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CHAPTER 6

THE ENDS OF LAW

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Structure and Legitimation in Social Relations: The Role of Law

On October 26, 2020, one week before the US presidential election, Senate Majority Leader Mitch McConnell led the Senate to confirm Amy Coney Barrett as Associate Justice of the Supreme Court. This move followed his refusal to permit Barack Obama to appoint a replacement for Justice Antonin Scalia with 293 days to go before the 2016 election. McConnell's ruthless efficiency concluded a process that began when the newly elected Richard Nixon and his Attorney General John Mitchell used information from the IRS and FBI to pressure Justice Abe Fortas to leave the Supreme Court in 1969¹ while Gerald Ford as Minority Leader in the House tried to impeach Justice William O. Douglas on baseless corruption charges,² one that was systematized by Ronald Reagan and his attorney general, Edwin Meese.³ The new Supreme Court majority is poised to pursue the program that has guided Republican judicial appointments strategy for half a century: reversal of the civil rights revolution of the 1960s and shrinking federal power to manage the economy. The election of Joe Biden a week after Coney Barrett's confirmation coupled with a progressive shift in Democratic Party politics on the economy, racial justice, and climate action have set up the coming two decades as a period of conflict between the federal courts and the democratically elected governments of the United States and several of the larger, urbanized states. By the end of its first term, the McConnell Court had restricted the power of the federal government to prevent states from suppressing voting by Black and other voters of color,⁴ and invented a new federal common law constitutional property right to overturn a half-century old California labor law designed to protect migrant farm workers, as Chief Justice John Roberts triumphantly dismissed dissenting arguments that "bear the sound of Old, unhappy far-off things, and battles long ago."⁵ In the midst of the Second Gilded Age, the United States is poised to repeat the decades-long battle that marked the first Gilded Age—over the role of law, and of unelected judges in particular, in democratic market society.

"What are the ends of law?" is primarily a question of social function: What role does law play in modern market societies? Law is one of the primary systems societies use to structure social relations: of production in the economy, of authority in the polity, of reproduction in kinship, and of meaning-making in culture.⁶ Law structures social relations functionally and symbolically. Functionally, it serves both coercion and coordination functions. First, it shapes social expectations about the use of legitimate

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violence. This is Holmes's "bad man" theory of law, or Weber's monopoly over the legitimate use of force. In this sense, law defines the background expectations that well-socialized actors come with into social relations about what they can or cannot do to and with each other in those relations without triggering a response from whoever has the power to coerce a change in their relations through the exercise or threat of violence experienced as legitimate by well-socialized actors, in the society in which the law is law. Second, law codifies and communicates expectations about patterns of social relations that provide coordination points and frameworks for cooperation, as people interact with each other in the normal course of social life as people whose actions are made thereby reasonably predictable. Symbolically, law produces and communicates conceptions of how social relations ought to be, conceptions considered authoritative by most well-socialized members of the society to which it applies, and function as internalized regulation for most people most of the time: that is, as guidelines for action a person undertakes because that person has internalized that this is how they should act in a given context.

Law plays a particularly large role in structuring and legitimating social relations in capitalism, or market society, because capitalism depends, first and foremost, on disembedding social relations of production from social relations of reproduction, authority, and meaning. Only by removing the stabilizing and stifling anchors of custom, religion, and servility on the questions of who may or must work with whom, on what projects, with what resources, and who gets what can the process of continuous improvement, or of creative destruction, as Schumpeter put it in the terms we commonly use today, take flight. But this new social relation required new abstracted agents and relations, that is, individual legal subjects engaging through contracts and prices rather than as a community embedded in a shared history and narrative. Something had to be able to carry the institutional load that custom, religion, and fealty had borne in prior systems but were no longer suffered to bear. To achieve these ends, all modern societies have developed a semi-autonomous social system for the production of law.⁷ Judges, legal scholars, legislatures, regulators, and lawyers are socialized (through education and apprenticeship) in norms, practices, and relations that constitute the profession and structure and legitimate the inside of the profession as "the profession." The profession, in turn, produces outputs that structure and legitimate social relations across a broader range of domains of social life by virtue of being seen and understood in the broader society as the outputs of the profession. Judges and legal scholars play a central role in producing the major legitimating narratives of the profession over time.

In this chapter, I focus on the law as it structures and legitimates social relations of production: who must and who may work, with whom and with what resources, on what projects, designed to make and distribute how much of what we need and want, who gets what from the outputs of these efforts, and who has the power to determine the answers to these questions. In this regard, law structures both productivity and power: how well the organization of social relations in a society can transform the material and social environment it inhabits to the satisfaction of the needs and wants of its

constituents, and who has the power to shape who does what and who gets what in these relations. To answer the question of what function law plays—what the ends of law are; and how it fulfills them—and how it operates as a means to that end, I offer condensed histories of the role of law in facilitating economic transformation and increasing inequality in the two quintessential periods of growing inequality in the United States: 1873 to 1929, and 1980 to the present. In both eras, debates over legal method played a role in legitimating the positions of both pro-business and progressive judges, lawyers, and legal scholars. Both eras saw conflicts between conservative conceptions of law as a system whose purpose is to enforce relations of formal equality between individuals, legitimated by adherence to formal methods of legal analysis, where the formalism is understood to be sufficiently determinative and objective to constrain judicial discretion and insulate law from politics; and progressive conceptions of law as a system for securing justice, defined through democratic processes and legitimated through fidelity to the substantive pursuit of democratically determined goals (and, after the rights revolution of the 1960s, minority protection as a fundamental attribute of democratic society). During the first Gilded Age, these legal debates focused, from both sides, on how law structured and legitimated economic relations and the organization of the transformation of American capitalism. Throughout most of the Second Gilded Age, conservatives pushed both on social relations of production, or the ways in which law structures the economy, and on relations of reproduction and meaning-making, or identity. Progressives, however, largely abandoned their earlier focus on production, and focused on social relations of reproduction and meaning-making—particularly on combating race and gender subordination through law. The result was a long string of victories in economic law for conservatives alongside a pitched battle over questions of identity subordination, which included both major progressive victories and sustained conservative retrenchment.

After the Great Recession, after the Occupy movement, after Donald Trump's remarkable success in harnessing the white working class to his 2016 campaign, progressives once more joined the battle on the economic front, without retreating from conflict over domination and status subordination. Nowhere was this shift clearer than in the remarkable successes of Senators Bernie Sanders and Elizabeth Warren in the 2016 and 2020 Democratic primaries. As we stand at the end of the neoliberal era, we are beginning to see this shift reflected in the legal academy with the emergence of a new law and political economy movement,⁸ extending prior work on subordination but complementing it with a new focus on economic power. Still in its infancy, this movement combines critique of neoliberal jurisprudence, programmatic prescription designed to transform social relations of production in the post-neoliberal economic order, and development of the bases of legitimation within the profession necessary to stabilize these programmatic changes as a new regime. It expands the focus of progressive legal scholarship from law as the pursuit of justice along dimensions of anti-subordination or equality of opportunity, to take law as a major institutional dimension through which to directly address economic power and inequality, as well as the interactions of class, race, and gender.⁹

Structure and Legitimation in the Second Industrial Divide: 1870s–1930s

Structuring Productivity and Power: Law as Rules of Engagement

The last quarter of the nineteenth century marked the transition from Great Britain to the United States as the leading economy in the world. The first industrial revolution was built around smaller, entrepreneur-owned firms that employed a mix of male craft workers who combined a production role with a quasi-managerial role overseeing unskilled women and children.¹⁰ The 1880s in the United States saw a shift to large firms and cartels, financed by emerging financial capital, and deploying a newly emerging managerial class to oversee a more fully deskilled workforce recruited initially from immigrants, and later Black migrants from the South.¹¹ Law played a central role in enabling these organizational transformations, insulating emerging organizational forms from state regulation, constraining labor's strategies for economic struggle, and nullifying labor's political victories, while insulating firms from paying for the risks their transformation posed for others in society. In doing so, law made possible the productivity-increasing changes in transportation and manufacture while also shifting power over the distribution of gains in favor of a small oligarchic elite at the expense of the broad population of workers, farmers, and consumers. Only the decisive political victories of the New Deal shifted law toward undergirding "the Great Compression": the period during which income and wealth inequality shrank in the United States from its height in the early twentieth century.

Until the last quarter of the nineteenth century, both American and English law treated corporations as creatures of the state, created by the special grant of delimited powers upon a group of people carrying on a predefined collective purpose. As such, they were subject to broad regulatory powers. Across a range of doctrines, judges reflected and enforced a strictly limited role for corporations well into the 1880s.¹² Corporate law was to be transformed, however, as first railroads and then manufacturing firms discovered the benefits of consolidation and scale and pushed for greater freedom to combine, free of state regulation and oversight. Railroads led the transformation of American industrial organization. The sheer scale of investment underwrote the emergence of the stock market as a source of investment funds, manipulation, and corporate consolidation. The scale and geographic spread of their operations forced railroads to invent what would emerge as middle management.¹³ Railroad consolidation provided the quintessential instance of both increased productivity and increased power. A smaller number of consolidated railroads were able to ship more goods, for longer distances, more quickly and reliably. But this handful of surviving companies also gained significant power: to raise freight charges and prevail on state governors and legislatures to help them put down the most extensive efforts of labor mobilization that the United States would ever know.

The power benefits of consolidation were not lost on other industries. Between 1882 and 1889, industries from petroleum and whiskey to sugar consolidated in trusts to control prices, extract higher rents, and wield extensive political power. When some states and Congress sought to limit the trusts, corporate lawyers pushed the pliant New

Jersey legislature to create an alternative vehicle for consolidation: the 1889 New Jersey general incorporation law. Corporations flocked to reincorporate in New Jersey and pursue the price extractive practices inside corporate structures that the new law made possible.¹⁴ The capital exodus from other states forced the “race to the bottom” among states. Then, in the 1895 sugar trust case, the US Supreme Court further insulated many of these companies by ruling that the Sherman Antitrust Act could not constitutionally cover manufacturing, because it was not “commerce” within Congress’s commerce clause power.¹⁵

The dramatic increase in scale and speed of production and shipping, and the introduction of new machinery, often replacing craft workers with unskilled immigrant workers operating that machinery, was associated with a dramatic increase in workplace accidents. Although these increases were observed throughout the industrializing world, accident rates in the United States were between three to five times higher than in the UK or other Western European industrializing countries.¹⁶ The difference lay in American tort law, which insulated railroads and manufacturing firms to a greater degree than was true in the UK or Europe, enabling companies to adopt technological and organizational processes that increased profit but externalized the risk to workers and neighbors. American railroads, for example, used heavier cars over single tracks to maximize payload and minimize cost. The heavier cars required trainmen and brakemen to operate on top of and between cars, rather than, as in the UK, from safer parts of trains made of lighter cars running on double track rails. As a result, railroad workplace fatalities were 50 percent higher in the US than in the UK. Similarly unconstrained by unions or liability laws, American coal mining companies used explosives and mining architectures that were cheaper to construct but more prone to collapse than techniques used in the UK.¹⁷ It was not only workers whom American tort law forced to absorb the cost of rapid corporate expansion. In the latter part of the nineteenth century, American judges were containing the exposure of corporations to risk their activities posed to third parties as well. A critical battlefield was causation: What relation between acts of a corporation and harms in the world was sufficient to place on the corporation a duty to pay? If a spark from a railroad started a fire, was the railroad liable only for the first building set on fire? For its neighbor? To the whole neighborhood? Consistently, nineteenth-century courts answered these questions in favor of railroads and at the expense of neighbors.¹⁸

The best known sustained intervention of law in the transformation of the second industrial divide was the aggressive role that the judiciary played in weakening labor organization, both economic and political.¹⁹ In terms of economic power, judges developed the labor injunction as a widely used summary process to direct and legitimate violent suppression and imprisonment of labor organizers, outlawing broad classes of labor strategies even in states where progressive governors resisted sending their own police to break up labor action. In terms of political power, in the infamous *Lochner* era, courts leveraged judicial review of legislation to nullify labor and progressive political victories in passing labor and occupational health and safety laws. From the Great Railroad Strikes of 1877 until the passage of the Wagner Act in 1935, judges developed

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and expanded their powers to issue injunctions against a growing range of union strategies.²⁰ Civil injunctions based on private law theories or tortured interpretations of federal legislation allowed judges to circumvent the onerous requirements of criminal procedure as well as progressive governors and mayors charged with enforcing criminal law who refused to suppress labor organizers. Civil injunctions could be issued in summary process, as preliminary and temporary measures, and contempt orders against noncompliant workers could be converted into summary orders to arrest strike leaders. The result was the development of a legal framework that operated quickly, with minimal standards of proof, and enabled federal judges to call up armed support to violently suppress labor organizing.

Judges used this legal framework for deploying armed force to suppress labor repeatedly and extensively over the following decades, reaching by some estimates more than 4000 injunctions between 1880 and 1930, and by the 1920s covering about 25 percent of strikes.²¹ Consistently, American judges declared that the most effective economic weapons available to labor violated the rights of the employers, or interfered with commerce. After passage of the Sherman Act, they held these tactics to violate federal antitrust law (the same law that the same federal judiciary held did not cover manufacturers' anticompetitive practices).²² Ultimately, in *In re Debs*, the Supreme Court would validate the panoply of legal interpretations that enabled federal courts to imprison labor organizers and exert broad authority, including violent coercion, over labor disputes using the summary process.²³ In an increasingly interconnected economy, federal courts denied labor the ability to leverage its power over critical infrastructures.

Meanwhile, the challenge for plantation owners in the postbellum South was not industrialization, but replacing chattel slavery with a legal framework that could deliver forced agricultural labor without transforming racial caste hierarchy. In addition to the more infamous Black Codes that invoked a strong federal reaction in the form of the Civil Rights Act of 1866 and the Fourteenth Amendment, and the Jim Crow laws that followed them, Southern legislatures and judges developed a system of criminal and civil law elements that forced Black workers into a mixture of sharecropping and peonage.²⁴ Crop-lien statutes created the legal architecture that, on the background of postbellum conditions in the South, put sharecroppers and share tenants in a position of perpetual debt.²⁵ The compulsion to raise cotton created by these crop-lien statutes was reinforced by newly enacted trespass, game, and closed-range laws geographically targeted toward majority-Black counties, which were designed to foreclose the primary options for self-sufficiency through hunting, fishing, and raising livestock on an open range.²⁶ Moreover, sharecroppers who might be tempted to walk away from their debt and search for their luck elsewhere were constrained by contract labor laws and false pretense laws, which criminalized breach of labor contracts and allowed courts to impose servitude as a criminal penalty on workers who tried to leave employers. Even when federal courts held these laws unconstitutional, Southern courts continued to enforce them, and federal enforcement of the constitutional prohibitions on these laws was weak. Enticement laws criminalized hiring an employee away from their employer. Emigrant agent laws required high licensing fees for out-of-state recruiters seeking to hire workers

out of Southern states—laws that became particularly common as Northern industrial business responded to anti-immigrant laws that cut off industrial access to cheap labor from Southern and Eastern Europe by recruiting cheap Black labor from the South.²⁷ All these were passed on the background of some of the better known techniques of forcing Black workers to work for pittance: vagrancy laws, criminalizing “idleness” (not being in someone else’s employ); debt peonage for taxes and small fines levied in discriminatory ways; and apprenticeship laws that enabled courts to impose child labor for years to an apprentice master. All these provided a backstop roving commission for Southern authorities to impose wage labor on Black workers throughout this period on terms determined unilaterally by white employers.

In Northern and Midwestern states, where farmer and labor coalitions were beginning to gain ground politically, the anti-labor stance of courts expanded beyond undermining the possibility of labor gaining economic power. Judges systematically blocked off avenues for the emergence of labor as a political force as well. Beginning in 1885 with *In re Jacobs*²⁸ and continuing until the “switch in time that saved the nine” in 1937, state and federal courts struck down progressive legislation wherever worker and farmer coalitions were able to gain democratic control over legislatures. Labor gained diverse political successes at the state level. These included, for example, legislation that banned manufacturing in tenement dwellings, abolished payment by scrip to the company store and required regular payment with legal tender, and laws that regulated hours of work, anti-union discrimination, or the means of measuring and calculating miners’ output and wages. All these diverse laws were struck down by state and federal courts on the constitutional grounds that they interfered with the property right of the employer to conduct business without interference or the freedom of contract of employers and employees to transact with whomever they saw fit under whatever terms they agreed.²⁹ The result was that income inequality reached its peak on the eve of the Great Depression, and would not return to those levels until the eve of the Great Recession in 2008, after forty years of a sustained campaign to overturn the legal and policy changes that had governed the American economy from the New Deal to the Great Society.

The Battle over Legitimation of Extractive Law: Classical Legal Thought and Legal Realism

The half century during which courts underwrote the emergence of the American system of powerful corporations, a weak state, and a suppressed and fragmented labor movement saw a sustained battle over the legitimation of these actions within the legal profession. A central part of Classical Legal Thought (CLT), to use the term introduced in the 1970s by Duncan Kennedy, was to produce a legitimating conceptual architecture experienced by legal elites as justifying these decisions in neutral and pre-political terms; as *principled law*, in stark distinction to the efforts of labor and progressive politicians to pass “class legislation.”³⁰ CLT adopted an understanding of law modeled on geometry: a practice of reasoning from foundational axioms to specific rules required by logical derivation. The approach proceeded by identifying a small set of top-level categories

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and principles such as: contracts are based on will; or, duty in tort only arises when acts of the defendant objectively caused harm to a right of the plaintiff. From these broad principles, classical legal scholars and judges derived formally concrete results in cases—if contract reflected the subjective will of parties, then an offer was accepted only when the acceptance arrived in the hands of the offeror. As the Supreme Court reasoned in *In re Debs*, if the federal government had absolute power over interstate commerce that the states could not overturn, and if the states had police power to enforce public order, and if courts of equity could issue injunctions to enforce the police power of the state, then it followed as a matter of logical necessity that federal courts protecting interstate commerce could issue injunctions against bodies of men who seek to exercise “powers belonging only to government” when those bodies interfered with interstate commerce (to wit, the unions conducting a sympathy strike with the Pullman strike). The core conceit of this legal consciousness was its claimed objectivity as a source of authority governed by reasoning that assured that the results were not the political preferences of the judges but were compelled by the logic of the law.

Most of the historiography of CLT conceives of this method as internalized consciousness. Just as scientists operate within scientific paradigms of their time, so too judges and treatise writers of the time internalized a method of legal reasoning and were faithfully operating within that tradition. Countering this purely structural understanding, diverse examples of the writings by jurists of that era betray a clear understanding of the power dynamics and the direct power effects of the legal rules. Chief Justice William Howard Taft was among the earliest to use the labor injunction to break strikes. His opinions when suppressing railroad labor action used abstract terms: “Neither law nor morals can give man a right to labor or withhold his labor for [the] purpose” of supporting the strike in another company.³¹ In private, Taft would describe himself in a letter to his wife as “a kind of police court” during the Pullman strike,³² and further wrote that the strikers would be quieted only after “they have had much bloodletting,” complaining that marshals “have killed only six of the mob as yet. This is hardly enough to make an impression.”³³ Few statements exhibit such a crisp, if not chilling, understanding that what a judge is doing in issuing his injunctions and imposing his contempt orders is to legitimate the violent use of lethal force to suppress strikers. Other courts similarly offered frank political assessments in their opinions, describing union boycotts as a “socialistic crime,” or threatening that because of boycotts “by combinations of irresponsible cabals and cliques, there will be an end to government.”³⁴

Progressive critics certainly knew what was going on, and they mounted attacks on the legitimacy of CLT in terms not only of its internal validity but also of its external function in shaping power in the economy. In contemporary legal culture the period is known as the *Lochner* era, after a case in which the US Supreme Court struck down a New York law limiting the working hours in bakeries to ten hours a day and sixty a week, as interfering with the liberty of contract of bakers and their employees. Justice Peckham, writing for the Court, rejected the claim that the court was “substituting the judgment of the court for that of the legislature,” rather beginning in an axiomatic formulation that “the liberty of contract relating to labor includes both parties to it. The one has as

much right to purchase as the other to sell labor,” and concluding that “The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts.” Rejecting this assertion of legal-analytic neutrality, Justice Oliver Wendell Holmes, Jr., opened his dissent with the simple assertion: “This case is decided upon an economic theory which a large part of the country does not entertain,” elaborating that the “Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”³⁵ This basic insistence that assertions of legal conclusions as necessitated by logical derivation were in fact judicial enforcement of a particular political worldview would become a central strand of the progressive assault on *laissez faire*.³⁶

Beginning with Holmes’s *The Path of the Law* in 1897, and continuing through the work of progressive legal scholars from Roscoe Pound, through Wesley Hohfeld, to Morris Cohen, Robert Lee Hale, and Felix Cohen, Legal Realism emerged as a sustained attack on the alleged neutrality and autonomy of law as a discipline in principle, and the internal coherence and apolitical sources of legitimacy of CLT in particular. The most trenchant internal critique of the logic of CLT was Hohfeld’s still-unmatched reconstruction of law as always and only about social relations, made of distinct, definable analytic elements of rights, privileges, powers, and immunities, which themselves described classes of possible social relations of production.³⁷ Hohfeld’s rigorous structure exposed the incoherence of how the conservative judiciary used terms like “liberty” and “right” to mask analytic slippages that pervaded the surface-level logic used to justify a range of holdings, such as imposing labor injunctions or invalidating closed shop agreements. Externally, Hale and Morris Cohen provided sustained analyses of how law, in particular property, shaped power in the economy.³⁸ Felix Cohen’s 1935 *Transcendental Nonsense and the Functional Approach* encapsulated the conjoined internal and external perspectives, providing the clearest statement among the Realists of the distinction between law as a social practice—a method of writing and arguing that reflected acculturation into a profession—and law as a structure of power in society.³⁹ *Transcendental Nonsense* remains the clearest statement of how progressive legal scholarship can, indeed must, be undertaken holding both the external understanding of law as a socially constructed field of knowledge with very particular social effects, and the internal perspective of practitioners inside that field behaving as well-socialized members aiming to produce moves that will be perceived within the legal profession as appropriate professional moves, with full knowledge and intent that that perception inside the profession will have the desired external effects in society at large.

After four decades of sustained progressive intellectual attack, however, CLT was defeated as much at the ballot box as in law journals or brilliant dissents. Franklin D. Roosevelt’s electoral victories allowed him to appoint judges and regulators. The functional approach, as Felix Cohen had called it, became what it meant to “think like a lawyer,” because people who created this tradition, or were trained in it, came to fill the ranks of the judiciary and administrative agencies. And just as political transformation

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shifted the inside of the legal profession, it also ushered in a host of statutory and administrative legal changes designed to transform the power of labor in industrial relations and the power of the state to regulate product, labor, and financial markets. Judges adopted statutory interpretation methods that placed judges in a collaborative relation with legislatures—seeking to understand the purpose of democratically enacted legislation by understanding the social, political, and historical background of the legislation, and then seeking to apply that purpose functionally, as the crooked timber of humanity or changes in context demanded adaptive application of the law. The prevailing understanding of “the ends of law,” what it was for and how it functioned, was to structure social relations. Law shaped how people acted toward and related to one another. This much was simple social fact. Whether law did so well or poorly, justly or unjustly, was a matter for both functional and normative debate. But the “realism” in Legal Realism was to recognize that any effort to understand law as either an autonomous internally coherent system of texts and analytic techniques or as applied philosophy of justice was a mistake as a matter of historical and sociological description.

The following three decades came to be known as “the Golden Age of Capitalism”: a period of high productivity growth and declining income inequality. At its origins, the New Deal and the Fair Deal relied on and reinforced racial and gender status hierarchies.⁴⁰ By the end of this period the Civil Rights Movement and the Women’s Movement would use law in efforts to overturn racial caste hierarchy in America and to leverage the power of the state to overturn entrenched patriarchy. While the older Realists had a hard time adjusting to the idea of a rights-based jurisprudence that would not ultimately redound to the benefit of capital, the successes of the civil rights movement in the Warren Court launched a generation of mainstream liberal legal scholarship designed to legitimate the rights jurisprudence of the courts. The prevailing constitutional wisdom had shifted toward a framework that elevated a substantive view of what a democratic constitution required: leaving economic regulation to the normal tussle of politics, while offering robust protection of individual political and civil rights and of “discrete and insular minorities,” whose protection could not be left solely to majoritarian rule.

Just as these liberal scholars were working to justify active judicial protection of these rights, however, the wheel of political economy once again turned. The failures of the Vietnam War, the Great Inflation, Southern white backlash against the Civil Rights Acts, Christian fundamentalist reaction to the Women’s Movement and the New Left’s successful reorientation of the moral universe toward individual choice and self-actualization, and Organized Business’s reemergence in reaction to the 1960s victories of labor and the consumer and environmental movements resulted in the emergence of a new and potent political coalition, initiated by Richard Nixon and crystalized by Ronald Reagan. From 1980 to the present, law would be harnessed to reverse the power realignment of the New Deal and Civil Rights coalitions, and judges and legal scholars on the political right would develop a combination of economic formalism and legal fundamentalism to legitimate the reactionary program of this new conservative coalition.

Law, Structure, and Legitimation in Neoliberal Capitalism: 1970s to 2010s

Structuring Productivity and Power: Law as Rules of Engagement

Beginning in the 1970s the United States saw a series of legal changes that resulted in relatively slow productivity growth and high inequality. Some laws squeezed the bottom of the income distribution, made life more precarious, and enforced the imperative to accept wage labor on any terms. Other laws weakened middle-income workers and led to the stagnation of labor income since 1973. Yet others enabled the escape of the 1 percent. The details are beyond the scope of this chapter, and a condensed version is presented in Table 6.1. At their core, these legal changes increased the dependence of low and middle-income families on accepting any job on offer by making life more precarious at the bottom of the income distribution and harnessing illness and aging as a “whip of hunger” for workers in the middle of the income distribution. At the bottom of the income distribution, the pressure began with the racialized assault on welfare.⁴¹ The War on Poverty was replaced by the racialized War on Drugs and mass incarceration.⁴² The effects were compounded by erosion of minimum wages, weak enforcement of employment law—which made wage theft common and work conditions more exploitative—and loose enforcement of immigration laws designed to create an underclass of unprotected workers, particularly in industries with high proportions of status-subordinated workers: immigrants, workers of color, and particularly women of color.⁴³ While these effects were worst for workers at the bottom of the income distribution, lower standards for overtime pay and similar changes hit middle-income workers as well.

The most important contributor to middle-income wage stagnation was the decline of labor economic and political power,⁴⁴ whose destruction was the central target of the dramatic expansion of corporate lobbying since the 1970s.⁴⁵ The defeat of the PATCO strike in 1981 by the Reagan administration,⁴⁶ complemented by a host of small and large decisions by the National Labor Relations Board, made unionization harder and defeating it easier,⁴⁷ and supercharged the “union avoidance” industry.⁴⁸ Deregulation of regulated industries where unionized workers had historically earned high wages; liberal trade laws that emphasized free movement of goods and services, particularly finance, but did not include labor or environmental protections; and weakened antitrust law and enforcement enabled firms to appropriate all the productivity gains made feasible from deregulation and trade liberalization. Financial deregulation and a host of shifts in both social norms and corporate governance laws increased the power of the professional and managerial class over consumers, workers, and small investors. Across dozens of discrete areas of law and policy the toggles were consistently flipped in favor of empowering the professional and managerial class, particularly finance, to extract the value of almost all gains in productivity over the past forty years. The result was that on the eve of the Great Recession income inequality in the United States reached the same level it had reached on the eve of the 1929 crash that ended the first long Gilded Age.

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Table 6.1 Major areas of legal change and their impact on the bottom, middle, and top of the income distribution in the United States, 1980–2020.

<i>Legal Change</i>	<i>Bottom 10–20%</i>	<i>Middle 80%</i>	<i>Top 10% [Top 1%]</i>
Shrinking social insurance	“Welfare Queen” attack; “War on Poverty” replaced by “War on Drugs” and mass incarceration. Forces workers to accept low-pay, poor terms.	ERISA shift from defined benefit to defined contribution & defeat of universal healthcare: fear of health shocks and old age poverty increase dependence on wage labor; weakens ability to bargain for wages or terms.	Shrinks fiscal burden and enables tax reductions.
Minimum wage erosion	Failure to index to inflation or raise accounts for most of the gap between the 10 th and 50 th percentiles of women’s wages.		
Weak employment law enforcement	Subject to higher wage theft; dangerous work conditions; disruptive scheduling.	Weak enforcement of overtime pay; loose definitions of supervisory roles; fissuring removes stability & puts downward pressure on wages.	Increased opportunities for wage theft for small businesses: grocery stores; security and janitorial services. [Easier adoption of fissured workplace practices; permatemps]
Labor law changes to make unionization harder		PATCO Strike shifts norms; NLRB decisions in the 1980s. Declining unionization largest contributor to wage stagnation in the middle; disparate impact on Black members.	Significant shift in political power across the board on economic issues.
Deregulation of regulated industries		Large impact on unionized male workers who had the power to get a share of rents from regulatory barriers to entry.	Greater freedom to pursue strategies focused on short-term profit.

Weakening antitrust standards and enforcement	Higher markups increased prices consumers had to pay.	Higher markups increased prices consumers had to pay.	Higher markups increased profits.
Trade law: globalization		“China Shock”: offshoring causes wage stagnation, persistent localized unemployment & underemployment effects; downward pressure on wages in trade-exposed industries.	Global financial flows feed financialization; disinvestment from labor increases available profits.
Financial deregulation			Financialization: major growth in share of income going to those working in finance; changed executive compensation norms lead to explosion in executive pay.

Legitimizing the Great Extraction: Economic Formalism and Legal Fundamentalism

Two fundamentally different kinds of formalism have combined in American legal culture since the 1970s to legitimate the systematic redistribution of power, income, and wealth from the majority of the population to a tiny minority. The first was the law and economics movement, which, in the crucial first two decades of neoliberal transition deployed a simplistic formalization of transactions costs and rational actor theory.⁴⁹ The second was the emphasis of the new conservative legal movement on textualism in statutory interpretation and originalism in constitutional interpretation. Both arms of this ideological pincer movement reflect an interaction between agency and structure. For each, it is possible to identify specific individuals and organizations who can be observed in the act of self-consciously developing a way of thinking about law designed to legitimate a reactionary program aligned with the core concerns of each of the three legs of the new Republican coalition: business elites, white identity voters, and Christian fundamentalists. And yet each also drew on broader cultural changes (in the case of law and economics) and deep strains of legal culture (in the case of originalism and textualism), such that it would be a mistake to imagine every practitioner of these two formalisms as actively engaged in a consciously political act. Rather, we can think of identifiable agents consciously engaged in an effort to introduce an ideological intervention designed to achieve a set of instrumental goals. But they can only be considered successful once they have effectively shifted the way in which

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members of the profession who are not ideological activists think and write law and what they come to experience, as well-socialized members of the profession, as legitimate moves within the profession. In this, law and economics enjoyed an unmitigated success, while originalism and textualism continue to be visibly “activist” and to be understood as politically charged rather than neutral.

Law and Economics

The Chicago-centered law and economics movement was a branch of the broader effort to create an intellectual infrastructure for what would come to be known as neoliberalism.⁵⁰ Initially funded by ideologically committed individuals and foundations, neoliberals built organizational capacity through programs within academia and in think tanks that translated the academic work into discrete programmatic elements.⁵¹ One well-studied example was Henry Manne’s Law and Economics Center, particularly in the 1970s and early 1980s. Manne’s fundraising included direct appeals to companies like ITT or US Steel that had direct interests in loosening antitrust law. Subsequent analysis confirmed that the companies got what they paid for: judges who participated in Manne’s Pareto in the Pines program rendered systematically more pro-business verdicts and tended to rule against regulatory and tax agencies more often for decades thereafter.⁵² That program was the clearest example of intentional change in legal consciousness: the socialization of a generation of professionals in leadership positions into a new common sense shared by well-socialized professionals about how to approach law that, broadly speaking, structured economic relations. Such a clean relationship between intentional acts of identifiable agents and the transformation of ideological structure are rare, and evidence will rarely be as clean. But it does offer a model for how to think about the relations between the conscious actions of agents and structural shifts that shape the behavior of populations whose members are unconscious of their ideological reorientation.

Efficiency became for law and economics in the 1980s and 1990s what logic had been for Classical Legal Thought a century earlier. Formal economic modeling offered a conception of an apparently scientific platform, just as logic had in the late nineteenth century. It offered a foundation for claiming normative neutrality in support of the array of legal changes that restructured social relations of production—shifting power in favor of finance and the professional and managerial class and weakening the state relative to corporations—and underwrote a dramatic extraction of most of the surplus gained into the hands of the top 1 percent of the income and wealth distributions.

Law and economics met with resistance from both rights liberals, who questioned whether wealth could coherently be considered a value and whether welfare maximization could capture the full normative commitments of law,⁵³ and from Critical Legal Studies (CLS) scholars, who mounted a broader assault on the internal coherence of law and economics, on its disconnect from the way law functioned in fact, and on the systematically regressive distributive effects to which its prescriptions led.⁵⁴ Rights-based resistance to law and economics was overwhelmed when neoliberalism became the common sense of the professional and managerial class across the board, not only

in law, and was forced to retreat to focusing on constitutional rights and “public law” rather than economic law.⁵⁵ CLS, for its part, was as critical of rights discourse as it was of law and economics, for rights jurisprudence too depended on too essentialist a view of how law worked and of the idea that, if only it were done correctly, law could indeed provide a neutral, apolitical basis of legitimation. This postmodern attack placed CLS in an external stance to legal practice, robbing it of bases for legitimating progressive legal decisions with tools that cohered with the socially internalized practices of a legal profession. The result was that in areas of “private law” that directly structured social relations of production, neither liberals nor the left offered sustained competition to the right. Those who did offer liberal or progressive policy solutions began to frame them in terms of economics in an effort to yoke it to their own projects, from tradable permits in environmental regulation to applications of cost-benefit analysis that justified stricter health or safety standards.

Legal Fundamentalism: Originalism and Textualism

The purpose of the decades-long Republican effort to staff the judiciary with ideological allies was to overturn, narrow, or neutralize decades of progressive precedent and legislation. Doing so required a legal theory that could be publicly presented as neutral and pre-political, while being plausible within the legal profession and providing authority for ignoring or overturning decades of progressive precedent and legislative or regulatory victories. The solution was text-anchored originalism in constitutional interpretation and textualism in statutory interpretation. Both had roots in Protestant textualism and Biblicism, and thus strongly appealed to the base of the party.⁵⁶ Both bore a family resemblance to how legal culture had long-treated text and authorial intent, albeit in a new, imperious role as exclusive bases of authority. The result was a theory of judicial interpretation that could play both a public role of legitimating a frontal assault on progressive precedents,⁵⁷ and be a plausible response to the anxiety many in the legal profession, including some liberals and progressives, experienced as to the sources of legitimacy for core pillars of the rights revolution—from *Brown v. Board of Education* through *Roe v. Wade*.⁵⁸

Intellectually, Robert Bork’s 1971 article *Neutral Principles and Some First Amendment Problems*⁵⁹ is arguably the first statement of originalism by a high-status legal academic,⁶⁰ but it is Raoul Berger’s 1977 *Government by Judiciary*,⁶¹ a more complete and expansive development of originalism, that is seen as “the starting point for modern originalist theory.”⁶² Politically, it was Edwin Meese who routinized the use of political orientation in judicial nominations, making adherence to originalism and a commitment to overturning *Roe* into litmus tests for Republican judicial appointments. Judicially, it was Antonin Scalia who launched the argument that textualism was the sole legitimate method of statutory interpretation and who would, after the defeat of Bork’s Supreme Court nomination, become the leading champion (later joined by Clarence Thomas) of originalism in constitutional interpretation. Originalism was reaction to the “living constitution” and “democratic values” approach that had marked progressive

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constitutional theory: the idea that the constitution evolved over time and that its core was a rich conception of democratic society that required not only procedural equality and majority rule but also protection of fundamental individual rights and of discrete and insular minorities from majoritarian overreach.⁶³ Originalism emerged over the course of the 1960s in conservative intellectual debates and was popularized in radio talk shows as a reaction to the Warren Court's desegregation and reapportionment (one person, one vote) cases.⁶⁴ Berger devoted two full chapters to making the historical claim that "Negro Suffrage was Excluded" from the intent of the Fourteenth Amendment, and an additional chapter to undermining *Brown*.⁶⁵ Textualism was a reaction to the dominant eclecticism of statutory interpretation throughout the twentieth century,⁶⁶ which led one prominent judge to comment in the early 1980s that "the 'plain meaning' rule had been laid to rest."⁶⁷ In the late 1980s Scalia was the sole voice on the Supreme Court excoriating the ease of manipulation of the meaning of statutes that this eclecticism permitted.⁶⁸ As textualism was integrated into the critique of "activist judges" (read: progressive precedents) alongside originalism, and as Meese's routinization of conservative appointments filled the federal bench with ideological allies, what began as one man's crusade became the new norm of the profession.

Progressive responses to legal fundamentalism fell into three major buckets. The first was epistemic critique of the idea that anyone at the end of the twentieth century could claim that text had sufficiently deterministic meaning.⁶⁹ Not only is language itself capacious and necessarily available for interpretation but common law interpretive canons are also full of paired opposing moves (such as *inclusio unius* [if the language expressly states one thing, it means to exclude others] paired with *ejusdem generis* [if the language expressly includes one thing, it means to also encompass similar things]).⁷⁰ And history is too multifaceted to constrain interpretative freedom. The second response to legal fundamentalism was to get good enough at using this very plasticity to make arguments that led to progressive outcomes.⁷¹ The third was to underscore the political valence of legal fundamentalism.⁷² These lines of critique were complemented by the work of progressive constitutional scholars who modernized and updated the older "living constitution" tradition: most prominently Ackerman's theory of constitutional transformations and Kramer's popular constitutionalism,⁷³ keeping alive an alternative model of constitutional adjudication and, in combination with the critiques, denying legal fundamentalism the hegemonic role that law and economics succeeded in attaining in economic law.

Structure and Legitimation for a Post-neoliberal Order: The Challenge for Law and Political Economy

The neoliberal order appears to be falling apart since the Great Recession. Vying to replace it are a more-or-less authoritarian ethno-nationalism, on the one hand, and an assertive progressivism, aimed partly at rehabilitating the role of the state in the economy and the pursuit of social justice, and partly at elevating nonstate, nonmarket forms of economic, political, and cultural life. As part of this broadly progressive revival,

a new movement of law and political economy is emerging within the legal academy to engage in the design and legitimation of a post-neoliberal legal order. While still in early stages, the movement aims to produce both a comprehensive critique of the core claims of law and economics and legal fundamentalism⁷⁴ and a comprehensive programmatic framework for a post-neoliberal order.⁷⁵

Combining trenchant critique with detailed programmatic reform was a hallmark of Legal Realism. The tension that CLS identified between these two quite divergent goals presents a theoretical and practical challenge for the new law and political economy.⁷⁶ Felix Cohen's solution to this tension continues to be the most instructive for the present generation of academics engaged in law and political economy. Just as a contemporary molecular biologist can read Bruno Latour at night and still go into the lab in the morning and produce a new vaccine that reduces disease burden, so too the Realist lawyer can understand the historical specificity of legal culture, the imperfection of empirical social science, and the socially constructed nature of legitimacy and still go into the office and design a legal arrangement that has a reasonable chance of producing more equitable social relations of production, or of limiting the effects of systemic racism. Moreover, the new law and political economy will need to work inside the legal materials and legal culture and not focus exclusively on external critique, morality, or social science to support reform. One already-successful strategy, used with regard to antitrust or trade secrets, for example, has been to revive lines of cases that were abandoned during the neoliberal era, but that remain available to resuscitate as anchors for distinctively legal arguments.⁷⁷

What does this brief overview of two major transition points in the history of American economy and society teach us about the "ends of law"? First, it is worse than pointless to seek an internal, teleological answer, as though law were an autonomous discipline with its own "ends" or goals. Historically, claims regarding the demands and ends of law *qua* law have always played the role of legitimating the power relations that past law helped forge and entrench. Second, therefore, rather than seeking a normative answer to the question "what should be the ends of law" as though that were an independent question bounded by law as a discipline, we need a clear-eyed view of what the functions of law have been in fact—in the lived experience of modern market societies. It is to sketch out the contours of this basic descriptive task that I have dedicated this chapter, focused specifically on the role of law in structuring and legitimating social relations of production.

Viewed in this light, law lays out the basic rules of engagement in market relations. Property law lays out rules regarding who may, and who may not, use how much of which resources, both material and cognitive, for what purposes. In doing so, it distributes power over the organization of production processes that depend on access to and use of these resources. Labor law, including its iterations as the law of master and servant and enslavement, criminal conspiracy, unfair competition, and antitrust, sets the terms of who may and who may not apply their labor to a given set of resources, doing what tasks, in coordination with what other people or organizations, and under what terms of division of labor. Contract law plays a smaller role in structuring the division of labor,

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mostly in coordinating among smallholders or larger firms, but most labor is actually governed by these other more systemic sources of law, such as labor, corporate, and unfair competition law. Tort law structures relations with respect to risks, while welfare, pensions, and criminal law structure relations with regard to uncertainty, shocks, and inherited deprivation. All these create the basic rules of the game—who comes into relations of production with which endowment; who has what kinds of alternatives to a negotiated agreement to work on this project, with these people, at this time, making how much of what and getting what out of it.

Beyond structuring society by laying down the rules of engagement, it is equally the role of law in modern market society to legitimate the patterns of life that emerge given the imbalances of power those rules of engagement produce. And recall, by “legitimate” I mean have a given sociological effect at the population level. The function of law, and in particular the legal profession as a semi-autonomous social practice, is to produce statements about “what the law is” that are received by the rest of the population, usually through translation by other parts of the sense-making elites in society, as socially appropriate statements that justify, as well as declare, what the relations ought to be. At a bare minimum, a socially appropriate legal decision conveys to everyone, including the losers, that the decision ought to be obeyed peacefully. It is precisely because law not only structures but also legitimates the social relations that emerge from victories in battles to shape the law that these battles played such a prominent role in both the first and second gilded ages.

And so too, we must join battle today. Entrenchment of the McConnell Court has concluded the decades-long takeover of the American judiciary by a politically committed cadre of right-wing operatives. It has begun to roll out decisions that weaken labor, undermine the voting rights of non-white voters, and contain the power of the government to deal with public health emergencies, the climate challenge, or corporate power, and it stands on the cusp of expanding the power of religion to suppress individual autonomy and contain democratic majorities. On the background of these facts, the most important task for legal scholarship in the coming generation is to analyze the reality of how law, in practice, shapes power, productivity, and inequality in society, and to translate that analysis into concrete programmatic approaches that could make for a more democratic, egalitarian society even in the teeth of a judiciary hostile to both democracy and justice.

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