towards the rich through structures of domination operating under the guise of the free market.⁵⁰ But while decades of institutionalist political economy and the best economic sociology have received only thundering silence from policymakers,⁵¹ the idea of predistribution seems to be making some headway in the public sphere of policy discourse (Hacker 2013; O'Neill 2012; Schonfeld and Winter-Levy 2021;

⁴⁹ This definition shares much with Boushey (2019), Piketty (2014; 2020), Therborn (2013), and Wilkinson and Pickett (2009), all of which treat inequality in the context of its broader societal injuries.

⁵⁰ From Marx and Weber to the German and English historical economists (Koot 1987; Lindendfeld 1997), from Veblen ([1904] 1978; 1936) to the Legal Realists, the institutional economists (Commons 1924; [1934] 1990; Novak 2010; 2019; Yonay 1998), to today's economic sociologists (Block 2018; Burawoy 2019; 2021; Block and Somers 2014; Fligstein 2001; Fligstein and Dauter 2007; Krippner 2001; Krippner and Alvarez 2007; Dobbin 2004) and political economists (Barma and Vogel 2021; Streeck 2009; Vogel 1996; 2018; Hacker and Pierson 2010; 2020), social scientists have for decades theorized and produced findings that challenge the quasi-naturalistic precepts of mainstream economics and demonstrate the illusory character of self-regulating economic laws, whether those of the price mechanism or labor markets and wages.

⁵¹ Exceptions are Hacker and Pierson (2010; 2020), Vogel (2019; 2021), and Sargent (2021) in the US, and Streeck (2014; 2016) in Germany.

Vogel 2019; Bai 2007).⁵² This suggests that it is an especially generative concept for the new Law and Political Economy project.

Predistributive institutional power inside the economy is thus the means by which primary market distributions of income and wealth are determined. But theoretical precision requires identifying the active mechanisms that do the actual predistributive work. This brings us to Polanyi's unique contribution, for his socioeconomic theory demonstrates the causal primacy of the law as the predominant predistributive mechanism that converts the fiction of the self-regulating market into a legal reality. It does this by coercing humans and nature into commodity markets, without which there could be no market capitalism. This is a very unnatural process, as it entails violent political engineering and massive social "liquidation" of human relationships, not only initially but as an ongoing management problem.⁵³ It is *legal predistribution* that drives these processes of commodification and market making.

Legal predistribution entails using the law and legal mechanisms—both private and public, common and statutory, contract and policing, arbitration and the judiciary—to turn people and land into *fictitious commodities*. Polanyi dubbed them fictitious because unlike "real" commodities, such as computers and widgets, they are not produced for the purpose of buying and selling but are treated by law *as if* they were/are. Since people and nature are not fabricated but social, however, even when they are commodified they will not conform to normal inert commodity behavior (*GT*, 71-80, 136-40). Fictitious commodities, instead, must be coerced into their condition by legal predistribution, whose power to engineer capitalism's contractual relationships rests on several of law's distinctive properties: The law *creates* rights, *allocates* rights, and *can take them away*; the law (backed by the state) exercises coercion; the law creates value and wealth (Pistor 2019; 2020); and the law is at once *contingent*—it is a public institution laden with coercive resources universal in principle that in practice private power can readily appropriate as a resource for the property rights the law developed to protect.⁵⁴

⁵² One reason for this may be its relatively narrow focus on inequality and distribution, which after all, only became a topic of much concern (to some) after the dramatic increase in inequality of recent decades began to be noticed in contrast with the 1940s–1970s when its notable reduction (in rich countries) made it a topic of little interest to most. Another reason may be that predistribution seems at first glance to be less provocative than the political toxicity associated with redistribution as grist for the "undeserving" and theft from the "deserving"—an amplification of market justice's diktat against mitigating the suffering of the excluded.

⁵³ A feature of markets and market societies that Polanyi argues is inevitable, however much hidden behind the illusory desiderata of individual volition: "No society is possible in which power and compulsion are absent, nor a world in which force has no function. It was an illusion to assume a society shaped by man's will and wish alone. (*GT*, 266-67)."

⁵⁴ And legal codification has evolved ever more complex means to not only protect but to amplify property (Pistor 2019).

b. Creating the Contract by Commodifying Humans⁵⁵

Legal predistribution captures Polanyi's most influential insight that capital deploys law to extract societal value by converting social beings into factors of production (Somers 2021). The value of labor in part derives from the vast amount of unpaid reproductive work extracted from families, communities, schools, indeed, the entire social environment that makes humans possible—none of which is returned to the commons after its value has been appropriated (Eichner 2020; Federici 2008; Folbre et al. 2013; Hester 2018; Fraser 2016).⁵⁶ These conversions are mediated through the labor contract, and for Polanyi nothing was more duplicitous than its claim to being “free.” In law, freedom of contract defines a voluntary agreement between legal equals negotiating on a neutral and nonpolitical baseline. In practice, it is a terrain of deep asymmetrical power. To be available as “true” commodities—units of labor detached from their humanity to be bought and sold no differently than “cucumbers”⁵⁷—people have to be converted into deracinated units of labor power willing to meet whatever demands are made upon them for flexibility and mobility, with no choice but to accept whatever wage is on offer. Polanyi defines this as the commodity character of a labor market:

In human terms [it] implied for the worker . . . abject readiness to be shoved and pushed about indiscriminately, complete dependence on the whims of the market . . . *It is not for the commodity to decide* where it should be offered for sale, to what purpose it should be used, at what price it should be allowed to change hands, and in what manner it should be consumed or destroyed. (*GT*, 185, italics added)

Polanyi deconstructs the making of the labor contract to show how much coercion is exercised in the state's predistributive legal work:

To separate labor from other activities of life and to subject it to the laws of the market was to annihilate all organic forms of existence . . . Such a scheme of destruction was best served by the application of the principle of *freedom of contract*. In practice this meant that the *noncontractual organizations* of kinship, neighborhood, profession, and creed were to be liquidated [by the state] since they claimed the allegiance of the individual and thus restrained his freedom. To represent this principle as one of [government] *noninterference*, as economic liberals

⁵⁵ Polanyi famously defined labor, land, and money as fictitious commodities, each of which he treated as inherently social rather than produced solely for the purpose of buying and selling, as is the case with actual commodities. For reasons of space, I can only deal here with the commodification of labor, but I urge readers to consult *GT*, 71-81, 187-209 for Polanyi's remarkably prescient analysis of how land and money are commodified in a market system. There is a great deal of scholarship on the commodification of nature and the entire nonhuman planet, touching on environmental law, animal rights law, and disaster law, and there have been a lot of interesting attempts to undo this commodification by, for example, granting rights to rivers and attempting to use the writ of habeas corpus on behalf of sentient nonhumans such as orcas and chimps. See for example Pettifor (2019), Steinberg (2019), and Iannuzzi (2018). Similarly, there is new scholarship that shows money as a social and political relationship, not a commodified medium of exchange. See for example Block and Hockett (2022), Desai (2020), Pettifor (2017), Baradaran (2017), and Desai (2014). Thanks to Angela Harris for suggesting I add these points about nature and money.

⁵⁶ On modern capitalism being fed through extraction and rents rather than the production of value, see Mazzucato (2019); on extracting value from the public sector and the state, see Block and Keller (2011) and Mazzucato (2015).

⁵⁷ For Polanyi, the depredations inflicted on labor come directly from its commodification (or commercialization), which turns human beings into saleable fictitious commodities to be bought and sold on a labor market and disposed of by market forces no differently from widgets or “cucumbers” (Dale 2016a, 168).

were wont to do, was merely the expression of an ingrained prejudice in favor of a definite kind of interference, namely, such as would destroy noncontractual relations between individuals and prevent their spontaneous reformation. (*GT*, 171, italics added)

In this single statement, Polanyi breaks wide open the workings of the labor contract to reveal the internal mechanisms of legal predistribution. First, he establishes that the legitimating fulcrum of the modern labor market is not actually a freely contracted agreement, but the *idea* of “freedom of contract.” By emphasizing how it is represented by economic liberalism as “one of [government] *noninterference*,” Polanyi highlights how the legal fiction of free contract embodies market naturalism’s deceptive baseline neutrality principles—the claim that labor contracts entail relationships between legal equals meeting on an level nonpolitical field of negotiation; how operating on allegedly nonpolitical terrain makes it a free exchange in an ontological sense, the means of escaping that which has “restrained his [the human’s] freedom,” namely all that which is noncontractual—“organizations of kinship, neighborhood, profession, and creed,” as well as the positive legal rights upholding these alternate forms of existence from those of the “laws of the market.”

Freedom of contract, clearly, is no mere ideological veneer to be swatted aside with empirical unmasking. Its legal instantiation converts the fiction of the self-regulating market into a reality. Before worker and owner negotiate a labor contract, mechanisms of legal predistribution must “annihilate” all alternative nonmarket means of survival. Political economy’s Ricardian prescription for a labor market required constantly generating “a flow of human lives the supply of which [is] regulated by the amount of food put at their disposal” (*GT*, 172). But whereas Marx ([1867] 1992) conceptualized this as a process of proletarianization by which rural artisans were robbed of their means of production, Polanyi framed it as the “smashing up of social structures to extract the element of labor from them.” By itself, inflicting hunger was insufficient. To make hunger do the commodifying work, “it was necessary [first] to liquidate organic society, *which refused to let the individual starve*” (*GT*, 172-173, italics added).

In short, men and women had to be coerced to be free by law if they were to contract from a position of having no alternative; hence the “smashing up” of nonmarket associational ties. The use of law is necessary because these nonmarket organizations are not primarily held together by sentiment, but by statutory laws and rights with centuries of codification, community buy-in, and legal enforcement (Somers 1993; 1994). In practice, the work of commodifying labor requires deploying all the mechanisms of legal predistribution—taking away and reallocating rights, using state-backed coercion and the violence of hunger, using law to create commodity value, and devolving the resources of public law into a private legal arsenal held by property holders and employers.

An example of how English working people were robbed of property in their own skills is the destruction of the apprenticeship rules embodied in the 1563 Statute of Artificers. Lacking formal guilds in the countryside, in the sixteenth through eighteenth centuries rural-industrial textile workers used the apprenticeship clauses of this statute to create proto-unions of skilled weavers. Because this guild-like association of working families was technically a “property,” skills (“misteries”) possessed by associations of spinners and weavers were held—and legally protected—as property rights (Somers 1995a). Controlling through apprenticeship laws the rights of entry to the property served to exclude the unapprenticed, who drove wages down below subsistence and undermined community. Determined to undercut these nonmarket forms of property, however, Parliament destroyed the rights that recognized them with the 1813/14 Repeal of the Statute of Artificers. The repeal introduced a

new regime of “free agency,” turning rights-bearing citizens into rightless subjects “freely” available for entering a labor contract (Rule 1986; 1987). By ripping away the public and associational foundations of property rights, the Lockean concept of property became hegemonic (Somers 1995b).

Another, more familiar instance of legal predistribution in English history is the 1834 Poor Law Amendment Act (New Poor Law [NPL]), which dismantled the centuries-old system of poor relief and instantiated a carceral system of forced labor as the alternative to starvation (*GT*, 82-88, 143-46; Somers and Block 2005). The NPL is commonly described as creating a free labor market by disembedding labor from an archaic system of protective welfare and restoring labor relations to their prepolitical state. But liquidating the right to live in the face of unforeseen harvest scarcity, unemployment, and economic insecurity did not create a free labor market. It merely eliminated the old institutional arrangements and substituted a *new* set of coercive institutions designed to compel the unemployed to be responsive to the signals of the market by threat of incarceration—a classic example not of deregulating, but of *reregulating* through legal predistributive engineering (*GT*, 73-88, 106, 112, 122, 143-46, 174, 181; Block and Somers 2014, 114-92).⁵⁸

Polanyi mocks the description of this coercive, indeed violent work as “noninterference.” Refusing to characterize these activities as state intervention, he argues, shows clearly classical political economy’s “preference” for one kind of interference over another or, put slightly differently, the willingness to use the state to effect one economic outcome rather than another:

The economic liberal can, therefore, without any inconsistency call upon the state to use the force of law; he can even appeal to the violent forces of civil war to set up the preconditions of a self-regulating market. . . The accusation of interventionism on the part of liberal writers is thus an empty slogan, implying the denunciation of one and the same set of actions according to whether they happen to approve of them or not . . . the behavior of liberals themselves proved that the maintenance of freedom of trade—in our terms, of a self-regulating market—far from excluding intervention, in effect, demanded such action, and that *liberals themselves regularly called for compulsory action on the part of the state.* (*GT*, 155-57, italics added)⁵⁹

Polanyi thus shows how what is treated by law as a transaction between equal free agents is actually the result of previous coercion implemented by law.⁶⁰ The result is that the state and the law are not external forces of interference, but are inside the contract, where they create durable imbalances of power. Freedom of contract works as ideational balm, while it facilitates the legal predistributive engineering of humans into commodities and sustains their market powerlessness. With this Polanyi not only explains the contractual source of suffering, but also shows how commodification and contract are sources of unfreedom.

Law, in short, is at the very center of a predistributive political economy because law is what constitutes economies and markets in the first place. As David Grewal puts it most concisely, “capitalism is

⁵⁸ On the parallel between the making and meaning of the NPL and Clinton’s 1996 Welfare Reform Bill, see Somers and Block (2005).

⁵⁹ It is a point echoed by Pistor (2019, 205): “Capital is inextricably linked to law and state power, because in its absence, the legal privileges capital enjoys would not be respected by others.”

⁶⁰ This account of the labor contract is of course only half the story; the other half is the disproportionate power that predistributive law grants to employers through the property regime, as the Legal Realists emphasized.

fundamentally a legal ordering” (Grewal 2014, 652), a theme echoed by Katerina Pistor (2019, 205) who writes “capital rules, and it rules by law.” Polanyi’s analysis of law as the mechanism of fictitious commodification, without which there could be no market economy, is the hallmark of his approach to law and political economy.

D. *Predistributive Dedemocratization*

So far, I have reviewed three themes of a Polyanian political economy: (1) his analysis of the bifurcation between a political economy of market naturalism and an institutionalized economic infrastructure; (2) the dominant legal construct of market justice and its dictates for a political economic order; and (3) the institutional arrangements and legal redistributive mechanisms that organize the “actually existing” market economy, especially through fictitious commodification. In this last section I turn to the fourth of the Polyanian themes I am highlighting, that of *predistributive dedemocratization*.

We have seen how market justice bestows moral privilege on market outcomes based on their alleged neutrality, voluntarism, and freedom from power and human bias. Institutionalism and legal predistribution, by contrast, make clear that whether we’re speaking of nineteenth and early twentieth-century laissez-faire capitalism or today’s neoliberalism, fidelity to freedom *from* power in the market has always been a myth and a mystification. Where the professed desideratum of a world without political power *is* accurate, however, is when it comes to democracy: *Freedom from the power of democracy* has been the constant aspiration of capitalism from its inception.⁶¹

Freedom from democracy is institutionalized through *predistributive dedemocratization*, which uses the powers of predistribution to exclude from the entitlements of democratic citizenship the right to influence our collective livelihoods. The logic of market justice, recall, made popular sovereignty a mortal and moral threat to property, and so dictated criminalizing and then radically constricting popular governance to that of a “market-conforming democracy.” But to truly contain the threat purportedly posed by the pitchforked masses and to prevent democratic “contamination” of market processes required deeper structures of power indemnifying property against the mobocracy. Although capitalism’s long history of repressing democratic forces in the public sphere (property requirements, gender exclusion, voter suppression and violence, Jim Crow laws) has always been the more conspicuous, predistributive dedemocratization is more effective as it hardwires—and naturalizes—dedemocratization into the heart of the market and bars ordinary citizens from exercising democratic powers over the economic forces that dominate their lives.

Like other forms of legal predistribution, dedemocratization and the restrictions of market-conforming democracy are difficult to recognize, as they have been so normalized as part of a free-market society that excluding citizens from having a voice in their own livelihoods appears to be simply in the nature of things. From the outset, the founders of the US designed it to institutionalize, and naturalize, a Rubicon-like divide between the economy and the polity, to structurally depoliticize the economy by isolating it from constitutional jurisdiction, and to give to a limited sector of the population free rein only insofar as their citizen activities did not intrude into the autonomy of markets

⁶¹ In a disturbing new book, Slobodian (2023) documents just how successful global “ultracapitalists” have already been in escaping the controls of democratic government and national oversight altogether by establishing legal enclaves throughout the world where capitalism without democracy thrives.

or threaten the sanctity of property.⁶² Thanks to the self-evidentiary status of natural rights, constructing what Polanyi called the “only legally grounded market society in the world” appeared not as an act of affirmative power, but as if dividing up and protecting market processes from citizens was simply *naming* what was *already given in nature*. As a result of this constitutional Rubicon, and notwithstanding an early white male franchise, even citizens with political rights were effectively powerless against the power of owners and employers (*GT*, 234). By protecting property from jurisdictional power, and underwriting it in the labor contract, predistributive dedemocratization constitutionally prohibits labor and popular democratic constituencies from intruding on property rights.⁶³ And as Nice (2012) has historically substantiated, the flip side of protecting the rights of capital is the Supreme Court’s disrespect for the constitutional rights of the poor.⁶⁴

Predistributive dedemocratization thus gives institutional heft to market justice’s normative injunction against efforts to subject economic life to democratic influence. It transforms ideational precepts about what constitutes moral worth, legitimate citizenship, and the imperative of democratic restraint into brute legal force and workplace domination. Under the rule of judicial review, the American judiciary has repeatedly entrenched predistributive dedemocratization by negating legislative attempts to contest the power embodied in private property rights and freedom of contract ideology. In the early twentieth century *Lochner* era, the Supreme Court notoriously and repeatedly struck down, in the name of freedom of contract, legislation that aimed to expand and protect the rights of workers and to rebalance the asymmetry of power between labor and capital.⁶⁵ These rulings could be viewed narrowly as cases of control over labor by property. But they should be seen more broadly as engaging and defanging the democratic rights of citizens to exercise any power in the sites of production. The powerful legacy of the *Lochner* era meant that it took years before New Deal economic policies were able to survive constitutional scrutiny, finally achieving in 1935 the National Labor Relations Act (creating the right to form unions) and in 1938 the Fair Labor Standards Act (creating federal minimum wage and maximum hours standards).⁶⁶ Yet despite these successful economic victories in the 1930s and 40s, and later landmark civil rights victories under the Warren Court in the 1950s and 1960s, since the 1970s we have seen the full-blown return of a neo-Lochnerian “juristocracy” that polices with an iron fist the structural constraints of a market-conforming democracy, not merely thwarting democratic efforts at regulation but also making creative use of unrelated constitutional rights to undermine the democratizing power of unions (Purdy 2015; 2018a; 2018b; Cohen 2020; Moyn 2020; Doerfler and Moyn 2020).

Thanks to the predistributive dedemocratizing work of freedom of contract, employees are not the rights-bearing citizens of abstract democratic ideals but are rightless fictitious commodities who can

⁶² See Nedelsky (1990a; 1990b) for further elaboration on how the US Constitution was designed to structurally depoliticize the economy.

⁶³ But see Konczal (2021), who argues that from the start the American republic tried to free citizens from subjection to the market through such practices as giveaways of land, and Fishkin and Forbath (2022), who argue that the Constitution should be reread as building “anti-oligarchy” into its foundational political economy.

⁶⁴ Thanks to Angela Harris for reminding me of this perverse symmetry in constitutional structure.

⁶⁵ See *Lochner v. New York*, 198 U.S. 45 (1905); Goluboff (2007); Zumbansen (2012); Sunstein (1987). In *Adair v. United States*, 208 U.S. 161, 174-76 (1908), Justice Harlan supported firing a worker for joining a union, stating that “the employer and the employee have equality of right, any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land” (cited in Bagenstos 2020, 4).

⁶⁶ Nonetheless, Roosevelt’s New Deal incorporated racially inflected legal predistribution to exclude African American workers, thus weakening this potentially decommodifying project. See Fishkin and Forbath (2014; 2022); Katznelson (2013).

be prohibited from expressing opinions—whether at home or at work—about the conditions and practices that dominate their lives and livelihoods. Legal predistribution thus makes the workplace a *private government* and the ultimate site of dedemocratization (Anderson 2017, 54). With legally orchestrated rightlessness in the workplace, predistributive dedemocratization turns citizenship into a frail concept, cleaved at the point where the public sphere crosses into the private.

Privatization of public goods is another mechanism of predistributive dedemocratization. At first blush this may not appear to be a strategy directly related to dedemocratization. But public goods and social insurance programs have been targeted relentlessly by neoliberalism because they are the most direct conduits to the status of social rights-bearing citizens (Somers 2017). For every right attached to a public good there is a correlative duty of the state to be responsive. It is here that the predistributive agenda joins hands with public choice ideology's attack on democracy for its dangerously politicizing the economy. It is precisely because the rights attached to the social state are instruments of democratic empowerment with the potential to break through that firewall that rights-claims and distributional political demands are deemed irresponsible and excessive, and increasingly subject to suppression. The imperative is to depoliticize distributive allocations in favor of efficiency-driven decision metrics. Rights, after all—however treated as individual possessions—are themselves nothing less than public goods.

So while we have been told for years that dismantling the social state is required for market efficiency, time has revealed that these privatizations are efficient only as facilitating vectors of dedemocratization and the nullification of rights. When public goods and social provisioning disappear through austerity or privatization, they are removed from the public sphere of democratic accountability and the rights attached to them are de facto nullified. When, for example, a public school becomes a charter school, the public no longer has a say in its operations (despite its continued public funding), because it has been removed from the public sphere of democratic transparency and moved into the private zone of dedemocratized indemnity. Privatization shuts down efforts to influence the distribution of social necessities and silences democratic voices for violating the firewall between market efficiency and politics (Somers 2017; Farrell 2018). Previously empowered citizens are pushed into the category of needs-driven supplicants, no longer legitimate participants in debates over distributional equity. Starving the social state and attacking the economic viability of social insurance converts democratic claims into threats to the nation's economic health, rather than as legitimate exercises of citizenship. Instead, good citizenship gets redefined as the *restraint* of rights-claims upon an ever more depleted public fisc. The building blocks of a potential countermovement—the democratic practices that serve as channels of influence in contestations of economic distribution in the public sphere—are thus summarily dissolved, allowing the upward redistribution of wealth and income to occur unimpeded by what J.K. Galbraith (1954) famously called “countervailing power.”

Rather than just the effect of the outsized political clout of economic elites, these developments demonstrate that the powers of predistributive dedemocratization are engineered into the infrastructure of property, contract, and labor relations. This is evident in the immense political and structural empowerment of corporations, especially pronounced in *Citizens United v. FEC*, 558 U.S. 310 (2010), and other cases in which the Supreme Court has repeatedly awarded personal constitutional rights to corporations and equated political donations with free speech. By historicizing and focusing on the public and socialized nature of the corporation, Ciepley (2020; 2013) gives empirical confirmation of the predistributive source of this corporate power. It is easy to forget that the corporation is not actually a private entity but is legally chartered by the state (Knight 2022). Even in a corporate-dominated economy not stockholders but the “sovereignty of public authority” is the

ultimate owner, which should—but does not—include workers, consumers, the community, and the environment in its decision-making processes (see Kapczynski 2020; Crouch 2011; Black and Carbone 2015 on how corporate power dominates the polity and the economy under neoliberalism).

Central banks are another means by which dedemocratization is hardwired into the heart of the political and economic order. The outsized authority of the American Federal Reserve is virtually uncontested because of its independence from—and unaccountability to—the legislature and public sphere. Unimpeded by democratic voices, it sets interest rates based on its singular focus on low inflation, which is guaranteed to keep unemployment rates high and labor’s bargaining power low and so facilitates inequality (Jordan 2017). Financialization of the economy more generally is also a critical aspect of redistributive dedemocratization, as the state is the primary driver in the shift of economic power from the manufacturing economy to the “paper” one (Krippner 2011). Thus Hockett and Omarova (2017, 1147) write:

At its core, the modern financial system is effectively a public-private partnership that is most accurately . . . interpreted as a franchise arrangement. Pursuant to this arrangement, the sovereign public, as franchisor, effectively licenses private financial institutions, as franchisees, to dispense a vital and indefinitely extensible public resource: the sovereign’s full faith and credit.

Predistributive dedemocratization has also been the very essence of the global economy. Fashioned to scale up to the global level the allegedly self-regulating capacities of the domestic market, the gold standard, which prevented national social democratic reforms in the 1930s, has given way to such bodies as the WTO, GATT, the IMF, the World Bank, and international treaties—all of which perform the same antidemocratic work as did the gold standard decades earlier. In the absence of any comparable global political bodies, these institutions of global capital are even more cloistered from democratic input than are national markets, while at the same time legally enabled through trade tribunals to impose policies and mandates to override democratically elected national legislative bodies. This is especially true in how the IMF and the World Bank are able to leverage the power of debt to impose austerity upon the global South, thwarting those nations’ attempts to protect their own national interests and forcing them to subordinate environmental and social policies to debt reduction (Gonzalez 2002; 2019; Kuttner 2015). In an especially devastating case, the *New York Times* recently documented how these global institutions of capital have used Barbados’ debt to prevent it from protecting its citizens and land from climate change (Lustgarten 2022). (On the suppression of democratic preferences and national regulations by global trade agreements, see also Block 2018; Kuttner 2018; Streeck 2014; Slobodian 2018; Adkins and Grewal 2016; Block and Somers 2014; Anghie 2007; Thomas 2000).

III. After Denaturalization: Deconstructing the Diktats of Market Justice

What are the political implications of these Polanyian themes for our understanding of inequality and the threat to democracy? First is the urgency of recognizing the presence and the power of the market-driven moral economy to shape our political economic order, even while it misdirects our attention away from power and coercion. From its inception, market justice was designed to assuage the conscience by explaining the brutalities of social exclusion and inequality as the unimpeachable and unbiased judgment of natural market forces. At the close of *GT*, Polanyi expresses this poignantly by

recounting the moral superiority and the smug indifference so often expressed toward the suffering of the unemployed in the 1930s:

Neither voters, nor owners, neither producers, nor consumers [felt they] could be held responsible for such *brutal restrictions of freedom* as were involved in the occurrence of unemployment and destitution. Any decent individual could imagine himself free from all responsibility for acts of compulsion on the part of a state which he, personally, rejected; or for economic suffering in society from which he, personally, had not benefited. He was “paying his way,” was “in nobody’s debt” ... His *lack of responsibility* for them seemed so evident that he *denied their reality* in the name of his freedom. (GT, 266, italics added, quotations in original)

Polanyi here captures the self-righteousness—expressed in the language of personal responsibility, individual merit, and self-reliance—that allocates moral worth, blame, and responsibility according to the code of market justice and the myth of the stateless market. Regulated by the allegedly moral neutrality of marginal productivity, unemployment and social exclusion can only reflect merit and desert. “Paying one’s own way” and being in “nobody’s debt” put one beyond both moral reproach and responsibility for others’ suffering. After all, if market justice makes unemployment and destitution the effect not of shared fate and social conditions but of moral deficits and nature’s preferences, then our own good luck reflects our superior capacities, extraordinary productivity, and moral character.

But then, with surgical precision, Polanyi tears away the veil of self-satisfaction: Look closer and we’ll see that market justice is a “false Utopia” as it is in fact driven by underlying mechanisms of power and coercion:

Liberal economy gave a false direction to our ideals. It seemed to approximate the fulfillment of intrinsically Utopian expectations. *No society is possible in which power and compulsion are absent, nor a world in which force has no function.* Vision was limited by the market which “fragmented” life into the producers’ sector that ended when his product reached the market, and the sector of the consumer for whom all goods sprang from the market. The one derived his income “freely” from the market, the other spent it “freely” there. Society as a whole remained invisible. The *power of the state* was of no account since the *less its power, the smoother the market mechanism would function.* (GT, 266, italics added, quotations in original)⁶⁷

This is the second implication of Polanyi’s denaturalizing political economy: The “power of the state” makes the price mechanism not a neutral regulator but a product of the law’s allocation of rights and capacities, just as the legally sanctioned maldistribution of bargaining power between workers and employers undermines the meritocratic claims of marginal productivity theory. The fairness, worth, and desert attributed to market distributions are reflections of power and coercion hidden under the neutral protective cover of “natural” market forces. Social exclusion and inequality are problems of domination and unfreedom (Rahman 2016a).

⁶⁷ Thanks to David Woodruff (2014) for reminding me of the importance of these paragraphs for my analysis.

These two lessons—the power of market justice to morally justify suffering, and the revelation that power, not market naturalism, drives the actual market economy—impel us to ask, Where does the unmasking and denaturalizing of the economy leave the dictates and imperatives of market justice?

A. *Inequality and Social Exclusion Revisited*

From its inception in the eighteenth century, market justice vindicated inequality because income distribution is controlled by “natural law.” Today, more than two centuries later, decades of rising inequality have likewise been explained by so-called objective market forces—globalization, automation, and technology—combined with the voluntaristic self-congratulatory language of meritocracy that Polanyi derided in the 1930s. Just as Polanyi disposed handily of it in his time, a comparative international glance refutes it in ours: No advanced country comes even close to the levels of US inequality (see Alvaredo et al. 2018; Vogel 2021, 280-282; World Inequality Lab 2022). It is not globalization that has driven up the enormous fortunes of Tesla, Big Pharma, and the top .01 percent but, among other things, government-granted patent and copyright monopolies (Baker 2016; Baker 2018; Pistor 2019; 2020; Kapczynski 2014). Market justice would have us believe that oligopolies are so profitable and CEOs so overpaid because they are superbly managed, but the reality is that predistribution, not meritocracy, are at the root of these concentrations of wealth. These heightened profits reflect neoliberal rules and policies that facilitate monopolies and oligopolies in the name of “consumer welfare” (Crouch 2011; Khan and Vaheesan 2017; Rahman 2016a; 2016b).

If the alarmist cries of the 1970s about the perils to capitalism of an “excess of democracy” had any credibility, moreover, the preceding decades should have been years of stagnation. Instead, as is well known, the *trentes glorieuses* produced not only high growth rates, but years of relatively greater equality.⁶⁸ By contrast, over the recent decades of neoliberalism, almost every additional penny of growth has accrued to the top 0.01 percent, leaving workers unremunerated for their productivity gains.⁶⁹ Not innocent property owners, but the public fisc is the real prey in the market/democracy relationship (Baker 2016; Streeck 2014; 2016; Hacker and Pierson 2010; 2020; Gilens and Page 2014; Teles 2015).

The end of market naturalism should put an end to the belief that it is robots and automation that have caused 40 years of stagnating wages. Rather, it is the asymmetries of power inside the workplace, including both the unequal initial endowments that market participants bring to labor contracts and the rules of absolute dominion—“employment at will”—those contracts enforce (Economic Policy Institute 2020; Bagenstos 2020; Anderson 2017). These are policies and laws that, under the formalist illusion of the free labor contract, overwhelmingly endow employers and high-level managers with vastly disproportionate power, while simultaneously restricting and constricting the rights and freedoms of the citizenry qua workers, both inside and outside the workplace (Anderson 2017; Purdy 2018a; Vogel 2021, 286-288). The specious doctrine of equal bargaining power⁷⁰ in labor law has provided cover for the courts to prohibit collective labour litigation, while it has weaponized the First

⁶⁸ But see note 5 above for the caveat on the inequality of racialized capitalism even during this so-called golden age.

⁶⁹ Recent estimates suggest that the annual sum that has shifted from workers to owners now tops \$1 trillion. Every American worker who is not in the top 10 per cent of the income ladder is in effect sending an annual check for \$12,000 to a richer person in the top ten percent (*New York Times* 2020). The World Inequality Lab’s 2018 report reveals that the global top 1 percent of wage earners captured twice as much economic growth as the bottom 50 percent between 1980 and 2016. See note 28 above on the recent RAND study on upward redistribution.

⁷⁰ On the deadly effects of the doctrine of equal bargaining power in labor law, see Bagenstos (2020) and EPI (2020).

Amendment to weaken and undermine unions (see *Janus v. AFSCME*, 585 U.S. – (2018); Purdy 2018b; Tebbe 2020). A significant measure of radical inequality today can be attributed to the anti-union judicial rulings that today’s neo-Lochnerian juristocracy can count among its most shameful redistributive achievements (Cohen 2020; Vogel 2021; Summers 2020; Western and Rosenfeld 2011).⁷¹

In short, it is redistributive political and judicial engineering that has orchestrated the massive upward redistribution of wealth and income in the US since the 1970s (Saez and Zucman 2021; Baker 2016; Whitehouse 2020). One financial commentator put it perhaps most felicitously: Capitalism was “painstakingly built not by invisible hands but by the invisible pens of lawyers and judges that created over time broader and bolder property rights that are ultimately enforced by the power of the state. . . It is not to the strong, or the swift, or the wise that the victory belongs, but to the one with the best lawyer” (Nutting 2019, n.p.).

B. *Revisiting Redistribution as Theft and Democracy as Threat*

Recall that after justifying inequality and social exclusion, the second and third diktats of market justice are that redistribution is theft and that democracy is a mortal threat to property, justice, and prosperity. What becomes of these two diktats once institutionalism and predistribution undermine market justice’s naturalist foundations?

To answer, it is worth revisiting and historicizing the transition from the New Deal through Great Society interlude in the US to today’s accelerating drive toward dedemocratization.⁷² It was during this relatively egalitarian interregnum of social citizenship⁷³ that the once seemingly impenetrable wall between market and politics was challenged by redistributive and progressive tax policies (Piketty 2014). But the brief success of these social democratic policies and laws represented a far greater challenge to the dedemocratizing project than a singular focus on the burdens of welfare state/redistributive taxation would suggest. Social citizenship, however limited in the US, was an achievement of expanded rights, and its institutionalization created new democratic rights bearers (Simon 1986). Public goods and social entitlements, after all, do much more than offer goods and services. They create rights-bearing citizens who have legal claims on the state and are, in principle, entitled to full social inclusion as social, political, and moral equals, regardless of market value—the right to have rights, as I have argued elsewhere (Somers 2008; see also Rahman 2018; Marshall 1950). Rather, it makes social citizenship and redistributive justice causal instruments in the expansion of a democratic citizenry, now critical actors in a set of new institutional arrangements that at least to some degree subject market outcomes to greater democratic influence (Somers and Roberts 2008). The rights attached to public goods are thus contingent on the ability of a democratic citizenry not merely to make claims on goods and social services, but to expand the institutional foundations of rights as public goods.

⁷¹ Even Lawrence Summers (2020), Stansbury and Summers (2020), and Summers and Stansbury (2020) now argue that strengthening the countervailing power of unions is the “central and urgent priority” for combating inequality.

⁷² Several of the following paragraphs are adapted from Somers (2022).

⁷³ I use Marshall’s (1950) term of social citizenship in its aspirational sense, fully cognizant that in the US racial apartheid and social exclusion render it hollow as an empirical concept. See note 5 above.

And expand they did: In the US the movements of the 1950s, 1960s, and 1970s for civil rights, for voting rights, for expanded welfare rights, women's rights, union rights, social insurance, student rights, and sexual rights—all were built on existing New Deal/Great Society foundations. Social citizenship was beginning to threaten the work of redistributive dedemocratization.

Neoliberalism set about reversing this in the 1970s. Political economy, market naturalism, and market justice were once again deployed to displace and delegitimize the forces of popular sovereignty. The crisis of stagflation provided an opening to target social rights-bearers as the sources of economic crisis. Key agents in this attack were the “economic theory of governance” with its mandate to put “democracy in chains” (Buchanan 2000; MacLean 2017), and Chicago's Law and Economics, which trained lawyers in the dangers to efficiency and growth posed by distributional claims and antitrust concerns (McCluskey 2003; Britton-Purdy et al. 2020). An artificially induced moral panic made it clear: Rights claims had to be abated for the sake of the nation's economic health.

Dedemocratization, however, is not on its face popular. Protecting the nation's prosperity from the “predatory” poor and “unworthy” and not taking from the “deserving” and giving to the “undeserving”—these are popular. Hence dedemocratization expressed itself in not so coded attacks on “welfare queens” in the name of market justice's moral economy (Somers 2022). Its weaponization was threefold. First, relying on the epistemics of market naturalism and everyday libertarianism, it targeted redistribution as violating just deserts and meritocracy (marginal productivity theory) and, in turn, as threatening market growth and efficiency. Second, it named redistribution as a perverse moral hazard undermining the critical market signals (hunger) that drive people to work (Baker 1996; Pauly 1968). And third, it turned its ire on one narrow class of welfare beneficiaries: Hardworking taxpayers (implicitly white) were being robbed of their fair earnings solely to provide for the needs of undeserving (nonwhite) “takers” (Somers and Block 2005; Hacker 2019).

That these attacks were triggered by the expansion of political rights and an emboldened multiracial citizenry is blindingly obvious in retrospect. But because in the 1980s and 1990s, neoliberal rhetoric was not of dedemocratization, authoritarianism, and right-wing populism but of the “culture of dependency,” of the need to privatize public goods and social services through massive spending cutbacks, and of welfare relief “incentivizing lazy welfare queens,” it was hard to discern that underlying this familiar Reagan/Thatcher rhetoric was a deeper drive for the nullification of democratic citizenship across the board.

The language of market justice and the moral crusade against welfare dependency gave cover to the dedemocratizing citizenship project, as it did not attack people for exercising their rights but for violating the moral rules of market justice and the “personal responsibility” of virtuous citizenship. Even this was often done obliquely: The “welfare cheats” were said to be incentivized to commit moral violations by the perverse structure of misplaced compassion. Welfare was the cause, not the consequence, of unemployment and need, thus making it imperative to eliminate the moral hazard and the perversity entailed in social rights (Somers and Block 2005; Baker 1996; Pauly 1968). Critical to this process was removing rights to social services and even social insurance: One of the first blows levied against social citizenship was a Supreme Court ruling in 1960 declaring that even Social Security

was not constitutionally protected as a right (Simon 1986).⁷⁴ An enfeebled social sector stripped of rights facilitates an enfeebled citizenry (Rahman 2018; Somers 2017).

Finally, in a direct link between then and now, the attack on welfare in the 1980s and 1990s laid the ground for naming whole swaths of the (Black) population as criminalized rights claimants whose entitlement to vote threatens the polity today.⁷⁵ In the US, white supremacy and 400 years of racial exclusion easily transformed yesterday's "welfare queens"—already robbed of their moral worth and their right to be recognized as moral equals—into today's accused voting cheats. It explains the alarming speed by which the democratic rights of communities of color (not only Black, but also Latino, Asian, and Native American) are now being dismantled. Populist authoritarianism colludes with reactionary state legislatures to readily use violence to disrupt, delegitimize, and criminalize institutions and procedures that facilitate the democratic citizenship of those they name as moral outlaws and threats to "real" Americans. Given the longstanding racialized social and political exclusions to which welfare beneficiaries have long been subject, the neoliberal moral economy combined in new ways old forms of racial apartheid with political economic strategies for excluding whole classes of Americans from equal membership in the polity (see Jordan and Harris 2005a; 2005b; 2011 for casebooks on how law, race, class, and gender intersect to selectively withhold economic justice and to determine who is entitled to full citizenship inclusion).⁷⁶

Market justice's problem with redistribution, it should now be clear, is not that it entails theft but that it endows rights-consciousness, whether or not codified in law. And the problem with democracy is not that the pitchforked masses will rapaciously plunder wealth and property, but that it emboldens citizens to participate in their own economic fates. In response, neoliberalism bulldozed through the postwar settlement in a pattern of warfare so asymmetrical that it prompted Warren Buffet, the fourth-wealthiest person on earth, to tell the *New York Times* in 2006: "There's class warfare, all right, but it's my class, the rich class, that's making war, and we're winning."⁷⁷ In the US, as I've argued above, much of this was accomplished through the union-destroying rulings of the neo-Lochnerian juristocracy. It was also a triumph of breaking up working-class solidarities, especially by mobilizing race and gender differences and grafting them onto the division between public and private unions. But at stake in union-busting is much more than a strategy of upward income redistribution. Unions are critical vectors of democratization; absent unions, the participatory voices of working people are demonstratively silenced. By destroying unions, predistributive dedemocratization further excludes the citizenry from its democratic potential.

In short, decades of predistributive dedemocratization have rendered cynical the continuing narrative of property needing to protect itself from the chronic menace of a democratic mobocracy. Instead, as we have seen, predistributive dedemocratization has institutionalized structural barriers deep inside the market economy to completely bar the citizenry from coming anywhere near the propertied elite and their wealth. From the constitutional firewall between politics and property, to the prohibition of workers' voices in "private governments," to the judicial support of monopoly and monopsony, to

⁷⁴ *Flemming v. Nestor*, 363 U.S. 603 (1960).

⁷⁵ To wit, Florida's Gov. DeSantis's newly formed "election police force" has been arresting African Americans for "illegally" voting, despite their having been sent voter registration cards.

⁷⁶ The tragedy of Hurricane Katrina in which thousands of Black Americans were abandoned to perish can be explained by this same dynamic (Somers 2008, ch. 2).

⁷⁷ <https://www.forbes.com/profile/warren-buffett/#10fd80af4639>.

the de-democratized central banks and global financial organizations, the very idea that we suffer from “too much democracy” is risible.

History, in fact, demonstrates the reverse: It has been the refusal of capital to tolerate even the mildest of economic reforms that has precipitated not merely plutocratic control of governance, but the use of law, state power, and violence to eliminate democracy altogether. In *GT*, Polanyi argues that the triumph of fascism in Continental Europe in 1930s was triggered by an impasse between democracy and global capital—working-class-led parliamentary efforts for social protections against the privations of mass unemployment were undermined by the gold standard’s dictum against distorting national currencies through social spending. Defining the essence of fascism as using state power to save capitalism by extirpating democracy,⁷⁸ Polanyi argues that economic elites’ antagonism to democracy was so virulent that it motivated them to ally with fascists to fortify capitalist power through a strong state:

Nowhere did the liberals in fact succeed in reestablishing free enterprise, which was doomed to fail for intrinsic reasons. . . Planning, regulation, and control, which they wanted to see banned as dangers to freedom, were then employed by the confessed enemies of freedom to abolish it altogether. The victory of fascism was made practically unavoidable by the [economic] liberals’ obstruction of any reform involving planning, regulation, or control. (*GT*, 265; see also Dale 2016a)⁷⁹

Polanyi saw fascism’s triumph as but the most virulent outbreak of capitalism’s innate antidemocratic DNA, which becomes prominent whenever the calculus between more democracy and equality and less control of capital comes to the fore, as it did in the 1930s. Echoes of the calamitous fate of Europe in that era are found in the inequality and illiberal market capitalism surging throughout Europe and the US today, underlining the affinity between plutocracy and authoritarianism. Hence Stiglitz (2020, n.p.):

In America, self-interested wealthy elites who want to secure their position at the top have formed a de facto unholy alliance with extremists (including white supremacists and neo-Nazis). By manipulating the political system and supporting measures to disenfranchise and suppress voters, they have effectively replaced American democracy with minority rule.⁸⁰

⁷⁸ The irony, of course, is that Hitler saved capitalism by adopting military Keynesian policies to get Germany back to full employment with plenty of “planning, regulation, and control.” Business had looked to Hitler to rescue it, but once he acquired total power, they had little choice but to go along with his version of fascist crony capitalism, which is deeply destructive of businesses owned by “enemies of the people” or businesses that don’t follow the party line. The capitalism that Hitler “rescued” he dramatically transformed. But as Sheri Berman (2006) argues, the triumph of German fascism in the first place can be explained by the German SDP’s utter failure to undertake policies needed to rescue the population from the Great Depression. Thanks to Elizabeth Anderson for urging me to make this point.

⁷⁹ The Italian liberal socialist, Carlo Rosselli, made the same pointed critique when he wrote in *Socialismo Liberale* in 1930 (1944, 84) that when a choice had to be made between capitalism and liberalism in the 1930s “all over the world the bourgeoisies . . . are no longer necessarily liberal,” the more they try to “escape from the discipline and pattern of liberty” (cited in Katznelson 2020, 529).

⁸⁰ And as Katznelson (2020, 529) notes, it is becoming increasingly apparent today that market elites are “all too prepared to degrade constitutional liberty for the sake of economic deregulation, tax relief, and the political guardianship of ever-growing inequalities of income and wealth.”

IV. Conclusion

Samuel Moyn (2014, 50) recently observed that “behind the appearance of ‘necessities of the social world’ are contingent effects of legal rules and legal choices.” He could hardly have better captured the essence—and the challenge—of Polanyi’s denaturalizing institutionalism. Because the diktats of market justice take cover under naturalistic “necessities”—today taking the names of inflation, deficit reduction, and deregulated markets—it is very difficult to discern the contingent rule-driven coercions and acts of legal predistribution behind the social facticity and legal construct of market justice. Paradoxically, the opposite is also true: Despite its insulation from political contestation (Hacker et al. 2022) and its seeming invisibility, market governance nonetheless operates in plain sight. Deploying political engineering to reorganize the economy by seizing and repurposing law and state power under the guise of returning to the free market is market capitalism’s singular achievement (Somers 2018; 2021). Enforced arbitration clauses, intellectual property and patent laws, anti-union rulings, monopoly-making mergers, etc. all take place in open legislative and judicial arenas. Yet an alchemy of misdirection convinces us, despite clear evidence to the contrary, that we are seeing free markets and small government at work. What makes Polanyi’s institutionalism unique is that he treats both dimensions—the ideational and the institutional, the appearance of free markets and the actuality of legal predistribution—as equal parts of a holistic political order. He shows us that both have causal powers and empirical effects. Since neither by itself will sufficiently explain the social world, attention must be paid equally.

Thinking through the crises of inequality and dedemocratization through this Polanyi-inspired method requires historicizing conceptual categories and instruments (McDonald 1996). Market justice was born under the false flag of nature and the myth of the stateless market, which gave it the patina of being unencumbered by the arbitrary passions of power. Classical political economy then usurped from governmental rule of law the role of unbiased arbiter of social fate and bestowed the role of righteous adjudicator to markets instead. This produced a political economy of moral worth that grafted stigmatizing blame onto the pain of exclusion, and self-congratulatory praise onto the comfort of wealth. Finally, in the name of property rights and freedom of contract, the upstart new moral economy mandated indemnifying the zone of market freedoms against the untrustworthiness of popular sovereignty.

Institutionalism and redistributive analysis are denaturalizing solvents; they strip away the naturalism and expose market justice as empirically and morally bankrupt. Today’s crises can be traced to an overly powerful juristocracy, the wrongful extraction of social wealth and public investment, and the structural processes of dedemocratization. Polanyi certainly didn’t have all the answers to today’s crises, but without his voice it is almost impossible to imagine that such concepts as legal predistribution and the fictitious commodification of humans and nature could have been formulated. Identifying these Polanyi-inflected principles is indispensable to explaining what is driving extreme social exclusion and dedemocratization today.

Marguerite Mendell, a long-time scholar of Polanyi’s work and life, characterizes his life’s project as aiming for “instituted processes of economic democratization” (Mendell 2003, 7). This can be parsed into three general themes for a new democratic political economy, all revolving around the stipulation that the currency of markets is power. First, we must rethink political economy through a historicized institutionalism that captures its interdependent moral and structural forms. Second, we must put concepts of justice, law, and legal predistribution at the center of economic analysis, thus dissolving

the fictitious binary between a nonpolitical neutral economy and coercive political and legal powers. Third, we must build a political economy oriented toward a *predistributive democracy* by reverse-engineering the dedemocratization built into the market, especially the market-conforming restrictions on popular sovereignty and the nullification of democratic citizenship rights.

This article has probed the first two of these principles. In the companion article to follow, I put Polanyi and Piketty into conversation and explore the aspirational meaning of the third—a predistributive democracy.

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