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Capitalism and Risk: Concepts, Consequences, and Ideologies

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INTRODUCTION

Politically charged claims about both "capitalism" and "risk" became increasingly insistent in the late twentieth century. The end of the post-World War II boom in the 1970s and the subsequent breakup of the Soviet Union inspired fervent new commitments to capitalist ideas and institutions. At the same time structural changes in the American economy and expanded industrial development across the globe generated sharpening anxieties about the risks that those changes entailed. One result was an outpouring of roseate claims about capitalism and its ability to control those risks, including the use of new techniques of "risk management" to tame financial uncertainties and guarantee stability and prosperity. Despite assurances, however, recent decades have shown many of those claims to be overblown, if not misleading or entirely ill-founded. Thus, the time seems ripe to review some of our most basic economic ideas and, in doing so, reflect on what we might learn from past centuries about the nature of both "capitalism" and "risk," the relationship between the two, and their interactions and consequences in contemporary America.

I. CAPITALISM

Attempts to define capitalism have ignited "immense controversy,"[1] and the only general agreement is that the

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1. RAYMOND WILLIAMS, KEYWORDS 43 (1976).

term refers to a wide variety of arrangements that change over time. An "individual economy may be conducted along capitalistic lines to the most widely varying extent," Max Weber explained.[2] "The essential point to grasp is that in dealing with capitalism we are dealing with an evolutionary process," Joseph Schumpeter added.[3] It is "by nature a form or method of economic change and not only never is but never can be stationary."[4] By the early twentieth century economic literature offered 111 different definitions.[5]

True, what came to be called capitalism in the nineteenth century is commonly identified with certain characteristics: private property, contractual freedom, wage labor, profit-seeking, invested surplus, competitive markets, expanding commodification, rationality and calculation, and production for sale rather than use.[6] Those are all elastic concepts, however, and they define little meaningful consensus. Joan Robinson and John Maynard Keynes, for example, stressed the centrality of just one—the profit motive[7]—while Fernand Braudel denied that markets were specific to capitalism,[8] and other historians have shown the same for wage labor.[9]

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2. MAX WEBER, GENERAL ECONOMIC HISTORY 275 (Frank H. Knight trans., Martino Publishing 2013) (1927).

3. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82 (Harper Colophon 1975) (1942).

4. *Id.*

5. JURGEN OSTERHAMMEL, THE TRANSFORMATION OF THE WORLD: A GLOBAL HISTORY OF THE NINETEENTH CENTURY 668-69 (Patrick Camiller trans., Princeton Univ. Press 2014) (2009).

6. *See, e.g.*, Robert L. Heilbroner, *Capitalism*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 688-93 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008); *Capitalism*, *in* BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 74 (John Downes & Jordon Elliot Goodman eds., 4th ed. 1995) [hereinafter *Capitalism*, *in* BARRON'S].

7. JOHN MAYNARD KEYNES, THE END OF LAISSEZ-FAIRE 50 (1927); JOAN ROBINSON, ECONOMIC HERESIES: SOME OLD-FASHIONED QUESTIONS IN ECONOMIC THEORY 25 (1971).

8. *See* FERNAND BRAUDEL, 3 CIVILIZATION AND CAPITALISM, 15TH–18TH CENTURY: THE PERSPECTIVE OF THE WORLD 620 (Sian Reynolds trans., Harper & Row 1984) (1979).

9. *See* Jeffrey Sklansky, *The Elusive Sovereign: New Intellectual and Social Histories of Capitalism*, 9 MOD. INTELL. HIST. 233, 237 (2012). These views

Consider "competitive markets." First of all, capitalist firms themselves regularly reshape the size and nature of competition by expanding or contracting their operations on both horizontal and vertical levels.[10] More broadly, ideas and structures of competitive markets change.[11] Recently, for example, defenders of capitalism have argued that economic concentration was necessary to preserve America's ability to compete in global markets.[12] Such an idea is light years from Adam Smith's belief that "competitive markets" required large numbers of small and independent producers. Though still widely invoked in apologetics, Smith's idea no longer seems applicable to most advanced capitalist economies marked by "large realms of monopoly, oligopoly, and monopolistic competition."[13] At a minimum, such changing ideas and structures show that even purportedly "essential" elements of capitalism exist in an evolving variety of forms.[14]

Moreover, most supposedly essential elements of capitalism—contracts, markets, wage labor, private property, and economic surpluses—have existed for millennia and thus, however necessary to capitalism, cannot

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challenge Weber's analysis which emphasized the critical role of "free labor" in rational "capitalistic calculation." *E.g.*, WEBER, *supra* note 2, at 277.

10. *E.g.*, ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 36-38 (1990); R. H. COASE, THE FIRM, THE MARKET AND THE LAW (1988).

11. *E.g.*, MICHAEL H. BEST, THE NEW COMPETITION: INSTITUTIONS OF INDUSTRIAL RESTRUCTURING (1990); DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION (2010); RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW (rev. ed. 1996).

12. *See* Corinne Crawford, *The Repeal of the Glass-Steagall Act and the Current Financial Crisis*, 9 J. BUS. & ECON. RES. 127, 130 (2011).

13. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 2 (1970); *see, e.g.*, Reed Abelson, *Bigger May be Better for Health Insurers, but Doubts Remain for Consumers*, N.Y. TIMES, Aug. 3, 2015, at B3 (consolidation among health insurance companies defended on grounds of "efficienc[y]").

14. *E.g.*, W. W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO 152 (3d ed. 1990); VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001); Robert Boyer, *The Variety and Unequal Performance of Really Existing Markets: Farewell to Doctor Pangloss?*, *in* CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 55, 66-70 (J. Rogers Hollingsworth & Robert Boyer eds., 1997) [hereinafter CONTEMPORARY CAPITALISM].

constitute any distinctive core. One could usefully see the distinctive core of capitalism as three interrelated ideas about private property and the dynamic tendencies those ideas generated: first, the idea that property can be abstract and liquid, appear in a multitude of forms, and be exchanged systemically through numbers written on paper; second, the idea that individuals should use property to create commodities for sale and profit rather than for their own consumption; and third, the idea that individuals should pursue their own self interest and strive to amass the largest amount of property as possible because doing so is both a social and moral good.

Whatever its core elements and tendencies, however, capitalism manifestly appears in a variety of forms. Consider, for example, the slave economy of the antebellum American South.[15] Although many have seen Southern slavery as "anti-capitalist," it nonetheless operated with capitalist values, practices, and institutions. While it had distinguishing racial and cultural characteristics, it produced for profit and required for its success contracts, credit, insurance, private property, purchased labor, mass production, and expanding commercial markets.[16] The cotton market—"the largest single sector of the global economy in the first half of the nineteenth century"—comprised "in actual fact a network of material connections that stretched from Mississippi and Louisiana to Manhattan and Lowell to Manchester and Liverpool."[17] The elaborate and manifold elements of that network constituted one particular form of capitalism, and consequently it was hardly surprising that the Bank of the United States, thanks to its mortgage business, became the largest slaveholder in Mississippi.[18]

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15. See*, e.g.*, *Interchange: The History of Capitalism*, 101 J. AM. HIST. 503, 510, 516 (2014).

16. *See generally* IAN BAUCOM, SPECTERS OF THE ATLANTIC: FINANCE CAPITAL, SLAVERY, AND THE PHILOSOPHY OF HISTORY (2005); SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY (2014).

17. WALTER JOHNSON, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 10 (2013); *see also id.* at 252-54.

18. RICHARD HOLCOMBE KILBOURNE, JR., SLAVE AGRICULTURE AND FINANCIAL MARKETS IN ANTEBELLUM AMERICA: THE BANK OF THE UNITED STATES IN MISSISSIPPI, 1831–1852 (2006).

The example of Southern slavery suggests two conclusions. One is that capitalism should not be identified narrowly with wage-labor but with the power of money to command labor, however purchased and controlled. The other is that capitalism has no "pure" existence and can be accurately understood only by examining its varied historical forms.

The necessity of detailed historical analysis is particularly obvious when one considers the innumerable conflicting claims that have been advanced about capitalism's alleged political consequences. Milton Friedman put one such contention bluntly. "The kind of economic organization that provides economic freedom, namely, competitive capitalism," he declared, "also promotes political freedom."[19] Assuming that capitalist forms supported democracy in the United States, as Friedman believed, history shows that other capitalist forms in other countries failed to support democracy in the same way and to the same extent.[20] Worse, it also shows that some capitalist forms readily opposed or abandoned democracy and were compatible with authoritarian regimes.[21] German capitalism failed to stop Nazism, while major German corporations and business leaders worked closely with the Nazi government and reaped profits from its most blatantly anti-democratic policies.[22] Indeed, the twentieth century introduced single-party dictatorships directing forms of "state capitalism."

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19. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 9 (1962); *see also* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN *passim* (1992) (drawing on Hegel to argue that capitalism and democracy went hand in hand and that their union represented the culmination of historical development).

20. *See* OSTERHAMMEL, *supra* note 5, at 572-633.

21. *E.g.*, ROLAND SARTI, FASCISM AND THE INDUSTRIAL LEADERSHIP IN ITALY, 1919–1940: A STUDY IN THE EXPANSION OF PRIVATE POWER UNDER FASCISM (1971); EUGEN WEBER, VARIETIES OF FASCISM (1964); THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP: OUTSTANDING DEBTS (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., 2015); David Baker, *The Political Economy of Fascism: Myth* or *Reality, or Myth* and *Reality*, 11 NEW POL. ECON. 227 (2006).

22. *See, e.g.*, NEIL GREGOR, DAIMLER-BENZ IN THE THIRD REICH (1998); PETER HAYES, INDUSTRY & IDEOLOGY: IG FARBEN IN THE NAZI ERA (1987); HAROLD JAMES, THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS (2001); BUSINESS AND INDUSTRY IN NAZI GERMANY (Francis R. Nicosia & Jonathan Huener

Thus, sweeping generalizations about the relationship between capitalism and democracy—or between capitalism and any other form of government—are highly dubious.[23] Ultimately, they seem rooted in their proponents' political perspectives and historical contexts, and they assume that capitalism has an essence that necessarily produces specific political consequences independent of time, place, culture, and historical context. History shows the fallacious nature of that assumption. If some capitalist forms supported forms of democracy under some historical conditions, other capitalist forms meshed with anti-democratic forms under other historical conditions.[24]

II. RISK IN CAPITALISM

The term "risk" can apply to any kind of peril, but the capitalist concept involves more than danger of future harm. It is an evaluative tool of business and finance with two critical characteristics. It is socially constructed, and it is the product of methodical calculation.[25]

The social construction of risk seems obvious when one considers the diverse apprehensions of peoples who worshiped different gods, lived in different times and places, and relied on different material resources for their daily sustenance.[26] One of the principal functions of culture is to

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eds., 2004). HENRY ASHBY TURNER, JR., GERMAN BIG BUSINESS & THE RISE OF HITLER (1985) explores the limits of businesses' support for the Nazis.

23. Seriously establishing any such causal connection would involve, among other issues, answering difficult empirical questions about the extent to which a country was truly "capitalist" and truly "democratic." *E.g.*, DIRK PHILIPSEN, THE LITTLE BIG NUMBER: HOW GDP CAME TO RULE THE WORLD AND WHAT TO DO ABOUT IT (2015) (economic measures of economic progress are misleading and distorted); CHARLES TILLY, DEMOCRACY 59-66 (2007) (complexities involved in specifying extent to which a country is truly "democratic").

24. *See, e.g.*, VIVEK CHIBBER, POSTCOLONIAL THEORY AND THE SPECTER OF CAPITAL (2013).

25. *See, e.g.*, Mark J. Machina & Michael Rothschild, *Risk*, *in* 7 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 190, 190-96 (Steven N. Durlauf & Lawrence Blume eds., 2d ed. 2008).

26. *See* F. A. HAYEK, THE CONSTITUTION OF LIBERTY 145 (1960) [hereinafter HAYEK, CONSTITUTION].

define normative categories that shape perceptions of peril and therefore of risk.[27] Further, recognition of risk depends on the geographical, practical, and moral distances between societies and whatever perils threaten, the methods of perceiving those perils, and the benefits and burdens of addressing them. Thus, social construction determines whether risks are recognized or ignored, considered preventable or inevitable, and ranked as minor or grave.[28]

Capitalist forms privilege perils that accompany commercial and financial enterprises while minimizing those rooted in traditional and religious values.[29] Insurance, spreading in the nineteenth century to cover previously ignored types of perils, illustrates the process. Death was an inevitability that rested in the hands of God until a combination of social forces—law, religion, industrialism, actuarial science, and corporate promotionalism—transformed it into a "risk" that could be valued and used to encourage the exchange of small regular payments for large future returns.[30] Similarly, economic changes in the late nineteenth and early twentieth centuries generated new ideas about the interconnected nature of human activities and gave rise to concepts of "social risk" that brought novel proposals for "social" insurance.[31]

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27. *E.g.*, EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE (Karen E. Fields trans., Free Press 1995) (1912); CLAUDE LEVI-STRAUSS, THE RAW AND THE COOKED (John & Doreen Weightman trans., Harper & Row 1969) (1964).

28. MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS 29-30 (1982); *Introduction* to *Part One: Theorizing Risk and Morality*, *in* RISK AND MORALITY 13, 15 (Richard V. Ericson & Aaron Doyle eds., 2003); Steve Raynor, *Cultural Theory and Risk Analysis*, *in* SOCIAL THEORIES OF RISK 83, 87 (Sheldon Krimsky & Dominic Golding eds., 1992). For changing concepts in the United States, see ARWEN P. MOHUN, RISK: NEGOTIATING SAFETY IN AMERICAN SOCIETY (2013).

29. *See* RISK AND MORALITY, *supra* note 28.

30. *See generally* VIVIANA A. ROTMAN ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES (1979).

31. *See generally* THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY (1977); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004).

Capitalist forms not only shaped the cultural construction of risk, but they also transformed it into a methodical "calculating concept" for people learning how to "consume the future."[32] Identifying perils whose incidence and significance seemed calculable, capitalist forms gave them monetary "value" and created multiplying ranges of risk-based commodities defined in terms of the economic interests and legal rights of human beings. Odysseus faced many perils sailing the wine-dark sea, but in a capitalist sense his voyage posed no "risk" absent a credit obligation or insurance contract.

The "rational calculating" characteristic of capitalism[33] was nowhere more apparent than in escalating efforts to identify, quantify, and value "risk."[34] In the seventeenth century, probabilistic reasoning was becoming common, and by the early eighteenth century governments were compiling massive sets of numbers by methodically collecting information on the characteristics and activities of their populations.[35] By the nineteenth century statistical analysis was well established, with actuarial tables in common use and both the "law of large numbers" and the "bell-shaped curve" fully recognized.[36] From there, ever more powerful and sophisticated statistical methods were developed and applied to ever broader ranges of human activity, making the "risk" involved in all of them a quality that could be calculated and given a rational market price.[37]

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32. *Introduction* to *Part One: Theorizing Risk and Morality*, *in* RISK AND MORALITY, *supra* note 28, at 13.

33. Stephen Innes, *Puritanism and Capitalism in Early Massachusetts*, *in* CAPITALISM IN CONTEXT: ESSAYS ON ECONOMIC DEVELOPMENT AND CULTURAL CHANGE IN HONOR OF R.M. HARTWELL 90 (John A. James & Mark Thomas eds., 1994); *see also, e.g.*, WEBER, *supra* note 2, at 254.

34. ROGER LOWENSTEIN, WHEN GENIUS FAILED: THE RISE AND FALL OF LONG-TERM CAPITAL MANAGEMENT 233-36 (2000); BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS 52-68 (2010).

35. GERD GIGERENZER ET AL., THE EMPIRE OF CHANCE: HOW PROBABILITY CHANGED SCIENCE & EVERYDAY LIFE 6-26 (1989).

36. IAN HACKING, THE TAMING OF CHANCE 95-114 (1990); *see also* GIGERENZER ET AL., *supra* note 35, at 6-8, 53, 65.

37. LOWENSTEIN, *supra* note 34, at 234-35; MCLEAN & NOCERA, *supra* note 34, at 52; MICHAEL POWER, ORGANIZED UNCERTAINTY: DESIGNING A WORLD OF RISK

Thus, "capitalism" and "risk" functioned together, the former inspiring ways to create the latter by identifying perils that could be given economic value and legal protection, packaged in vendible forms, and traded freely for profit. Capitalism expanded by monetizing more "perils" and thereby creating more commodified "risks," more value, and more wealth.[38] As those commodified risks multiplied and their values swelled, capitalists layered and pyramided them to create ever more value while, in the process, creating ever more perils that could, in turn, be identified and transformed into ever more "risks," ever more commodities, and ever more value and wealth.[39] Thus capitalism and "risk" combined to create a dynamic for both astonishing economic growth and potentially devastating economic crises.[40]

The belief that risk could be rationally calculated highlighted the concept's social construction, for such calculations were products of human imagination and purpose. Thus, in understanding any particular risk it became essential to know who identified and calculated it, who used the calculation, and what results they sought.[41] It became necessary, in other words, to understand the sociology of knowledge of risk.

MANAGEMENT (2007); *Introduction* to *Part One: Theorizing Risk and Morality*, *in* RISK AND MORALITY, *supra* note 28, at 14.

38. *See, e.g.*, HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 55-56 (2000). Though insurance can shift "risks," the human consequences of perils remain with their victims. *See* JONATHAN LEVY, FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA 13 (2012); Barbara Young Welke, *The Cowboy Suit Tragedy: Spreading Risk, Owning Hazard in the Modern American Consumer Economy*, 101 J. AM. HIST. 97, 97-99 (2014).

39. *See* NOURIEL ROUBINI & STEPHEN MIHM, CRISIS ECONOMICS: A CRASH COURSE IN THE FUTURE OF FINANCE 66-67 (2010).

40. *E.g.*, CHARLES P. KINDLEBERGER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES (1978); CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY, at xxxiii, xxxix, 292 (2009); Christina D. Romer, *Remeasuring Business Cycles*, 54 J. ECON. HIST. 573 (1994); William H. Sewell, Jr., *The Temporalities of Capitalism*, 6 SOCIO-ECON. REV. 517, 519-21 (2008).

41. *E.g.*, Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 LAW & SOC'Y REV. 771 (1988).

In practice, the capitalist habit of methodical risk calculation did far more than create value and enhance opportunities for rational market exchanges, for it also inspired those with sufficient power to use such calculations to shift anticipated risks onto weaker parties. Thus, as much as capitalism was about "risk taking" by bold entrepreneurs, it was also about "risk shifting" by the economically powerful. Adhesion contracts required individuals to surrender important legal rights and shifted risks from relatively powerful producers to those who commonly lacked either meaningful alternatives or adequate understandings of what they were surrendering.[42] "Releases" from workplace or consumer injuries, "independent contractor" agreements, anti-union policies, race- and gender-based wage discriminations, and the use of part-time employees and unpaid interns shifted operational costs onto the weak, uninformed, and vulnerable.[43] On a more sophisticated level investment banks, brokerage firms, and credit agencies used risk analysis to design complicated financial instruments that generated huge fees and profits while shifting the risks of those instruments onto distant, ill-informed, and often misled investors.[44] Indeed, during the past several decades wealthy and powerful interests in the United States

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42. *E.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 679-93 (1996). As Justice Oliver Wendell Holmes, Jr., wrote almost a century ago, "the fact that a choice was made according to interest does not exclude duress." Union Pac. R.R. v. Pub. Serv. Comm'n of Mo., 248 U.S. 67, 70 (1918).

43. *E.g.*, Edward A. Purcell, Jr., *The Action was Outside the Courts: Consumer Injuries and the Uses of Contract in the United States*, 1875–1945, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES 505, 505-35 (Willibald Steinmetz ed., 2000); Steven Greenhouse, *More Workers are Claiming 'Wage Theft,'* N.Y. TIMES, Sept. 1, 2014, at A1. For the broad and unfortunate social impact resulting from the decline of unions, see JAKE ROSENFELD, WHAT UNIONS NO LONGER DO (2014).

44. *See* LOWENSTEIN, *supra* note 34, at 231; *see also* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003); Nathaniel Popper, *Goldman to Pay $3.15 Billion to Settle Mortgage Claims*, N.Y. TIMES, Aug. 23, 2014, at B3.

succeeded in shifting a great variety of social and economic risks onto weaker and more vulnerable social groups.[45]

Historically, the exploitation of government was likely the most extensive form of capitalist risk-shifting. Private entrepreneurs and investors enthusiastically relied on government to bear the greatest and most far-reaching risks involved in creating the conditions necessary for economic growth and private profit making.[46] Those risks involved huge and continuous investments in elaborate order creating and enforcing institutions and in massive infrastructure and development projects, efforts whose risks were often incalculable but whose results radically expanded opportunities for private profit making. From courts, postal services, and police and military protection to highways, canals, railroads, and facilities for air travel to the internet, cybernetics, digitalization, and nanotechnologies, government investment and leadership underwrote economic growth, spurred ever more efficient methods of transportation and communication, and generated stunning new technologies that entrepreneurs exploited to create new products and industries.[47] Thus, in capitalist societies governments commonly shouldered the economic risks that posed the greatest uncertainties and required the most massive investments, while private entrepreneurs and investors subsequently exploited the results.[48]

Capitalist enterprises also learned to use risk in a variety of other profit-enhancing ways. Some hyped or created alleged "risks" to sell dubious products promoted as "risk

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45. JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES *passim* (2002) [hereinafter HACKER, THE DIVIDED WELFARE STATE]; JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM (2008) [hereinafter HACKER, THE GREAT RISK SHIFT].

46. *See, e.g.*, CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, A.D. 990–1992 (1992).

47. MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (PublicAffairs 2015) (2013); PETER J. WESTWICK, THE NATIONAL LABS: SCIENCE IN AN AMERICAN SYSTEM, 1947–1974 (2003).

48. *See* OSTERHAMMEL, *supra* note 5, at 670.

reducing,"[49] while others denied lethal risks to ensure the continued marketability of truly perilous products.[50] Financial services companies used risk to justify higher premiums and interest rates for poor and minority consumers even in the absence of sound statistical justifications.[51] Some companies weaponized the risks involved in asserting legal claims against them by adopting costly and burdensome litigation tactics that discouraged potential claimants from challenging their practices and products.[52] Others avoided risks of liability for the wrongs they caused by adopting legal devices that rendered them judgment proof.[53]

Such uses of "risk" mocked a supposed moral premise of capitalism, the claim that there was a merited correlation

49. *See, e.g.*, ALISON BASS, SIDE EFFECTS: A PROSECUTOR, A WHISTLEBLOWER, AND A BESTSELLING ANTIDEPRESSANT ON TRIAL (2008); BEN GOLDACRE, BAD PHARMA: HOW DRUG COMPANIES MISLEAD DOCTORS AND HARM PATIENTS (2012); MELODY PETERSEN, OUR DAILY MEDS: HOW THE PHARMACEUTICAL COMPANIES TRANSFORMED THEMSELVES INTO SLICK MARKETING MACHINES AND HOOKED THE NATION ON PRESCRIPTION DRUGS (2008).

50. ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA (2007); GERALD MARKOWITZ & DAVID ROSNER, DECEIT AND DENIAL: THE DEADLY POLITICS OF INDUSTRIAL POLLUTION *passim* (2002); Robert K. Jackler & Hussein A. Samji, *The Price Paid: Manipulation of Otolaryngologists by the Tobacco Industry to Obfuscate the Emerging Truth that Smoking Causes Cancer*, 122 LARYNGOSCOPE 75 (2012); Anne Landman & Stanton A. Glantz, *Tobacco Industry Efforts to Undermine Policy-Relevant Research*, 99 AM. J. PUB. HEALTH 45 (2009).

51. RICHARD D. MARSICO, DEMOCRATIZING CAPITAL: THE HISTORY, LAW, AND REFORM OF THE COMMUNITY REINVESTMENT ACT 156-59 (2005); Lei Ding et al., *Neighborhood Patterns of High-Cost Lending: The Case of Atlanta*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 193, 193-95 (2008); Jacob S. Rugh et al., *Race, Space, and Cumulative Disadvantage: A Case Study of the Subprime Lending Collapse*, 62 SOC. PROBS. 186 (2015); Rachel L. Swarns, *Long Banned, Mortgage Bias is Back as Issue*, N.Y. TIMES, Oct. 31, 2015, at A1; *Racial Penalties in Baltimore Mortgages*, N.Y. TIMES, May 31, 2015 (Sunday Review), at 10.

52. For the dynamic, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 440-59 (1992).

53. *E.g.*, Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 14-38 (1996).

between risk and reward.[54] It was fitting and reasonable, Frederick Hayek wrote, that wealth should flow to "men who accept the risk and responsibility of organizing the use of resources."[55] In practice, however, capitalist forms inspired and sanctioned many tactics that allowed the powerful to break the link between "risk and responsibility" and to reap the rewards while forcing the risks on others.

III. RISKS OF CAPITALISM

The most obvious risk of capitalist forms lies in the continuous and disruptive changes they cause.[56] "Creative [d]estruction," Schumpeter famously declared, "is the essential fact about capitalism."[57] For more than two centuries commentators debated the nature and direction of those changes, and extreme positions became familiar. Positive versions argued that capitalism produced freedom, opportunity, and economic growth and that it ultimately led to prosperity, democracy, and international cooperation.[58] Negative versions maintained that capitalism created massive inequalities, political oppression, and international rivalries and that it ultimately led to fascism, imperialism, and war.[59] For positive versions, the risk was that capitalism would be rejected, and the result would be political and

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54. LOWENSTEIN, *supra* note 34, at 219; *see* DE SOTO, *supra* note 38, at 55-56; GEORGE GILDER, WEALTH AND POVERTY 62, 106 (1981); Louis M. Hacker, *The Anticapitalist Bias of American Historians*, *in* CAPITALISM AND THE HISTORIANS 64, 88-89 (F. A. Hayek ed., 1954).

55. HAYEK, CONSTITUTION, *supra* note 26, at 121; *see id.* at 96; *accord* GILDER, *supra* note 54, at 245.

56. The social sciences developed out of the "reaction to the capitalist, democratic, and industrial revolutions" and the acute recognition that "traditional society was crumbling." FRANK W. ELWALL, MACROSOCIOLOGY: THE STUDY OF SOCIOCULTURAL SYSTEMS 11 (2009); *accord* STJEPAN G. MESTROVIC, EMILE DURKHEIM AND THE REFORMATION OF SOCIOLOGY (1988).

57. SCHUMPETER, *supra* note 3, at 83.

58. *E.g.*, ALBERT O. HIRSCHMAN, *Rival Views of Market Society*, *in* RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 105, 108-09 (1992) [hereinafter HIRSCHMAN, RIVAL VIEWS].

59. *E.g.*, J. A. HOBSON, IMPERIALISM: A STUDY (1902); NIKOLAI LENIN, IMPERIALISM: THE LAST STAGE OF CAPITALISM (Vanguard Press 1927) (1917).

economic oppression; for negative versions, the risk of capitalism was that it would proceed unimpeded, and the result would be political and economic oppression. None of those extreme versions captured the complexities of capitalism's risks and consequences, and all were oversimplified, essentially ahistorical, and ultimately obscurantist.

One of the most intriguing characteristics of the debate about those alleged mega risks of capitalism was the extent to which analyses—including some positive ones—adopted the underlying trope of capitalism's "contradictions." Marx and Engels famously started the ball rolling when they declared that the bourgeoisie inevitably produced "its own gravediggers,"[60] and subsequent analysts of varied stripes—from Thorstein Veblen and Max Weber to Daniel Bell and Irving Kristol—developed theories of such contradictions.[61]

Despite its frequent invocation, however, the trope of contradiction was misleading. While it lured capitalism's adversaries with the promise of ultimate triumph and counseled its defenders with the wisdom of strategic compromise, the trope embodied a rationalist fallacy that obscured rather than illuminated. Capitalist forms created countless conflicts, tensions, disruptions, oppositions, uncertainties, and instabilities, but those consequences were hardly "contradictions" in any dialectical sense. Nor were they inherent components of any inexorable process that unfolded according to its own intrinsic logic. The trope of contradiction ultimately assumed an overarching unity, some pure form of capitalism with an unchanging core, but capitalism constituted no such logical unity and existed in no such pure form.

The fallacy in the trope of contradiction mirrored the fallacy in the trope of the "iron laws" of classical economics. Both posited inherent logics that purportedly ruled economic

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60. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848), *reprinted in* BASIC WRITINGS ON POLITICS AND PHILOSOPHY 6, 20 (Lewis S. Feuer ed., 1959).

61. DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM (1976); IRVING KRISTOL, TWO CHEERS FOR CAPITALISM (1978); THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE (1904); WEBER, *supra* note 2; MAX WEBER, THE PROTESTANT ETHIC AND THE "SPIRIT" OF CAPITALISM (Peter Baehr & Gordon C. Wells eds., 2002).

behavior, and both failed in the same way. They transformed acute insights into totalizing theories and thereby elided complexity, contingency, and contextuality. While capitalist forms tend to create certain kinds of risks and results, it is the specific form of capitalism in its specific context—not "capitalism in general"—that determines the scope, extent, and impact of those risks and results. Werner Sombart was insightful when he noted that capitalist forms showed "a tendency to proclaim the supremacy of business interests over all other values," but he stumbled when he moved from tendency to necessity.[62] Then, he declared that capitalism's "acquisitive drive" was "quantitatively and qualitatively absolute" and necessarily brought "unscrupulousness and ruthlessness" that made "all moral and temperamental inhibitions disappear."[63] Such uncompromising claims led only to escalating abstractionism and unending disputation.

Although "capitalism in general" had no absolute form or necessary consequence, its various historical manifestations did tend to pose certain common risks. One was dramatic economic expansions and contractions that generated periodic crises,[64] while another was the tendency to concentrate wealth and increase economic inequality.[65] Less obvious was the tendency to define risk in narrow economic terms limited to easily quantifiable and monetarily defined risks while minimizing or ignoring other kinds of real-world

62. Werner Sombart, *Capitalism*, *in* 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 195, 197 (Edwin R. A. Seligman & Alvin Johnson eds., 1962).

63. *Id.* at 197-98.

64. *See, e.g.*, REINHART & ROGOFF, *supra* note 40; GEORGE SOROS, THE ALCHEMY OF FINANCE (2003); FINANCIAL CRISES: CAUSES, CONSEQUENCES, AND POLICY RESPONSES (Stijn Claessens et al. eds., 2014) [hereinafter FINANCIAL CRISES]; Romer, *supra* note 40, at 573.

65. *See, e.g.*, ZYGMUNT BAUMAN, COLLATERAL DAMAGE: SOCIAL INEQUALITIES IN A GLOBAL AGE (2011); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014); SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY (2014). Even Frank H. Knight, one of the founders of the Chicago School of Economics, acknowledged as much. There was "an undeniable natural tendency toward increasing inequality and concentration of power under free enterprise itself." FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT l (8th prtg. 1957).

personal and social risks.[66] Perhaps the ultimate risk of capitalist forms arose from an apparently common drive for continual expansion,[67] a drive that placed increasingly severe demands on the earth's resources and environment.[68]

One additional risk deserves special note. All societies harbor myths and visions testifying to their special nature, and capitalist societies proved no exception. While analysts made serious intellectual efforts to understand and explain the successes of capitalist forms, the growing wealth and concentration of economic power that accompanied those forms ensured tenacious support for rosier explanations that minimized their unpleasant and undesirable consequences. The resulting risk was that partisans of some particular capitalist form would seize on the rosiest theories available and transform them into glorifying ideologies that, like classic Marxist-Leninism, would lead them to deny any flaw in their theories and—if they acquired political power—attempt to impose their prescriptions on their societies.

Serious analysis of those relatively common risks of capitalist forms, however, cannot rest on mere generalities. As capitalism does not exist in any pure form, meaningful analysis must focus on specific historical manifestations.

IV. CAPITALISM AND RISK IN CONTEMPORARY AMERICA

The United States has been a capitalist nation for at least two centuries, but American economic ideas and practices remained fluid and diverse.[69] Since the 1970s, however, as both capitalist forms and the world itself changed, those

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66. *Cf.* LYNN HUNT, WRITING HISTORY IN THE GLOBAL ERA (2014) (emphasizing the importance of such non-economic factors as gender, race, religion, and culture).

67. "Modern capitalism has no purpose except to keep the show going." ROBINSON, *supra* note 7, at 143.

68. *See, e.g.*, BAUMAN, *supra* note 65, at 21-23, 25, 82; ULRICH BECK, POWER IN THE GLOBAL AGE: A NEW GLOBAL POLITICAL ECONOMY (2005); ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY (2014).

69. JOYCE APPLEBY, THE RELENTLESS REVOLUTION: A HISTORY OF CAPITALISM (2010); AMERICAN CAPITALISM: SOCIAL THOUGHT AND POLITICAL ECONOMY IN THE TWENTIETH CENTURY (Nelson Lichtenstein ed., 2006) [hereinafter AMERICAN CAPITALISM].

ideas and practices also changed.[70] While the nation continued to experience risks common to capitalist forms, one of those risks grew particularly acute. The last quarter of the twentieth century spawned glorifying capitalist ideologies that inspired true believers, spread into politics and popular culture, and helped make contemporary American capitalism colder and harsher for most Americans.

Those ideologies promoted an idealized form of capitalism that their advocates identified with the most fundamental American value of "freedom" itself, labeling it "free enterprise," "free price system," and—most commonly—"the free market."[71] By the late twentieth century their campaign had largely succeeded in equating the nation's contemporary form of capitalism with "the free market,"[72] thereby masking the fact that the former was flawed and the latter imaginary. Unlike thorough and exacting analyses of real-world market forces that sharpened insight and illuminated economic processes, the market ideologies blunted understanding and obscured consequences.[73]

A. *The Rise of Contemporary Market Ideologies*

The 1970s introduced daunting new problems that demanded attention. Raging inflation and persistent underemployment challenged orthodox Keynesian economics, while acute social and political changes

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70. *E.g.*, GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA (2009); EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY (Tom Baker & Jonathan Simon eds., 2002).

71. *Capitalism*, *in* BARRON'S, *supra* note 6.

72. JERRY Z. MULLER, THE MIND AND THE MARKET: CAPITALISM IN WESTERN THOUGHT, at ix-xvii (2002); Richard F. Teichgraeber III, *Capitalism and Intellectual History*, 1 MOD. INTELL. HIST. 267-69 (2004).

73. *See* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 110 (2015); CONTEMPORARY CAPITALISM, *supra* note 14, at 51. It is essential to distinguish such market ideologies—sweeping, extreme, and intensely partisan—from professional economic analyses of markets that are careful, qualified, and often highly skeptical of market behavior. *See, e.g.*, JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 288-362 (2012).

reoriented American politics.[74] The turmoil undermined faith in government, revitalized neo-classical economics, and fragmented the New Deal coalition.[75] Anti-tax movements spearheaded the way, and by the 1980s anti-tax passions dominated economic "conservatism" and the Republican Party.[76] Indicative of the dramatic reorientation in conservative thinking, neither Hayek's classic work, *The Road to Serfdom* (1944)[77] nor Friedman's early polemic, *Capitalism and Freedom* (1962)[78] gave significant attention to taxation, while no Republican presidential candidate from Barry Goldwater to Gerald Ford adopted the anti-tax ideology.[79] By the 1980s, however, anti-tax ideologies had spread widely among Americans and became gospel in the Republican Party, and they spurred ever more fervent condemnations of government and ever more extravagant praise for its supposed opposite, "the free market."

The market ideologies indicted government tax policy, regulatory practices, social welfare programs, and all "interferences" with "private" economic activity.[80] Although Hayek had consistently praised free markets in his earlier

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74. *See, e.g.*, GEOFFREY KABASERVICE, RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY 288-362 (2012); ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S (2012); Alice O'Connor, *The Politics of Rich and Rich: Postwar Investigations of Foundations and the Rise of the Philanthropic Right*, *in* AMERICAN CAPITALISM, *supra* note 69, at 228-48.

75. *See, e.g.*, ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION (2012); DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS (2012); JAMES LIVINGSTON, THE WORLD TURNED INSIDE OUT: AMERICAN THOUGHT AND CULTURE AT THE END OF THE 20TH CENTURY 1-20 (2010).

76. MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 4, 7 (2005); MIKE O'CONNOR, A COMMERCIAL REPUBLIC: AMERICA'S ENDURING DEBATE OVER DEMOCRATIC CAPITALISM 206, 208, 210 (2014).

77. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

78. FRIEDMAN, *supra* note 19.

79. O'CONNOR, *supra* note 76, at 213, 220, 224-25.

80. *See, e.g.*, CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950–1980 (1984).

work, he had also accepted a role for state regulation.[81] By 1976, however, he was insisting more fervently on the sheer benevolence of the market's "spontaneous ordering" and condemning the very idea of any contrary "social justice," an idea he castigated as a "quasi-religious superstition" that was "at present probably the gravest threat to most other values of a free civilization."[82]

By the 1980s Hayek, Friedman, and other market ideologues had become gurus of a fundamentalist faith that urged adoption of "market-based" policies across the social and economic spectrum.[83] That faith transformed American ideals of freedom, opportunity, and liberty into abstractions designed to serve as unquestioned prescriptions for "the free market," and it forged a passionate union between anti-government resentments and ostensibly "true" patriotism.[84] Above all, the faith embraced two counterpoised moral assumptions: the economically successful were hard-working, productive, self-sufficient, and morally exemplary; the economically unsuccessful were lazy, incompetent, willfully dependent, and morally dubious or worse. The former were worthy; the latter were not.[85]

In retrospect, Irving Kristol's *Two Cheers for Capitalism* proved something of a turning point. Disturbed over an "inner spiritual chaos" that was "created by the dynamics of capitalism itself," Kristol offered a sharp moral critique of Hayek, a thinker whom he admired as "the most intelligent defender of capitalism today."[86] In elaborating his market

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81. HAYEK, CONSTITUTION, *supra* note 26, at 101, 125, 142-47; HAYEK, THE ROAD TO SERFDOM, *supra* note 77, at 119-33.

82. 2 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 62, 66-67 (1976).

83. *See generally* BURGIN, *supra* note 75, at 152-85.

84. *See* GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999).

85. Consequently, ideology increasingly polarized the nation, *see* ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010), with racial tensions playing an important role, *e.g.*, Alberto Alesina et al., *Why Doesn't the US Have a European-Style Welfare State?*, 39 (Harv. Inst. Econ. Res., Discussion Paper No. 1933, Nov. 2001).

86. KRISTOL, *supra* note 61, at 268.

theory, Kristol observed, Hayek rejected the principle that "justice" required the "proportionality of reward to moral merit."[87] Instead, Hayek claimed that "in a free society it is neither desirable nor practicable that material rewards should be made generally to correspond to what men recognize as merit."[88] In taking such a position, Kristol noted, Hayek was "opposing a *free* society to a *just* society."[89] That was profound error. Human beings, Kristol countered, "cannot accept the historical accidents of the marketplace—seen merely as accidents—as the basis for an enduring and legitimate entitlement to power, privilege and property."[90] To protect both capitalism and democracy, he urged, their defenders had to satisfy the nation's "hunger for authority" by providing a unified moral justification for both.[91] "The results of the political process and the exercise of individual freedom—the distribution of power, privilege, and property—must also be seen as in some profound sense expressive of the values that govern the lives of individuals."[92] Calling for moral justifications for "the distribution of power, privilege, and property," Kristol's clarion inspired a generation of paeans to the virtues—economic, political, and moral—of "the free market."

George Gilder was one of those who responded. The free market, he announced, embodied the "key to peace and prosperity."[93] Although it brought unequal economic results, government interventions were far worse. They "always, unfortunately, turn out bad: highly skewed, hugely unequal, presumptively unfair, and changing little, or getting worse."[94]

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87. HAYEK, CONSTITUTION, *supra* note 26, at 93, *quoted in* KRISTOL, *supra* note 61, at 259.

88. HAYEK, CONSTITUTION, *supra* note 26, at 94, *quoted in* KRISTOL, *supra* note 61, at 259-60. Kristol misquoted Hayek, substituting the word "society" at the beginning of the quote for the word "system," which the latter had used in the original.

89. KRISTOL, *supra* note 61, at 260.

90. *Id.* at 263.

91. *Id.* at 266-67.

92. *Id.* at 267.

93. GILDER, *supra* note 54, at 9-10.

94. *Id.* at 10.

Every attempt to redistribute wealth "strikes at the living heart of democratic capitalism."[95] The unsuccessful must learn to appreciate the successful, for "the golden rule of economics" taught that "the good fortune of others is also finally one's own."[96] Indeed, amassing great wealth was an achievement that demanded praise. "The risk-bearing role of the rich cannot be performed so well by anyone else," Gilder declared.[97] Providing for the general welfare—"turning gold into goods and jobs and art"—was the "the function of the rich: fostering opportunities for the classes below them in the continuing drama of the creation of wealth and progress."[98]

The new market ideologies relied on all-encompassing abstractions to support glittering simplifications that reached far beyond any policies reasonably necessary to deal with the distinctive problems of the 1970s and early 1980s. They claimed that "the free market" was the most "efficient" form of economic organization but refused to acknowledge the complexities and subjectivities embedded in economic concepts of "efficiency."[99] Equally, they dismissed the fact that their claims of "efficiency" were based on contrary-to-fact assumptions about perfect competition and perfect market-clearing equilibria.[100] Highlighting the importance of incentives and "self-interest," they ignored the complexities of human motivation and the fact that the very idea of "self-interest" was itself malleable and culturally formed.[101]

The market ideologues draped their claims in absolutist terms, as though the concepts they deployed contained

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95. *Id.*

96. *Id.* at 9.

97. *Id.* at 63.

98. *Id.*; *accord* HAYEK, CONSTITUTION, *supra* note 26, at 127, 129-30.

99. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS (1992); AMARTYA SEN, INEQUALITY REEXAMINED (1992); LESTER C. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE (1980).

100. *See* ATKINSON, *supra* note 73, at 244; ROGER BACKHOUSE, A HISTORY OF MODERN ECONOMIC ANALYSIS 311 (1985); CONTEMPORARY CAPITALISM, *supra* note 14, at 72-73.

101. *See, e.g.*, JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 316-17 (2012); HIRSCHMAN, RIVAL VIEWS, *supra* note 58, at 143-47.

inherent meanings that mandated the specific policies they urged. They claimed possession of such honored terms as "freedom," "liberty," and "property," while avoiding the fact that those concepts represented highly complex and invariably qualified ideas whose practical significance changed as social, economic, and political conditions evolved.[102] Continually invoking "liberty," for example, they ignored the fact that "liberty" was always and necessarily limited to certain specific liberties that were compatible with both broad communal interests and competing individual liberties.

Their absolutist thinking swept the ideologues to extremes. Jude Wanniski claimed that the free market constituted a "global mechanism" that boasted a "timeless coherence."[103] Left alone, it generated freedom and prosperity for all. Disrupted, it broke down, and such break-downs stemmed from the "intellectual failure" of politicians who dared interfere with the "timeless coherence" of that "global mechanism."[104] Similarly, as chair of the Federal Reserve Board, Alan Greenspan insisted that government regulation of hedge funds was unnecessary because they "are strongly regulated by those who lend the money."[105] "We must not lose sight of the fact," he proclaimed with absolute conviction, "that risks in the financial markets are regulated by private parties."[106] Even after the nation's most spectacularly successful hedge fund met financial disaster and collapsed in ruin, Greenspan continued to affirm the benevolent regulatory discipline of "the free market." It took the stunning financial catastrophe of 2008 to force him to

102. *See, e.g.*, AMARTYA SEN, RATIONALITY AND FREEDOM (2002); Ian Ayres, *Discrediting the Free Market*, 66 U. CHI. L. REV. 273, 276-82 (1999).

103. JUDE WANNISKI, THE WAY THE WORLD WORKS, at xi (1978).

104. *See id.* at xi, 17, 53 ("Decadence occurs in a political society only when the politicians themselves lose their way . . . .").

105. LOWENSTEIN, *supra* note 34, at 178, 231.

106. MCLEAN & NOCERA, *supra* note 34, at 66.

concede—even then with the greatest reluctance—that his market thinking contained a "flaw."[107]

The way the market ideologues used the "Laffer curve" revealed their mindset. The "curve" was a theoretical construct that did nothing but illustrate the unexceptional point that there was some assumed level of taxation that would produce maximum tax revenues.[108] The "curve" did not and could not specify the location of that maximizing level. Indeed, it could as readily suggest tax increases as tax cuts, and studies found that a maximizing rate could be as high as 71%, many times what the anti-tax market ideologues desired.[109] Moreover, the "curve" did not and could not dispute the fact that the actual impact of tax cuts would depend for the most part on prevailing economic conditions and that they would not necessarily stimulate enough growth to increase—let alone maximize—revenues. Finally, the "curve" did not and could not specify the proper beneficiaries of any tax cuts or identify the wealthy as their proper paramount beneficiaries. The market ideologues, however, ignored those facts and, instead, hailed the "Laffer curve" as proof of the unquestionable beneficence of tax cuts, especially steep cuts for the wealthy.[110]

David Stockman, President Ronald Reagan's first budget director, captured the true-believer mentality he saw animating the administration's market ideologues. The "Laffer curve," he wrote, resonated instinctively with Reagan himself because he had long resented high taxes on the rich.[111] Thus, when Reagan heard about the "curve," he "knew instantly that it was true," for it "set off a symphony in his

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107. *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 11, 46 (2008) (testimony of Alan Greenspan, Former Chair, Federal Reserve Board).

108. *See* Don Fullerton, *Laffer Curve*, *in* 4 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 839, 839-41 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

109. *Id.* at 839, 841.

110. *See, e.g.*, WANNISKI, *supra* note 103.

111. DAVID A. STOCKMAN, THE TRIUMPH OF POLITICS: THE INSIDE STORY OF THE REAGAN REVOLUTION 10-11 (1987).

ears."[112] Reagan and many of his advisors, Stockman concluded, embraced a "fiscal mythology."[113] They took the Laffer curve "literally (and primitively)" and regarded it as "magical."[114]

Further, to support their anti-government animus and "free market" faith, the market ideologies denied the fact of "private" coercive power and the growing oligopolization of the American economy.[115] They defined "the free market" as a system that guaranteed economic liberty by giving all individuals the right to bargain freely and equally with all others, and they identified coercive "power" solely with governmental compulsion and its allegedly ever-present threat to their imagined ideal of absolute "liberty." Thus, the market ideologies conjured away the hard fact that "private" power existed and that those who commanded substantial economic resources often compelled the compliance of Americans with few or no resources.[116]

Not surprisingly, then, the market ideologies also ignored the fact that capitalist forms invariably relied on massive government support. From Hamilton's national bank to the latest communication marvels of the twenty-first century, American governments at all levels created the conditions, infrastructure, and many of the innovations that fueled the nation's economic growth.[117] The United States, in

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112. *Id.* at 10.

113. *Id.* at 74.

114. *Id.* at 295.

115. *See, e.g.*, SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010); BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010) (exploring the effects of monopolies present in the current U.S. economy).

116. *See, e.g.*, LESTER C. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 142 (1975) [hereinafter THUROW, GENERATING INEQUALITY]. *Compare* HAYEK, CONSTITUTION, *supra* note 26, at 120-21 (1960) (explaining why workers are "free" according to market theory), *with* BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (detailing some of the innumerable factors that intimidate and oppress low-income workers).

117. *E.g.*, BECKERT, *supra* note 16; SHARON ANN MURPHY, INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA 100-02 (2010); RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA (2011);

fact, benefitted from "one of the most interventionist governments when it comes to innovation."[118] The nation's space program, for example, provided a wide range of new technologies that private companies subsequently exploited, which led Republican Senator Ted Cruz to identify "NASA's primary mission" as "exploring space and developing the wealth of new technologies that stem from its exploration."[119] Equally, market ideologies ignored two of the most compelling facts of economic history, that governments often channeled market behavior effectively and that, when channeling laws were weakened or repealed, economic crises and depressions often followed.[120]

Thus, on the broadest level the market ideologies dismissed historical context and glossed over the contingent and complex factors that actually determined changing levels of economic activity and social welfare.[121] That compulsion to deny history led George Stigler, one of the major figures in the neo-classical revival, to advance "a hypothesis on the nature of political life" that was manifestly false on its face.[122] Because the "announced goals of a policy are sometimes unrelated or perversely related to its actual effects," Stigler maintained, "the *truly intended effects should be deduced*

GOVERNMENT AND TECHNICAL PROGRESS: A CROSS-INDUSTRY ANALYSIS (Richard R. Nelson ed., 1982); THE POSITIVE SUM STRATEGY: HARNESSING TECHNOLOGY FOR ECONOMIC GROWTH (Ralph Landau & Nathan Rosenberg eds., 1986).

118. MAZZUCATO, *supra* note 47, at 4.

119. Hunter Walker & Jessica Orwig, *Ted Cruz's Plan for NASA is Epic*, BUS. INSIDER (Jan. 14, 2015, 1:15 PM), http://www.businessinsider.com/heres-ted-cruzs-epic-plan-for-nasa-2015-1.

120. *See, e.g.*, REINHART & ROGOFF, *supra* note 40; ROUBINI & MIHM, *supra* note 39; CONTEMPORARY CAPITALISM, *supra* note 14, at 52.

121. *See, e.g.*, ANGUS MADDISON, CONTOURS OF THE WORLD ECONOMY, 1–2030 AD: ESSAYS IN MACRO-ECONOMIC HISTORY (2007); JONATHAN D. OSTRY, ANDREW BERG & CHARALAMBOS G. TSANGARIDES, REDISTRIBUTION, INEQUALITY, AND GROWTH (Apr. 2014) (staff paper of the International Monetary Fund); Paul A. Volcker, *Foreword to the New Edition*, *in* SOROS, *supra* note 64, at xi-xii.

122. GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 140 (1975).

from the actual effects."[123] Such an approach erased real-world history from what passed as economic analysis.

As a matter of that real-world history, the market ideologies in effect dredged up the standard claims of centuries-old, right-wing rhetoric, the arguments of perversity, futility, and jeopardy that Albert O. Hirschman so deftly illuminated. Those well-rehearsed anti-government and anti-"reform" assertions relied heavily on myths, clichés, stereotypes, personal biases, and stark oversimplifications that seldom captured real-world consequences. "[T]hey stand effectively exposed as *limiting cases*," Hirschman concluded, "badly in need, under most circumstances, of being qualified, mitigated, or otherwise amended."[124]

The ultimate foundation of the market ideologies was manifest. Pre-existing social and political commitments, not the demands of any compelling economic reasoning, underlay their absolutist claims and blessed the unyielding faith of their true believers.[125]

B. *Risks and Results*

Backed by anti-government passions, determined economic interests, and a new Republican coalition, market ideologies helped reorder American life, and by the early twenty-first century their damaging consequences had become readily apparent.[126] The field of economics embraced

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123. *Id.* (emphasis in the original).

124. ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 167 (1991).

125. *See, e.g.*, ROBERT J. SHILLER, THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY (2003); THUROW, GENERATING INEQUALITY, *supra* note 116.

126. *See, e.g.*, THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL (2013). Market-based policies brought failures to international aid programs, *e.g.*, Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's* Economic Growth in the 1990s: Learning from a Decade of Reform, 44 J. ECON. LITERATURE 973 (2006), and may have contributed to the growing governmental unwillingness to prosecute corporations and their officials for economic crimes, *see* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2003); Jed S.

neo-classic approaches, grew more theoretical and model-based, and dismissed social, political, and historical considerations. As a result, the profession's orientation became increasingly compatible with the market ideologies and tended to support a "thoughtless alliance with new business elites determined to use public policy for private rather than communal ends."[127] Repeated tax cuts brought huge and continuing government deficits and forced the nation into a growing reliance on foreign countries and their investments,[128] while repeated cuts to government budgets led to declines in public services and accelerating deterioration of the nation's infrastructure.[129] In the field of corporate governance, market ideologies gave birth to the theory that corporations should seek nothing but the maximization of "shareholder value."[130] Rather than leading to the steady corporate growth that it promised, the theory brought lavish and excessive compensation packages to high-level insiders, the pursuit of short-term goals that often compromised long-term corporate health, and substantial harm to the interests of shareholders themselves.[131]

Rakoff, *Justice Deferred is Justice Denied*, 62 N.Y. REV. BOOKS, Feb. 19, 2015, at 8.

127. MICHAEL A. BERNSTEIN, A PERILOUS PROGRESS: ECONOMISTS AND PUBLIC PURPOSE IN TWENTIETH-CENTURY AMERICA 184 (2001).

128. *E.g.*, JOSEPH E. STIGLITZ, THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM 196-202 (2015) [hereinafter STIGLITZ, THE GREAT DIVIDE]; CTR. ON BUDGET AND POL'Y PRIORITIES, CHART BOOK: THE BUSH TAX CUTS (Dec. 10, 2012), http://www.cbpp.org/sites/default/files/atoms/files/12-10-12tax.pdf; Jonathan Huntley, *The Long-Run Effects of Federal Budget Deficits on National Savings and Private Domestic Investment* (Cong. Budget Office, Working Paper No. 2014-02, Feb. 2014).

129. *E.g.*, Bruce Alberts, Editorial, *Am I Wrong?*, 339 SCIENCE 1252, 1252 (2013) (discussing the failure of the United States to invest in infrastructure and scientific research); William F. Marcuson III, *Fixing America's Crumbling Infrastructure: A Call to Action for All*, 12 PUB. WORKS MGMT. & POL'Y 473 (2008).

130. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, GEO. L.J. 439 (2001).

131. *See* ROUBINI & MIHM, *supra* note 39, at 68-70; LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC pt. 2 (2012).

In the field of education, market ideologies spurred a movement to make schooling a for-profit business. Roseate market-based promises finessed the real problems that plagued the nation's educational system—racial segregation, concentrated poverty, and inadequate and unequal public funding—while for-profit schools, once established, often produced dysfunction and disappointment.[132] For the political right, however, the movement offered significant benefits: new opportunities for private profit, a tool for weakening teachers' unions, and a rationale for reducing government funding for public education and justifying additional tax cuts. Advocates of market-based proposals "have an implacable hostility toward the public sector," Diane Ravitch concluded, and their reforms have "opened the public coffers to profiteering, fraud, and exploitation by large and small entrepreneurs."[133]

Market ideologies proved particularly harmful to the cause of environmental protection. Although scientific evidence of the anthropogenic causes of climate change was overwhelming,[134] many influenced by market ideologies ignored or denied it. They recognized that—if the scientific evidence were accepted—it would require governments to act vigorously to channel economic behavior along more

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132. DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS 4-6, 325 (2013); *see* HIRSCHMAN, RIVAL VIEWS, *supra* note 58, at 88-89 (discussing the conditions in which voucher schemes in a market-based solution remedies government programs and how education does not fit those conditions); RICHARD D. KAHLENBERG & HALLEY POTTER, A SMARTER CHARTER: FINDING WHAT WORKS FOR CHARTER SCHOOLS AND PUBLIC EDUCATION (2014).

133. RAVITCH, *supra* note 132, at 4; *see also* Patricia Cohen, *For-Profit Colleges Fail Standards, but Get Billions*, N.Y. TIMES, Oct. 13, 2015, at A1; Tamar Lewin, *Government to Forgive Student Loans at Corinthian*, N.Y. TIMES, June 9, 2015, at A11 (identifying college students defrauded by their for-profit school who will have their federal loans forgiven, which is funded by taxpayer dollars); Tamar Lewin, *Perks Grow for Presidents of Colleges, Survey Finds*, N.Y. TIMES, June 8, 2015, at A11 (discussing public university presidents' increasingly high salaries).

134. As of 2010, between 97 and 98% of scientists working on climate change agreed on the anthropogenic causes of climate change. William R. L. Anderegg et al., *Expert Credibility in Climate Change*, 107 PNAS 12107, 12107 (2010).

salutary, long-term lines.[135] Because true believers could not abide such a possibility, they were compelled to reject the overwhelming findings of science and ignore increasingly acute environmental dangers that threatened the United States and the world.[136]

The market ideologies caused other harms that were more immediately obvious. The devastating crash of 2008 was a spectacular example.[137] Market ideologies led both government agencies and private institutions to assume that "the free market" would operate automatically and efficiently. Actors throughout the system lost vigilance while many abandoned their sense of personal responsibility and gambled on geometrically multiplying financial risks.[138] "[D]ecades of free-market fundamentalism," Nouriel Roubini, the co-author of an elaborate study on the crash, concluded, "laid the foundation for the meltdown."[139] The crash demonstrated that "free market" arrangements often failed in their alleged "disciplinary" function and that whatever discipline they did impose was erratic and unreliable.[140]

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135. *See, e.g.*, ENVTL. PROT. AGENCY, CLIMATE CHANGE IN THE UNITED STATES: BENEFITS OF GLOBAL ACTION (2015).

136. *See* Robert J. Brulle, *Institutionalizing Delay: Foundation Funding and the Creation of U.S. Climate Change Counter-Movement Organizations*, 122 CLIMATIC CHANGE 681, 682, 692 (2014).

137. *See* ALAN S. BLINDER, AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD 56-59 (2013); ROUBINI & MIHM, *supra* note 39, at 72-76. *See generally* MCLEAN & NOCERA, *supra* note 34.

138. Unregulated and short-term risk taking was a major factor in the meltdown. *See* MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010); ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES 534 (2009).

139. THE ECONOMICS BOOK 61 (Darling Kindersley Ltd. ed., 2012); *see also* ANAT ADMATI & MARTIN HELLWIG, THE BANKERS' NEW CLOTHES: WHAT'S WRONG WITH BANKING AND WHAT TO DO ABOUT IT (2013); FINANCIAL CRISES, *supra* note 64.

140. GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 83, 87, 141 (2011); Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 1048 & n.436 (2009) (further supporting the proposition that free market discipline is ineffective). The federal government's erratic efforts to protect major financial institutions sometimes

"Relying on institutional investors to self-regulate," one economist conceded, "is the economic equivalent of letting children decide their own diets."[141]

Equally important, the meltdown demonstrated that government deregulation did not lead to "the free market" as true believers proclaimed. Rather, deregulation simply transferred more economic decision-making power to the economic elite that controlled the nation's dominant private economic institutions,[142] and it was those institutions that pursued the policies and made the decisions that caused the shattering worldwide crash.

Notably, the crash highlighted the risks inherent in the failure of absolutist market ideologies to take account of changing social and institutional contexts.[143] Few economists anticipated the meltdown, and a great many believed that such a meltdown was virtually impossible. Most thought that wise monetary policy would—as Friedman had taught—prevent future economic catastrophes,[144] while market ideologues adamantly insisted—as Greenspan had preached—that the self-checking operations of "the free market" would prevent such disasters. Accordingly, they failed to recognize the acute risks involved in radically

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encouraged even greater disciplinary shortfalls. *E.g.*, LOWENSTEIN, *supra* note 34, at 229-30.

141. Barry Eichengreen, *The Last Temptation of Risk*, 101 NAT'L INT. 8, 8 (2009); *see* SCOTT REYNOLDS NELSON, A NATION OF DEADBEATS: AN UNCOMMON HISTORY OF AMERICA'S FINANCIAL DISASTERS (2012) (discussing financial crises throughout U.S. history and the influence of decisions made by investors and bankers).

142. "[E]fforts to create competitive markets do not deregulate; they redeploy regulation." MARC K. LANDY ET AL., CREATING COMPETITIVE MARKETS 2-3 (2007); *see also, e.g.*, JOHNSON & KWAK, *supra* note 115; KRIPPNER, *supra* note 140, at 141-42; LYNN, *supra* note 115; Wilmarth, *supra* note 140, at 975-80.

143. Even before the meltdown of 2008 it was clear that the economic policies that the market ideologies had helped put in place were not proving successful. ANDREW GLYN, CAPITALISM UNLEASHED: FINANCE, GLOBALIZATION AND WELFARE 137 (2007).

144. Paul Krugman, *Why Weren't Alarm Bells Ringing?*, 61 N.Y. REV. BOOKS, Oct. 23, 2014, at 41. In 2003, for example, Robert E. Lucas, Jr., a leader of the Chicago school of economics, declared that the "central problem of depression prevention has been solved, for all practical purposes." Robert E. Lucas, Jr., *Macroeconomic Priorities*, 93 AM. ECON. REV. 1 (2003).

escalating levels of debt and in new financial practices that were shoddy and exceptionally risky, if not downright fraudulent. Equally, they failed to understand the significance of profound changes in the financial world from the rapid growth of unregulated "shadow banking" to the expanding role of international capital markets and the multiplying complexities of the global economy.[145]

The crash also spotlighted another baleful consequence of the market ideologies: rapidly increasing wealth inequality.[146] Compared to other developed countries, the United States struggled with "one of the highest levels of wealth inequality overall."[147] The policies of the market ideologues brought "wage inequality" that was "relatively high and fast-growing"[148] and, by the early twenty-first century, the "highest level of disposable income inequality among high-income economies."[149]

That painfully sharpening inequality was hardly surprising, for the policies that the market ideologies demanded were designed to advantage the wealthy. Steep tax cuts on high incomes, repeal of the inheritance tax, lower capital-gains taxes, rock-bottom effective corporate tax rates, and allowance of corporate "inversions" that shifted tax liabilities to foreign tax havens all led to denser

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145. *See* MEGHNAD DESAI, HUBRIS: WHY ECONOMISTS FAILED TO PREDICT THE CRISIS AND HOW TO AVOID THE NEXT ONE (2015); REINHART & ROGOFF, *supra* note 40, at 208-15; MARTIN WOLF, THE SHIFTS AND THE SHOCKS: WHAT WE'VE LEARNED—AND HAVE STILL TO LEARN—FROM THE FINANCIAL CRISIS 128-30 (2014).

146. *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008); HACKER, THE GREAT RISK SHIFT, *supra* note 45; NOLAN MCCARTY ET AL., POLARIZED AMERICA 165-75 (2006). *See generally* ATKINSON, *supra* note 73, at chs. 1-3 (discussing inequality and income distribution).

147. James B. Davies, *Wealth and Economic Inequality*, *in* THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY 127, 147 (Wiemer Salverda et al. eds., 2009).

148. Francine D. Blau & Lawrence M. Kahn, *Inequality and Earnings Distribution*, *in* THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY, *supra* note 147, at 177, 188.

149. Andrea Brandolini & Timothy M. Smeeding, *Income Inequality in Richer OECD Countries*, *in* THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY, *supra* note 147, at 71, 96.

concentrations of private wealth.[150] Similarly, skyrocketing compensation packages for corporate executives and exceptionally low tax rates for hedge fund managers allowed a relative handful of well-placed individuals to garner incomes reaching billions of dollars a year. In 2014 the bonus pool for Wall Street personnel was double the total amount of money earned by all Americans who worked full time for the federal minimum wage.[151]

Compounding those results, the market ideologies supported other policies that directly disadvantaged ordinary Americans. Corporate outsourcing of jobs, growing use of "part-time" employees, restrictions on labor unions, cuts in welfare programs, and threats to Social Security and government-supported health care struck at the welfare of millions.[152] The deepening economic inequality that resulted spurred a cascade of further harms. It altered marriage practices and family arrangements, for example, which drove many out of the "middle class" and further widened the gulf between wealthy elites and the majority of Americans.[153] Finally, the tax cuts the market ideologies sponsored caused ever-deepening government deficits and thereby provided further justification for their continuing "frontal attack on the welfare state."[154]

Reinforcing those policies, market ideologies infiltrated the United States Supreme Court and helped reshape American law to impose additional burdens on ordinary Americans. Controlled by a five-justice Republican majority shaped by their party's market ideologies, the Court

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150. *E.g.*, GRAETZ & SHAPIRO, *supra* note 76, at 4-6, 95; Edward D. Kleinbard, *'Competitiveness' has Nothing to Do With it*, 144 TAX NOTES 1055 (2014); Paul Caron, *Tax Foundation: Burger King and Corporate Tax Rates and Revenues*, TAXPROF BLOG (Sept. 2, 2014), http://taxprof.typepad.com/taxprof_blog/2014/09/tax-foundation-burger-king.html.

151. Justin Wolfers, *Income Inequality, in One Startling Comparison*, N.Y. TIMES, Mar. 17, 2015, at A3.

152. *See generally* HACKER, THE DIVIDED WELFARE STATE, *supra* note 45, at 6-7, 23-24, 36, 49-51 (discussing the privatization of social benefit programs).

153. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014).

154. STOCKMAN, *supra* note 111, at 74.

assiduously protected corporate interests by shifting the costs of economic enterprise onto vulnerable workers, consumers, tort victims, civil rights plaintiffs, and claimants who sought remedies under various federal statutes for the economic injuries they suffered. Through a variety of techniques, the Court restricted their access to the courts, multiplied the obstacles they faced, and narrowed the rights they could assert.[155]

One of the most striking examples of the Court's ideological drive came in a series of decisions dealing with jurisdiction over foreign corporations. The decisions limited the forums where corporations could be sued, thus reducing their potential liabilities and forcing on vulnerable parties the burdens of pursuing remedies in distant and often foreign forums.[156] The Court did so, moreover, by discriminating against individual defendants in favor of corporate defendants.[157] Perhaps more shocking, it did so in a way likely to encourage American companies to send ever more jobs and investments overseas.[158] Most ominous, four of the Republican justices implicitly rejected the public-protecting constitutional principle established in *International Shoe Co.*

155. *See, e.g.*, Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1738-47 (2014); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); Alan B. Morrison, *Saved By the Supreme Court: Rescuing Corporate America*, AM. CONST. SOC'Y (Oct. 2011), https://www.acslaw.org/sites/default/files/Morrison_-_Saved_by_the_Supreme_Court.pdf.

156. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 750-51, 762-63 (2014); Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2850-51 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785, 2790-91 (2011).

157. *Compare* Burnham v. Super. Ct. of Cal., 495 U.S. 604, 607-08, 627-28 (1990), *with Goodyear*, 131 S. Ct. at 2850-51, *and Daimler AG*, 134 S. Ct. at 750-51.

158. *See, e.g.*, *McIntyre Mach.*, 131 S. Ct. at 2790-91 (holding that an English corporation could avoid personal jurisdiction and therefore liability in New Jersey by selling its products in the United States through a formally "independent" U.S. distributor). The ruling provided another tactic by which American companies could seek to avoid liability for their products by shifting their production abroad to "independent" corporations chartered in foreign countries.

v. Washington almost three quarters of a century ago.[159] *International Shoe* held that sellers should not be allowed to systematically sell their products and make their profits in a forum while, at the same time, artfully manipulating legal technicalities to avoid the forum's jurisdiction over claims related to their profit-making activities in that forum.[160] In *McIntyre Machinery* the four rejected that proposition and approved precisely that kind of artful manipulation.[161]

Perhaps most fundamental, the market ideologies put American democracy itself at grave risk. Portraying democracy and the market as conjoined twins, they essentially equated the two.[162] "Markets are voting machines," proclaimed Citibank's chairman, Walter Wriston; "they function by taking referenda" and give "power to the people."[163] Although markets gave no meaningful power to the great majority of people, market ideologies did help make contemporary American democracy more congruent with "free market" economics. In both, massive flows of privately controlled capital substantially shaped the relevant markets; the products available to "purchaser/voters" were limited to those that dominant institutions placed on the market; and—perhaps most salient—"purchaser/voters" with the most money were able to command the most market power.[164]

The market ideologies accelerated the commodification of American democracy and its transformation into a plebiscitarian plutocracy governed by "free market politics," a system in which the "revealed preferences"—the willingness of buyers to spend their money for desired products—of exceptionally wealthy individuals and

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159. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 315, 320-21 (1945).

160. *See id.*

161. *See McIntyre Mach.*, 131 S. Ct. at 2785, 2790-91.

162. AMERICAN CAPITALISM, *supra* note 69, at 1.

163. STEVE FRASER, THE AGE OF ACQUIESCENCE: THE LIFE AND DEATH OF AMERICAN RESISTANCE TO ORGANIZED WEALTH AND POWER 297 (2015).

164. *See, e.g.*, MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013).

resource-laden corporations increasingly shaped issues, campaigns, and sometimes outcomes. "Free market politics" gave those powerful donors immense power to decide which potential candidates could seriously contend for public office, determine the ideological content and promotional strength of election campaigns, and mold the practical policy consequences that followed from almost any electoral result.[165] Through a wink-and-nod system euphemistically labeled "access," it ensured that the "information transfers" of the wealthy and powerful would regularly fall on the welcoming ears of candidates and office-holders heavily dependent on the sizeable, continuing, and purposeful campaign funding that only the wealthy and powerful could steadily and reliably provide.[166]

Not surprisingly, the Supreme Court's five "conservative" Justices constitutionalized "free market politics." Their decisions in *Citizens United v. FEC*[167] and

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165. *See, e.g.*, BARTELS, *supra* note 146; JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

166. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011); JOHN NICHOLS & ROBERT W. MCCHESNEY, DOLLAROCRACY: HOW THE MONEY-AND-MEDIA ELECTION COMPLEX IS DESTROYING AMERICA (2013); BENJAMIN C. WATERHOUSE, LOBBYING AMERICA 10 (2014); John M. de Figueiredo, *Lobbying and Information in Politics*, 4 BUS. & POL. 125 (2002). In 2011 and 2012, 30,000 individuals—one one-hundredth of one percent of Americans—contributed $1.7 billion to candidates, an amount that constituted twenty-eight percent of all disclosed federal campaign contributions. RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS: THE *MCCUTCHEON* DECISION, CAMPAIGN FINANCE LAWS AND THE FIRST AMENDMENT 17 (2014) (referencing quotation of Richard Briffault of the Columbia Law School). In the same years nearly 600 individuals contributed $250,000 or more each to political action committees, while ninety-five individuals gave more than a million dollars apiece. Richard Briffault, McCutcheon *and the Future of Campaign Finance*, JURIST: ACADEMIC COMMENTARY (Nov. 4, 2013, 8:00 AM), http://jurist.org/forum/2013/11/richard-briffault-mccutcheon-campaign.php. Perhaps even more striking, as of mid-2015 a mere 158 families had contributed $176 million toward the 2016 election, half of all the campaign funds raised. Nicholas Confessore, Sarah Cohen & Karen Yourish, *From only 158 Families, Half the Cash for '16 Race*, N.Y. TIMES, Oct. 11, 2015, at A1.

167. 558 U.S. 310 (2010).

McCutcheon v. FEC,[168] formally based on the First Amendment and a near absolute equation of money with "speech," overturned precedents and invalidated legislative limits on campaign funding. Most important, in *Citizens United* they announced that only the prevention of "corruption" could justify limits on campaign spending and then ruled that only explicit "quid pro quo" deals could constitute such "corruption."[169] To drive their meaning home, they declared that neither "[t]he appearance of influence or access" nor whatever could somehow be portrayed as "independent" campaign spending could constitute "corruption."[170] With that tinier-than-the-eye-of-a-needle definition, they made *Citizens United* a guidebook that could fairly be entitled "Political Corruption for Dummies."[171] They taught all but the most willfully obtuse how to safely attempt to buy and sell political influence, policies, offices, and votes.[172] Their support for "free market" politics served the

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168. 134 S. Ct. 1434 (2014). *See* Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005) (exploring the Supreme Court's recent hostility toward campaign finance regulation and anticipating possible future changes in this jurisprudence).

169. *Citizens United*, 558 U.S. at 345, 357, 359.

170. *Id.* at 357, 359-60. Prior cases had defined "corruption" more broadly and allowed proof under lower evidentiary standards. *See* McConnell v. FEC, 540 U.S. 93, 134-36, 143 (2003); FEC v. Beaumont, 539 U.S. 146, 155-56, 161-62 (2003); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440-41, 456 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390, 391-94, 397 (2000).

171. Ironically, the decisions were supported by justices who claimed to be "originalists." In fact, eighteenth-century Americans involved in the Revolution and Constitution making were reacting against the political "corruption" they attributed to the influence of concentrated power and excessive wealth. Such corruption, they believed, would undermine republican values and destroy republican institutions. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (identifying rampant fear of corruption as part of American Revolution ideology); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 107-114, 413-19 (1998). On some of the dangers of "corruption" after *Citizens United*, see Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. 88 (sidebar) (2013).

172.

> Voice is most likely to function as an important mechanism in markets with few buyers or where a few buyers account for an important proportion of total sales, both because it is easier for few buyers than for

interests of the Republican Party[173] and fit snugly with the teachings of the market ideologies about the beneficence of self interest, the properly commanding power of "revealed preferences," and the compelling need to honor and protect the interests of those who proved their virtue by amassing private wealth.[174]

CONCLUSION

To reverse those damaging developments and preserve a shared and genuine freedom, equality, and democracy, it is essential to understand the socially constructed nature of markets, identify the visible hands that shape those markets, and recognize the practical consequences of the nation's contemporary form of "free market" capitalism. It is essential, in other words, to recognize the economic fallacies and political biases embedded in the market ideologies. Such recognition can lead to new and effective policies designed to reshape real-world markets for everyone's benefit.[175]

Americans have consistently rejected the Marxist idea that capitalism means "class conflict," and their rejection sounds a healthy national principle. So an authentic American plea should go forth to the market ideologues: "Please stop!"

> many to combine for collective action and simply because each one may have much at stake and wield considerable power even in isolation.

HIRSCHMAN, EXIT, VOICE, AND LOYALTY, *supra* note 13, at 41.

"[V]oice is essentially an *art* constantly evolving in new directions." *Id.* at 43.

173. The Court's conservative Justices served similar interests in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which enabled Republican legislatures to adopt measures preventing large numbers of poor, elderly, and minority citizens from voting. Edward A. Purcell, Jr., *Reflections on the Fiftieth Anniversary of the March and the Speech: History, Memory, Values*, 59 N.Y.L. SCH. L. REV. 17, 46-55 (2014–15).

174. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* 8 (2014).

175. *See, e.g.*, ATKINSON, *supra* note 73, at 179-201 (2015); PIKETTY, *supra* note 65, at 571-77; STIGLITZ, THE GREAT DIVIDE, *supra* note 128, at chs. 4, 6-7.