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## Tempered Power, Variegated Capitalism, Law and Society

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## Tempered Power, Variegated Capitalism, Law and Society

JOHN BRAITHWAITE<sup>†</sup>

### I. TEMPERING POWER AT BALDY

The Baldy Center for Law and Social Policy has a richly variegated intellectual history to celebrate for its fortieth anniversary. Indeed, the law school that houses Baldy was a mother-ship of the law and society movement. In his history of the Baldy Center, Luke Hammill notes that Lynn Mather, soon to be a Baldy Director, spoke of the germinal 1975 Law and Society Association conference in the following terms:

According to that conference program, there were exactly 100 participants. . . . There were also well-known names such as Lon Fuller, E. Adamson Hoebel and Alan Dershowitz. The group was small enough that Red Schwartz, then dean of the law school, was able to invite them all to his Buffalo home for the concluding reception.<sup>1</sup>

This Article focuses more specifically on the Baldy role, from its inception, as a founder of the socio-legal tradition of regulatory studies; that is, the study of steering concentrations of power. The diversity of Baldy

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<sup>†</sup> Australian National University. My thanks to Philip Pettit for comments on aspects of the paper and to the participants at Buffalo and to Jacinta Mulders for research assistance.

1. LUKE HAMMILL, 40 YEARS AT THE BALDY CENTER: A LAW AND SOCIETY HUB IN BUFFALO 5 (2018).

interdisciplinary scholarship offers a galaxy of gems of variegated insight for my project as set out here. This includes knowledge from critical legal studies, private enforcement of environmental laws, relational rights enforcement, Buddhist law and compassion, and on regulatory communities and regulatory cultures. Then there is the more encompassing Baldy contribution of strengthening our capacity to focus both the “regulatory lens” and the “law and society lens.” Valuable lenses they have proved to be in the hands of so many Baldy scholars across these past forty years.

In this Article, I use the insights from the fields of knowledge collected at Baldy to consider how to temper power, and how to transform bad power in a society through good power. This is a non-linear art, which is partly a sort of ju-jitsu of using power against itself. In contemporary conditions, where power has shifted so greatly from states to capital, it is necessarily an art of responsiveness to variegations of capitalism, and major societal crises can be transformational tipping points. I will illustrate these ideas through the specific challenges of tempering the power of finance and accomplishing conditions of fair work. It is argued that unless these challenges of tempering power are met, globally liberal capitalism will continue to lose influence not to the communism it long feared, but to authoritarian capitalism engendered by a tempering of communism with capitalism. This Article argues that inadequate regulation of finance, unfair labor practices, and crumbling environmental governance pose existential threats to liberal capitalism.

#### A. *Baldy Insights*

As a starting point, Baldy’s work on *Law, Buddhism, and Social Change* led by former Director Rebecca French may seem esoteric, though not for those who hail from Buddhist societies, and not for the subject of this essay.

When the Dalai Lama spoke at Baldy in 2006,<sup>2</sup> his theme was compassion in the implementation of law, and responsive attention to context in law's implementation. I read that contribution as one about compassion and context in the tempering of power, a craft the Dalai Lama lovingly masters. The Dalai Lama pursues relational justice and relational social justice in his advocacy of nonviolent resistance to tyranny. He lives this as he works for freedom for his beloved Tibet. His insights have applications beyond the field of his immediate influence, and will be used later in this essay to show how relational justice and compassionate tempering of power can be used in struggles to regulate variegated capitalism.

From the work of the Baldy Center we also learn that while commerce and law are often brutal, law can be compassionate when it embraces gifts of compassion through pro bono values.<sup>3</sup> American divorce law evinces both vicious excess as well as the compassion, beauty, and relational justice of the collaborative family law movement—so admired and indeed emulated by two law firms in my little Australian city.<sup>4</sup> In Australia, we are grateful for the collaborative quality of the socio-legal research community on divorce that has enjoyed so much fellowship and leadership from Buffalo. My personal favorite from Baldy on how relational law can temper power is David Engel and Frank Munger on disability rights,<sup>5</sup> showing that in America, reputationally the homeland of adversarial legal

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2. See generally Rebecca R. French, *Law, Buddhism, and Social Change: A Conversation with the 14th Dalai Lama*, 55 BUFF. L. REV. 635 (2007).

3. See PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (Robert Granfield & Lynn Mather eds., 2009).

4. See LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001); JULIE TAYLOR & JUNE THOBURN, *COLLABORATIVE PRACTICE WITH VULNERABLE CHILDREN AND THEIR FAMILIES* (2017).

5. DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003).

formalism, disability rights law has transformed the lives of disabled people for the better. Yet in Engel and Munger's empirical sample, no disabled person ever resorted to litigation to enforce their new rights. Rather, what happened was that the college student in a wheelchair would pitch an appeal for relational justice to her Dean. She would appeal to the Dean's compassion as she invoked informally her new legal right to a ramp to access a building. America's ramp arrived; new rights were vindicated across your country through relational power and compassionate strength. Social justice was transformed through many such decisive moments of assertion.

This Article argues a counterintuitive case for compassionate and relational justice in regulating the excesses of Wall Street. Yet my argument is premised on the belief that this can only succeed if two conditions are met: first, if such justice is responsive to new variegations of capitalism; and second, if a "Sword of Damocles" stands behind relational and compassionate justice to take decisive action in the courts at the moment of exception.<sup>6</sup> In this context, the state of exception stands in exactly the opposite place to where it is put by Carl Schmitt<sup>7</sup> and Giorgio Agamben:<sup>8</sup> for them, the state of exception is where tyranny takes over from rule of law. The Dalai Lama's state of exception arises instead where pursuit of compassionate justice is overtaken by formal law enforcement (for example, in the case of responsibility to protect being activated in international law when compassionate appeals are bludgeoned by untempered power). In a similar way,

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6. This Sword of Damocles part of the argument is thinly theorized in this Article. I acknowledge the influence of the work of Lawrence Sherman and many others in another essay on when and how relational justice should be supplanted by deterrent or incapacitative justice as a last resort in John Braithwaite, *Minimally Sufficient Deterrence*, 47 *CRIME & JUST.: REV. RES.* 69 (2018).

7. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. of Chi. Press ed. 2005) (1922).

8. GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* (Kevin Attell trans., Univ. of Chi. Press ed. 2005).

unbridled corporate power can be bound through a relational justice of internationally networked justice, and without bringing in the troops. By putting Wall Street in harness with the “99 percent,” by binding business back together with the people through justice, capitalism can be more sustainable and make more money more sustainably in the long run. We can appeal to Wall Street in strategic regulatory conversations<sup>9</sup> by appealing to their compassionate interest in leaving the society better for their grandchildren.<sup>10</sup> The alternative we can put to them is that more, or even worse events than those that occurred in 2008, will one day leave their society and their banks in ruins.

## II. TEMPERED POWER<sup>11</sup>

Martin Krygier has elaborated some persuasive arguments about abuse of power that render ideals such as limiting, curbing, or controlling power less appealing than “tempering” power.<sup>12</sup> Power is a good thing; it is needed to enforce legal judgements, to keep the peace, to raise funds to build schools and hospitals. It is untempered power that is bad because it is arbitrary power. Arbitrary power in turn is conceived as unchecked power. Power can be checked in many ways—by balances of power, such as two houses in a legislature, or federalism—but accountability is the most

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9. See Julia Black, *Regulatory Conversations*, 29 J.L. & SOC'Y 163 (2002).

10. Braithwaite and Drahos have argued that webs of dialogue can do most of the work of global business regulation, but that webs of controls that include formal enforcement of state and international law are also important at many moments of exception at the peaks of private, public, and civil society enforcement pyramids. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); see also JOHN BRAITHWAITE, *REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER* (2008).

11. In this analysis I not only draw heavily on Martin Krygier and Baldy Center thinking. I have also drawn on previous publications, particularly some I have co-authored with Hilary Charlesworth, Adérito Soares, and Philip Pettit. These previous works are cited in the sections of text where they are discussed.

12. Martin Krygier, *Tempering Power*, in *CONSTITUTIONALISM AND THE RULE OF LAW* 34, 35 (Maurice Adams et al. eds., 2017).

important way of checking power. Accountability to the rule of law is the most important form of accountability. But there are many other forms of accountability beyond the rule of law.<sup>13</sup> The classic conception of accountability involves being required to give an account to which people can listen and respond, as in producing minutes of a meeting after all opinions are heard at the meeting, financial “accounts” are tabled, and hard questions are asked of officeholders.<sup>14</sup> Accountability in family life for children who hit their siblings involves requiring them to reflect on how their sibling would have felt, on whether what they did was right, and some kind of rectification such as an apology.

Power that is tempered by the rule of law’s discipline is more resilient in important ways. It grows authority in the art of regulation and governance; authority can be distinguished from domination (which is untempered, arbitrary power). Freedom as non-domination is the conception of freedom valorized in Philip Pettit’s republican theory of freedom, which will be discussed further in the next section.<sup>15</sup> The republican regulatory theory interpretation of the tempering of power is that power should be regulated to maximize freedom. The essence of being unfree according to this republican conception is the condition of being a slave. To be a slave is to be subject to the arbitrary power of another. The slave-owner is not required to listen to the slave nor to give any account to the slave, or anyone much else. The slave is the property of a slave-owner, who can do whatever he wishes with his private property without being constrained by laws that apply to persons. The capricious

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13. I am grateful to the conversation at the 2018 “Tempering Power” symposium and for discussions afterwards with Martin Krygier and Philip Pettit, which went to the rejection of lists of attributes for what is involved in tempering power in favor of an accountability emphasis combined with recognition that accountability takes many forms beyond classic lists of rule of law virtues.

14. See RICHARD MULGAN, *HOLDING POWER TO ACCOUNT: ACCOUNTABILITIES IN MODERN DEMOCRACIES* (2003).

15. See Philip Pettit on freedom as non-domination as a republican virtue. PHILIP PETTIT, *REPUBLICANISM* (1997).

power of domination struggles to build long-run legitimacy and the trust so vital to contemporary economies, which cannot flourish as slave societies. What worked well enough for the economics of machine bureaucracies that built pyramids or operated plantations cannot work for an innovative information economy.

For Krygier, and for ancient Greek philosophers who advanced temperance as a virtue, temperance means a “moderating balance of elements” (for example, justice balanced with compassion).<sup>16</sup> Tempered steel is made tougher, less hard, and less brittle as an alloy (a balance of more resilient metals) in a test of extreme heat. For Krygier, this tempering metaphor in governance means tempered power is less brutal and less brittle, and “infrastructural” rather than “despotic,”<sup>17</sup> because arbitrary power in pursuit of its whims is constrained by rule of law and other accountability institutions in a way that untempered power is not, and so power is less available for the arbitrary pursuit of power-holders’ whims. Accountability institutions that temper power grow deeper roots of authority for the enactment of power. This is what enables power to become more infrastructural in a way that penetrates a society. The institutional infrastructure of tempered power makes it more enduring as a rule of law virtue compared to an arbitrary “rule of men.”<sup>18</sup> In his essay in this volume, Krygier asks why

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16. Krygier, *supra* note 12, at 47.

17. Michael Mann, *Infrastructural Power Revisited*, 43 *STUD. INT’L COMP. DEV.* 355, 355 (2008).

18. Likewise, when in common usage we temper justice with mercy, we strengthen justice. Soldiers that are tempered by combat are hardened, but also moderated through the wisdom and prudence of experience. When music is tempered it becomes more powerful in the sense of more beautiful because it can be modulated into other keys. Tempering a sauce in cooking means gently heating egg yolk or a dairy ingredient before adding it to improve a hot sauce while avoiding curdling. Linda Larsen, *Temper in Baking and Cooking*, *SPRUCE EATS* (Oct. 31, 2018), <https://www.thespruceeats.com/learn-the-definition-of-temper-4050806>. Usage of the concept of tempering has been in continuous decline since the late 1700s, *Definition of ‘Temper’*, *COLLINS ENG. DICTIONARY*, <https://www.collinsdictionary.com/dictionary/english/temper> (last visited May 8,



we should want law to rule; for what purpose is rule of law a good thing? The answer he elaborates in a more developed way than in my essay is tempering power so that arbitrary abuse of power is checked.<sup>19</sup>

Using the example of constitutions, Krygier quotes Stephen Holmes on the error of seeing constitutions only as a restraint on power. Constitutions are also empowering in that they enable infrastructural concentration of power for good purposes:

Limited government is, or can be, more powerful than unlimited government. . . . [T]hat constraints can be enabling, which is far from being a contradiction, lies at the heart of liberal constitutionalism. . . . By restricting the arbitrary powers of government officials, a liberal constitution can, under the right conditions, *increase* the state's capacity to focus on specific problems and mobilize collective resources for common purposes.<sup>20</sup>

Transformative Constitutionalism (in South Africa)<sup>21</sup> is just one example of the rich variety of tempering traversed in this issue. It ranges from immigration activism tempering arbitrary power over border crossings,<sup>22</sup> to challengers to physician domination in health care,<sup>23</sup> to state domination in China.<sup>24</sup> These are just selective examples of the diversity of

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2019), though it experienced renewal at the hands of massive NGOs like the Women's Christian Temperance Union in the late nineteenth century. Krygier and I have always been yesterday's men.

19. Martin Krygier, *What's the Point of the Rule of Law?*, 67 BUFF. L. REV. [page #] (2019).

20. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY*, at xi (1995).

21. Heinz Klug, *Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa*, 67 BUFF. L. REV. [page #] (2019).

22. Susan Bibler Coutin, "*Otro Mundo Es Posible*": *Tempering the Power of Immigration Law Through Activism, Advocacy, and Action*, 67 BUFF. L. REV. [page #] (2019).

23. Mary Anne Bobinski, *Law and Power in Health Care: Challenges to Physician Control*, 67 BUFF. L. REV. [page #] (2019).

24. Kwai Hang Ng, *Is China a "Rule-by-Law" Regime?*, 67 BUFF. L. REV. [page #] (2019).

checks on arbitrary power diagnosed across the contributions to this volume. Part of the ambition arising from the scattered themes of my contribution is the conclusion that diverse, plural checks are the heartland of meaningfully tempered power. One reason advanced for this is that concentrations of power are so variegated in the conditions of contemporary capitalism.

### III. MAKING THE THEORY PRACTICAL: TEMPERING TYRANNY IN TIMOR

#### A. *Tempered Power in Timor-Leste*

First, I illustrate what it means to temper power through my Timor-Leste work with Hilary Charlesworth and Adérito Soares in the book *Networked Governance of Freedom and Tyranny*.<sup>25</sup> This research is also used to introduce the arguments about tempering financial power later in this Article.

In Indonesia, East Timorese student leadership was critical to the people power movement on the streets of Jakarta that helped democratize the country and overthrow the crony capitalist regime of President Suharto in 1998. In the process, East Timorese people power won democracy for an independent Timor-Leste. Our book is about how that was accomplished by networked governance, after the fulcrum of struggle shifted from armed struggle (rather as in South Africa's transition from Apartheid). In Baldy Center terms, this was a regulatory community<sup>26</sup> led from civil society that regulated regime change at the commanding heights of the state. But the transition was rocky, punctuated by moments of extreme authoritarianism and violence, especially in 2006 when a UN peacekeeping mission had to return to Timor.

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25. JOHN BRAITHWAITE, HILARY CHARLESWORTH & ADÉRITO SOARES, *NETWORKED GOVERNANCE OF FREEDOM AND TYRANNY: PEACE IN TIMOR-LESTE* (2012).

26. See Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 L. & POL'Y 355 (1987).

The problem was that once the new leadership group consolidated sovereignty over independent Timor-Leste after the 1999 UN referendum, leaders willfully cut themselves off from the networks of marginalized people in civil society that had helped them humble power in Jakarta in the first place. This was rather like what happened with the consolidation of sovereignty into the hands of post-Mandela African National Congress leaders. Our book displays how weapons of the weak in civil society were mobilized a second time to temper the power of their President and Prime Minister and rebuild a very distinctive and variegated hybrid of separated powers in a genuinely democratic Timor-Leste today. The mechanisms whereby networked governance by the weak can overwhelm great powers, rendering realist international relations theory predictively false, has long been a focus of Martin Krygier, our research group at the Australian National University,<sup>27</sup> and yours at the Baldy Center.<sup>28</sup> Like Krygier in his work on contemporary Eastern Europe,<sup>29</sup> we focus on the concern that the forces organized against domination become sources of domination from the moment they assume sovereignty over a state.

We interpreted the problem with the Timor transition as being that it was not republican enough in terms of Philip Pettit's republican political theory.<sup>30</sup> Up until 2006, transitional governance failed to keep working at

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27. BRAITHWAITE & DRAHOS, *supra* note 10, at 3.

28. I interpret Errol Meidinger's work on the networked power of regulatory communities and regulatory cultures in these terms here, and likewise his work on civil society environmental institutions like the Forest Stewardship Council. See Meidinger, *supra* note 26; Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006).

29. See Martin Krygier & Adam Czarnota, *After Postcommunism: The Next Phase*, 2 ANN. REV. L. & SOC. SCI. 299 (2006); Martin Krygier, *Virtuous Circles: Antipodean Reflections on Power, Institutions, and Civil Society*, 11 E. EUR. POL. & SOCIETIES 36 (1996); Martin Krygier, *Is there Constitutionalism after Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law*, in *THE RULE OF LAW AFTER COMMUNISM* 77 (Martin Krygier & Adam Czarnota eds., 2016).

30. See PETTIT, *supra* note 15.

institutionalizing tempered power. Yet when their leaders directed arbitrary power back at civil society, especially at the Catholic Church, civil society re-mobilized and re-established a richer democracy with tempered power after 2006. The book's title, *Networked Governance of Freedom and Tyranny*, signifies networks restraining excesses of realist international diplomacy and checking excesses of executive domination within a state to deliver republican freedom. We define networked governance as the action of plural actors linked by coordinating dialogue. Relational dialogue encompasses both interdependence and sufficient autonomy for different nodes of the network to check and balance other nodes of (tempered) power. Networks can only govern themselves nodally.<sup>31</sup> Inherent in that proposition is the fact that even sincere democrats who seize nodal control are at risk of corrupting the separation of powers to preserve their hard-won power. While networked governance has a more variegated horizontal architecture than state governance,<sup>32</sup> networks of capacity and accountability can be linked to every level of multi-level governance. This includes every layer of sub-national, national, and international hierarchies. Sometimes they are coordinated by state regulation, sometimes not.

We distinguish republican freedom from other conceptions by characterizing it as freedom as non-domination.<sup>33</sup> This is the type of freedom delivered by

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31. See Scott Burris et al., *Nodal Governance*, 30 AUSTL. J. LEGAL PHIL. 30 (2005); Peter Drahos, *Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach*, 77 TEMP. L. REV. 401 (2004); Clifford Shearing & Jennifer Wood, *Nodal Governance, Democracy, and the New "Denizens"*, 30 J.L. & SOC'Y 400 (2003).

32. See 1 MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY*, in *THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE* (1996); *THEORIES OF DEMOCRATIC NETWORK GOVERNANCE* (Eva Sørensen & Jacob Torfing eds., 2008); Eva Sørensen & Jacob Torfing, *Making Governance Networks Effective and Democratic Through Metagovernance*, 87 PUB. ADMIN. 234 (2009).

33. See JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 9 (1990); BRAITHWAITE, CHARLESWORTH & SOARES, *supra* note 25, at 7; PETTIT, *supra* note 15.

tempered power. Networked accountabilities that temper power enable regimes to change in ways that prevent one form of enslavement from replacing another. Domination can be continuously challenged by networks that renew themselves with novel ways of checking power that are not confined to enduring constitutional balances. Variegation in checks and balances is our theme here.<sup>34</sup> I join others like Jamie Peck<sup>35</sup> in this focus on understanding variegated capitalism.

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34. With finance, critiques that rely on the neoliberalism trope are rarely specific enough to describe what is happening in contemporary capitalism. See Andrew Kipnis, *Neoliberalism Reified: Suzhi Discourse and Tropes of Neoliberalism in the People's Republic of China*, 13 J. ROYAL ANTHROPOLOGICAL INST. 383 (2007).

35. See Jamie Peck & Nik Theodore, *Variegated Capitalism*, 31 PROGRESS HUM. GEOGRAPHY 731 (2007); Jamie Peck, *Disembedding Polanyi: Exploring Polanyian Economic Geographies*, 45 ENV'T & PLAN. A: ECON. & SPACE 1536 (2013); Neil Brenner, Jamie Peck & Nik Theodore, *Variegated Neoliberalization: Geographies, Modalities, Pathways*, 10 GLOBAL NETWORKS 182 (2010); Jamie Peck & Jun Zhang, *A Variety of Capitalism . . . with Chinese Characteristics?*, 13 J. ECON. GEOGRAPHY 357 (2013); Jun Zhang & Jamie Peck, *Variegated Capitalism, Chinese Style: Regional Models, Multi-Scalar Constructions*, 50 REGIONAL STUD. 52 (2016); see also MARTIN HESS, *GLOBAL PRODUCTION NETWORKS AND VARIEGATED CAPITALISM: (SELF-)REGULATING LABOUR IN CAMBODIAN GARMENT FACTORIES* (2013); Adam D. Dixon, *Variegated Capitalism and the Geography of Finance: Towards a Common Agenda*, 35 PROGRESS HUM. GEOGRAPHY 193 (2011); Bob Jessop, *Capitalist Diversity and Variety: Variegation, the World Market, Compossibility and Ecological Dominance*, 38 CAPITAL & CLASS 45 (2014) [hereinafter Jessop, *Capitalist Diversity and Variety*]; Bob Jessop, *Comparative Capitalisms and/or Variegated Capitalism*, in NEW DIRECTIONS IN COMPARATIVE CAPITALISMS RESEARCH 65 (Matthias Ebenau et al., eds., 2015); Kean Fan Lim, *On China's Growing Geo-Economic Influence and the Evolution of Variegated Capitalism*, 41 GEOFORUM 677 (2010) [hereinafter Lim, *On China's Growing Geo-Economic Influence*]; Kean Fan Lim, 'Socialism with Chinese Characteristics': *Uneven Development, Variegated Neoliberalization and the Dialectical Differentiation of State Spatiality*, 38 PROGRESS HUM. GEOGRAPHY 221 (2014) [hereinafter Lim, *Socialism with Chinese Characteristics*]; Andreas Mulvad, *Competing Hegemonic Projects within China's Variegated Capitalism: 'Liberal' Guangdong vs. 'Statist' Chongqing*, 20 NEW POL. ECON. 199 (2015); I-Chun Catherine Chang & Eric Sheppard, *China's Eco-Cities as Variegated Urban Sustainability: Dongtan Eco-City and Chongming Eco-Island*, 20 J. URB. TECH. 57 (2013); Ugo Rossi, *The Variegated Economics and the Potential Politics of the Smart City*, 4 TERRITORY POL. GOVERNANCE 337 (2016); Luis Felipe Alvarez León, *The Digital Economy and Variegated Capitalism*, 40 CAN. J. COMM. 637 (2015).

The politics of how to temper power in such a world must involve variegated separations of powers. One of the more exotic variegations we directly witnessed in the traditionalist, predominantly rural village society of Timor-Leste in 2006 was the ritual ripping out of the heart of an unfortunate pig in the presence of dead ancestors angered by the capricious exercise of power by the country's cabal of leaders. I had a ring-side seat, unfortunately next to the pig. There were genuine tears from these party hard-men that their people had found it necessary to humble their power under the wiser eyes of the ancestors in this way. As a result, these leaders genuinely did re-empower the institutions of traditional civil society presided over by the ancestors, as well as the church, opposition political parties, and to some degree the courts and the Constitution after 2006. Somehow I fear that invocation of appalled ancestors might not work with Donald Trump's America. For variegation to work it must be responsively attuned to local meaning-making.

Here there is common ground with other theoretical traditions that have flourished at the Baldy Center, such as critical legal studies,<sup>36</sup> in particular the notion of "destabilization rights" that Roberto Unger<sup>37</sup> introduced. Charles Sabel and William Simon<sup>38</sup> further developed the concept of destabilization rights within the somewhat different American pragmatist tradition of "democratic experimentalism." These are rights to unsettle and open up state institutions that persistently fail to fulfil their functions. Destabilization rights are dynamic checks on failures of institutionalized accountabilities to do their job. For example, the right to private litigation can destabilize

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36. See generally HAMMILL, *supra* note 1.

37. See ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987).

38. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1098–99 (2004).

defunct structures of environmental regulation.<sup>39</sup> Similarly, rights of oppressed minorities can appeal for redress to UN institutions. Destabilization rights enable a politics of dis-entrenchment. Networks can deliver experimental innovation by invigorating the separation of powers. The state is often too dug in to ancient entrenchments for innovation and democratic experimentalism. Western doctrine on the separation of powers has stultified because it has not been open to learning from the democratic experimentalism in civil separations of powers revealed in non-Western histories such as that of Timor-Leste, Thailand, and China.

Republics must radically pluralize their vision of how to separate and temper powers within the state so the state has many branches of separated powers rather than just the traditional three (legislature, judiciary, and executive). Can we enliven a political imperative for separations of powers that progressively become more separated? The history of Timor-Leste can be read as one of progressive struggle for continuous improvement in securing ever more separated powers: not just for Montesquieu's<sup>40</sup> tripartite separation of powers among an executive, legislature and judiciary, but for much more variegated and indigenously attuned separations of ever more powers; not just separations of government powers, but division of both private and public powers. We documented dozens of separated powers in response to Timor-Leste's post-conflict dominations. In a similar way, President Eisenhower's concept of breaking up the military-industrial complex in the United States captures this idea of a newly identified variegation of power that had to be tempered in the 1950s.<sup>41</sup> Capitalism is a continuous process

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39. See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 940 (1985).

40. MONTESQUIEU, *THE SPIRIT OF LAWS* (David Wallace Carrithers ed., Thomas Nugent trans., 1977) (1748).

41. Dwight D. Eisenhower, Farewell Address to the Nation (Jan. 17, 1961).

of creatively destroying old concentrations of power and constituting even more worrying ones. Hence the struggle for freedom must be more than struggle for a new democratic constitution that guarantees a conclusive separation of powers. It must be contestation of an ever-evanescent constitutionalism that struggles to continuously deepen separations of powers at every stage of a nation's history.

### B. *The Promise of Republicanism*

Republicanism is conceived as a political philosophy of continuous struggle for more effective complexes of separated powers.<sup>42</sup> A republic is an unfinished struggle towards a polity where each separated power has sufficient clout to exercise its own functions with support from other separated powers. This is not a new perspective. Hannah Arendt quoted Benjamin Rush who in 1787 complained of those who confuse the struggles of the "*American revolution* with those of the late *American war*. The American war is over: but this is far from being the case with the *American revolution*. On the contrary, nothing but the first act of the great drama is closed."<sup>43</sup>

A republic is a polity where no one center of power is so dominant that it can crush any other separated power without the other separated powers mobilizing to push back that domination. In our book on Timor-Leste, we are at one with Holmes and Krygier on the imperative to have a positively empowering vision of the constitution:

Republicanism does not require powers that are so diffused that separated powers cannot act decisively. The executive is empowered to declare war, the judge to declare guilt, the legislature to declare

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42. See Michael Barnett, *Building a Republican Peace: Stabilizing States after War*, 30 INT'L SECURITY 87 (2006); Michael Barnett & Christoph Zürcher, *The Peacebuilder's Compact: How External Statebuilding Reinforces Weak Statehood*, in THE DILEMMAS OF STATEBUILDING: CONFRONTING THE CONTRADICTIONS OF POSTWAR PEACE OPERATIONS 23 (Roland Paris & Timothy D. Sisk eds., 2009).

43. HANNAH ARENDT, ON REVOLUTION 301 (Compass Books 1965).



laws. Decisiveness for the judge is actually enhanced by the knowledge that only an appellate court can overturn her decision on an error of law; she cannot be dominated by a prime minister who demands the acquittal of a political crony. Decisiveness for a constable on the street is knowing that she is the one with the power to decide whether to arrest a judge who appears to assault his wife; then it is no longer in her hands but in the hands of the separated powers of a prosecutor. Decisiveness for a general is knowing that once the executive declares war, she can conduct it in accordance with laws of war approved by the legislature, without interference from politicians who think of themselves as armchair generals.

Of course, a mature constitutional debate is needed to finetune separated powers to ensure that each can decisively perform its function without domination from any centralising power and without confusion as to who exercises each separated power, and under what norms. None of this is to deny that democracies must at times debate trade-offs between greater accountability and greater efficiency. Separated powers of civil society and the media to speak assertively during those constitutional debates are critical elements of separated powers that get the separation clear and effective.<sup>44</sup>

We argue that dynamism is a neglected topic in discussion of the separation of powers. One of the things republican revolutions have done throughout history is disentrench powers, such as the powers of kings and dictators. Destabilization rights and “democratic experimentalism,”<sup>45</sup> as mentioned above, unsettle and open up state institutions that persistently fail to fulfil their functions. Networks are needed to deliver experimental innovation in the invigoration of separations of powers because of state propensities to rigidify.

One risk of richly separated powers is that they will result in gridlock. We argue that networked separations of powers are themselves the best ways of tempering the inefficiency of gridlock:

Our argument has been that, for most tasks of modern governance, networks get things done better than hierarchies. Well-designed networks of power are not only mutually checking upon bad uses of power; they are also mutually enabling of good capacities for power. Networks must be coordinated and

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44. BRAITHWAITE, CHARLESWORTH & SOARES, *supra* note 25, at 128–29.

45. *See supra* sources cited in notes 37–38 and accompanying text.

sometimes—not always—the state is the best candidate to supply a key node of coordination. For most problems, strengthening state hierarchy to solve problems is not as effective as strengthening checks and balances on hierarchy as we also strengthen private–public partnerships, professions with technocratic expertise on that problem, civil society engagement and vigilance, and other networks of governance, while at the same time strengthening coordination of networked governance. The most effective governance is rarely centrally monopolised; it is usually messily attentive to multiple accountabilities.

This is not to deny that there must be agreement on who will make the final call on matters that have not reached resolution after deep contestation under a separation of powers. Elections are one such state institution with this usefully ultimate capacity to break a logjam (without violence). So are state courts. On legal matters, as valuable as it is to have a rich tapestry of legal pluralism where the national rugby judiciary regulates most violence on rugby fields, it is also valuable to have state appellate courts that have the legitimacy to make ultimate decisions on the basis of a synoptic view of all the adjudication that has occurred across that tapestry.

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Gridlock is a risk of separated powers. Often it is more important that things are settled than settled right. Paralysis and disengagement in the face of great problems are profound risks, not only in times of war. Executive government has an oversight responsibility for ensuring that really big problems do not fall between the cracks. This is not the same as saying the government should fix them. It is to say that the state has a responsibility to take a synoptic view of a society, and to catalyse action when lesser actors are paralysed by the enormity of the challenge. We see this need most acutely at times of great natural disasters when so many leaders of civil society are busy bailing out their house or looking for lost families. One of the great examples of a chief executive with synoptic vision in the twentieth century was China's Deng Xiaoping when he saw in 1978 that the institutions of state production were bogged down. He opened up the Chinese economy to private institutions that broke through many of the production bottlenecks and bureaucratic gridlocks that were grinding the economy to a halt.

We might even say that the most important role of state political leaders is to be gridlock breakers: to get that budget through the legislative contestation process, to issue an ultimatum to an enemy state of a kind that has less meaning when only a general issues it. Yet the ultimate power to break gridlock resides with the people when they take to the streets in a revolutionary moment in which they persuade the media or the military to side with the revolution. Republicans hope these will be revolutionary moments that dis-entrench bad power and entrench new separations of powers that

secure freedom from domination.<sup>46</sup>

#### IV. TEMPERING WALL STREET

This theoretical architecture on networked regulation to temper power will now be applied to the regulation of the commanding heights of corporate power. It will then inform a more multi-level account of tempering contemporary capitalism.

The 2008 financial crisis in the United States did not occur because of a failure to temper power in any classic Montesquieu sense:<sup>47</sup> the U.S. executive government did not crush a legislature that was trying to implement the regulatory reforms needed to prevent the crisis. Likewise, the crash did not occur because the courts were insufficiently independent of the President and the legislature. One reason it did occur was that ratings agencies, which are paid to hold the solvency of banks and hedge funds to account, were insufficiently independent of the private interests they were rating. Boards of directors of great banks exercised insufficient independence of judgment over leveraging, over the hedge fund traders and the housing loan brokers who made them rich. Board audit committees failed. Major accounting firms failed to blow the whistle in countless cases—a lesson that should have been learned from the previous 2001 downturn when Arthur Andersen failed to do its job of auditing with independence Enron, WorldCom, and other companies that collapsed.<sup>48</sup>

The Global Financial Crisis was not caused by a failure of the tripartite separation of powers in the public sector, but by a failure of powers to be sufficiently separated within the private sector. More profoundly, there were failures of public branches of power to be sufficiently separated from Wall

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46. BRAITHWAITE, CHARLESWORTH & SOARES, *supra* note 25, at 302–04

47. *See generally* MONTESQUIEU, *supra* note 40.

48. *See* John Braithwaite, *Flipping Markets to Virtue with Qui Tam and Restorative Justice*, 38 ACCT. ORG. & SOC'Y 458, 463 (2013).

Street power. The legislature and executive failed to enact and enforce regulations requiring these culpable private powers to be separated and tempered. Financial regulators were insufficiently independent of the president, and of a legislature captured by a Wall Street that had funded their election. And there was a failure of the IMF to call U.S. monetary imbalance to account in the way it is so willing to do with powerless states. It was a failure of the ratings agencies to call the big institutions of American capitalism to account in a way they might have had the culpable banks been banks in more marginal economies. What then followed was the failure of the New York Stock Exchange to deliver financial transparency, and failure of the global banking regulators at Basel to call U.S. bank regulators to account in a way they might have had the banking regulators and monetary institutions been in weaker states.

In the separation of economic powers in multi-level governance, as in the separation of state powers, it is important that an independent sphere of action for each power is guaranteed. Each separated power of business regulation must not be dominated by any one power calling the shots above all others. Of course, there may be situations where a dictator who calls the shots can increase economic efficiency by overruling a court or a regulator that is needlessly slowing investment that would benefit the people.

The experience of history, however, is that autocrats more often exercise their domination for corrupt and patrimonial purposes that reduce the efficiency of national resource allocation. So in the long run many separations of powers that seem inefficient to the politically naive are in practice economically efficient.

Part of the efficiency dividend from separations of powers that are attuned to local realities is from a more efficient division of labour. Because central bank board members focus their intelligence and training on the large and intricate challenge of securing monetary balance for an economy, they are likely to make better decisions of this specialist kind than are the generalist politicians of the cabinet. Because police training is in community policing that enrolls the community to do most of the serious business of crime control, they become better at it than the military with their training and experience in the use of maximum force. Our Timor-Leste narrative has well illustrated the provocation and inefficiency that can arise

when the military takes over public order policing.<sup>49</sup>

With these historical lessons in hand of hedged virtues of variegated separations that temper financial power, let us now consider more deeply the contemporary challenges of variegated capitalism to which separated powers must respond.

## V. TEMPERING VARIEGATED CAPITALISM

### A. *Variating Capitalism to Architectural Regulation*

Clifford Shearing and Philip Stenning wrote in 2003 about how Disney World regulates its little customers to keep them safe.<sup>50</sup> Basically it channels them into queues of children tall enough for particular rides and into machines with an architecture of bars. It does not regulate them by punishing them for behaving in an unsafe or disorderly way. It makes it impossible for them to stand up dangerously or to wave. This is accomplished by bars that encase them. Their arms are prevented from being ripped off not by a normative order, not by a punitive order, but by architectural regulation.

At the time, this seemed a quaint, exotic work. But after the rise of Silicon Valley capitalism, what Lawrence Lessig called “architectural regulation” became quite dominant.<sup>51</sup> Microsoft, then Google and Facebook came to architecturally regulate us through the internet. They steer how events flow through our lives.<sup>52</sup> Tech giants steer us to their favored software products; they steer us to their customized news

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49. BRAITHWAITE, CHARLESWORTH & SOARES, *supra* note 25, at 300.

50. Clifford D. Shearing & Philip C. Stenning, *From the Panopticon to Disney World: The Development of Discipline*, in CRIMINOLOGICAL PERSPECTIVES: ESSENTIAL READINGS 499 (Eugene McLaughlin & John Muncie eds., 3d ed. 2013).

51. See LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE (1999).

52. Parker and Braithwaite define regulation as action with the intent of steering the flow of events. See Christine Parker & John Braithwaite, *Regulation*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 119 (Peter Cane & Mark Tushnet eds., 2003).

services (now purged of fake news of course); to products that pay a premium to jump to the head of the queue in search engines; they are harnessed by clever Russian intelligence operatives to steer votes; harnessed by National Security Agency programs with vivid code names like Muscular and Prism that monitor our movements.<sup>53</sup> In free societies Facebook and Google allow us to see WikiLeaks revelations about how the national security state works. Authoritarian societies steer us away from seeing secrets of the deep state. If we live in Myanmar, the sixty Burmese language Facebook censors Mark Zuckerberg employed in June 2018 deploy the architectural regulation of cyberspace to interrupt genocidal hate speech for the cleansing of Rohingya.<sup>54</sup> Spookiness is the business model of this stalker economy in cyberspace. It is a variegation of capitalism that gives us a lot of free stuff if we agree to be tracked. When the product is free, people increasingly realize that they are the product. Twitter, LinkedIn, Snapchat, Facebook, and others commodify the very networking that we argued in the Timor case study to be citizens' crucial bulwark against tyranny.

Former Baldy Student Fellow, Natasha Tusikov, has brilliantly dissected this new regulatory challenge.<sup>55</sup> She shows how networking generates troves of data that can be exploited by advertisers, pornographers, and the deep state alike. The data comes from all the companies mentioned, as well as others like eBay, PayPal, and Yahoo. So enmeshed are the connections between the national security state and internet capital that Eisenhower's threat of the military-industrial complex is now surpassed by a deep-state-Silicon-

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53. NATASHA TUSIKOV, *CHOKEPOINTS: GLOBAL PRIVATE REGULATION ON THE INTERNET passim* (2016).

54. Press Release, Facebook, Update on Myanmar (Aug. 15, 2018), <https://newsroom.fb.com/news/2018/08/update-on-myanmar/>.

55. See TUSIKOV, *supra* note 53. Tusikov now teaches at York University and acknowledges Baldy and its Director Errol Meidinger in the Acknowledgements to *Chokepoints*. *Id.* at xiv.

Valley complex.<sup>56</sup> It is an information-syphoning intelligence complex. Tusikov illustrates the potential for architectural self-regulation of cyberspace at “chokepoints.”<sup>57</sup> Global internet firms exert control at these chokepoints for the commercial purpose of catching people who purloin intellectual property. How does the largely U.S. and U.K. state regulation to accomplish this chokepoint self-regulation work? It is, Tusikov finds, mostly through conversation with the internet giants rather than punitive or litigious. It works by an architecture of the internet giants controlling flows of information at chokepoints, tracking down counterfeiters, blocking their access to vital commercial and technical services, and disabling websites used by counterfeiters.

Political leaders, captured by intellectual property interests and by the deep state, grant considerably untempered powers to these gatekeepers of cyberspace. Even when Facebook does good, it does bad because of the untempered quality of its hegemony. While it may be good that Facebook seeks to stop advocacy of Islamic terrorism on the internet, it threatens freedom when that script allows it to be co-opted by the government of India to crush free speech among Muslims in Kashmir protesting the very real tyranny and denial of human rights they suffer at the hands of a Hindu regime.<sup>58</sup> Who guards these guardians? Only invisible deep states. Do citizens have a say in gatekeeping decisions about what does and does not cross the line into child pornography, who is a terrorist and who is a freedom-fighter, what is obscenity and what is art, what is counterfeiting and what is life-saving production of legal generic drugs? No. Tusikov shows that chokepoint regulation is powerful

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56. *See id. passim.*

57. *Id.* at 29–31.

58. Facebook issued a statement explaining its actions in these terms: “There is no place on Facebook for content that praises or supports terrorists, terrorist organisations or terrorism.” Gowhar Geelani, *Facebook Under Fire over Kashmir Killings Gag*, DAWN (July 21, 2016), <https://www.dawn.com/news/1272206/>.

architectural regulation without law and without democratic accountability of any meaningful kind. Not only that, the “rule of men” can mean men in trench coats from just two states, the United States and United Kingdom (which count among only a handful of net intellectual property-exporting states). They rule over the citizens of almost two hundred other states (which are net intellectual property importers), from Australia to Argentina to Africa. In other words, states that benefit from the highest levels of expansive intellectual property monopoly rights are the informal rulemakers; citizens of states with an interest in tempered monopoly are ruletakers. Rule by “secret handshake deals” between executives of the U.S. state and its internet giants happened precisely because laws in the Congress to achieve the same result ran up against massive citizen protests inside the United States, and globally. An “Internet Blackout” on January 18, 2012 was the most effective and widely democratic online protest the world had ever seen, shutting down many major websites, including Wikipedia and Google.<sup>59</sup>

What is mostly gagged in Tusikov’s chokepoint regulation is access to income through cutting off payment services, access to advertising, search, marketplaces, and domain name services. Details of the regulatory technology are not important here, nor of how Tusikov accessed secret non-legal relational regulation by interrogating Edward Snowden’s disclosures. What matters is Tusikov’s insight that a major new variegation of capitalism can grow quickly to include the wealthiest corporations on the planet. Completely new modalities of regulation can spring up that have a certain effectiveness but that have no legal underpinning. These new forms of regulation work globally simply as relational regulation backed by coercive capabilities of the untempered “rule of men” from two commanding states. More fundamentally, Tusikov’s work

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59. TUSIKOV, *supra* note 53, at 1–2.



shows how regulation cannot keep up with variegations of capitalism unless it is agile, innovative,<sup>60</sup> and relational.

### B. *Variations of Capitalism*

Peter Hall and David Soskice's research defined two "Varieties of Capitalism," both based on assemblages of national policies, including regulatory ones.<sup>61</sup> Both varieties are successful capitalisms. One is the liberal market capitalism of which the United States and United Kingdom are lead examples; the second is the coordinated market capitalism of which Germany or Scandinavia are prominent examples. Coordinated market capitalism historically has stronger labor rights. These rights delivered lifetime employment and capacities of workplace democratic participation that produced committed employees, then vital to excellence in sophisticated engineering. An example of this is the production of better, safer cars in Germany and Sweden than in the United States or United Kingdom, by Mercedes Benz in Germany and Volvo in Sweden.<sup>62</sup> These countries also tended, according to Hall and Soskice, to have antitrust laws that were permissive to collaboration and technology sharing agreements between firms that supported sophisticated engineering excellence. Germany and Scandinavia have not been as successful as the United States or United Kingdom in investment banking, however.

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60. Cristie Ford has produced the most important work on the growing imperative for regulation to be innovative, and how this can be done in the face of the dynamism of contemporary capitalism. See CRISTIE FORD, *INNOVATION AND THE STATE: FINANCE, REGULATION, AND JUSTICE* (2017).

61. See VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001) [hereinafter VARIETIES OF CAPITALISM]; Peter A. Hall & David Soskice, *Varieties of Capitalism and Institutional Change: A Response to Three Critics*, 1 COMP. EUR. POL. 241 (2003); David Hope & David Soskice, *Growth Models, Varieties of Capitalism, and Macroeconomics*, 44 POL. & SOC'Y 209 (2016).

62. Both Sweden and Germany earn an unusually high proportion of their income from high technology exports. See VARIETIES OF CAPITALISM, *supra* note 61.

Deregulated labor markets and short-term responsiveness to increasing shareholder value proved a better fit to the bonus and burnout culture of twenty-four-hour trading. Though this may have been the case in the past, the labor markets of coordinated market economies have become more deregulated: post-Brexit, Frankfurt may learn to become a financialization powerhouse, and antitrust policies have become more globally convergent over time.

The two capitalisms described above can be conceived as two points that are reasonably close together along a wider continuum of variegated capitalisms.<sup>63</sup> Afghanistan is much further along that continuum, at the opposite end from these North Atlantic twin peaks. “Ceasefire capitalism” in Myanmar<sup>64</sup> is closer to Afghanistan than to Western Europe. The capitalism across the border from Myanmar in the poorer South-Western corner of China is somewhat wealthier, but also closer to Myanmar capitalism than to Western Europe, while some of the great industrial capitalist regions further to the East of China are more like the European industrial capitalism of sixty years ago. At the same time, the information technology and national security state capitalism of Beijing are more like Silicon Valley and Pentagon-coordinated national security state capitalism.<sup>65</sup> The latter involves competitive tournaments among teams of cooperative firms to win the contract for the weapons system of a submarine; then another competition among firms to build the vessel itself; and another to build IT systems, all before competing combinations of those firms are pitched against each other to produce competing integrated designs. This approach is revealed in the work of Michael Dorf and

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63. See Jessop, *Capitalist Diversity and Variety*, *supra* note 35; Peck & Theodore, *supra* note 35.

64. See Kevin Woods, *Ceasefire Capitalism: Military-private Partnerships, Resource Concessions and Military-state Building in the Burma-China Borderlands*, 38 J. PEASANT STUD. 747 (2011).

65. See LINDA WEISS, *AMERICA INC.? INNOVATION AND ENTERPRISE IN THE NATIONAL SECURITY STATE* (2014).

Charles Sabel,<sup>66</sup> and is mixed in with large doses of industrial espionage by the Chinese national security state. There is also a massive rural village agricultural capitalism in China that produces most of what is required to feed its huge population. It is a hybrid of a feudal past, collectivization, modern agri-businesses, and state-owned corporations, that is also tied to traditional rural Confucian values that the Communist Party embraces in the project of motivating agricultural workers into patriarchal bonds of loyalty and harmony. Business in some pockets of China is more privatized and experiences less Communist Party micro-management: there are eleven free trade zones which have no direct customs, lower tax, less red tape, and supposedly unfiltered internet approximating more liberal market conditions.<sup>67</sup> In contrast, while a large province like Xinjiang can have a flourishing tourist industry and some factories, its total domination by the Communist Party and its deep state surveillance (worst of all its massive internment system driven by fear of Islamic terror and Caliphate rhetoric) gives Xinjiang little prospect of flourishing with any of the sophisticated variegations of Chinese capitalism. Chinese financialization by banks is massive, concentrated at nodes (particularly Shanghai and the entrepot financialization of Hong Kong), and even less transparent than London and New York financialization. The main difference is that the two biggest mega banks are state-owned and are connected to persisting Communist Party imperatives to directly manage the financial system as any impending crisis approaches.<sup>68</sup> The main point of all this

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66. Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

67. Matt Slater, *China Free Trade Zones—Where Are They?*, CHINA CHECKUP (Apr. 25, 2018), <https://www.chinacheckup.com/blogs/articles/china-free-trade-zones>.

68. ICBC and China Construction Bank hold the two top spots in 2018 on the Forbes List of the World's Most Powerful Companies based on sales, profits, assets, and market value. *Global 2000: The World's Top 25 Companies*, FORBES, <https://www.forbes.com/pictures/edjl45efeik/the-worlds-top-25->

is to say that variegation of capitalism within China is huge.<sup>69</sup> While Chinese capitalism overall is authoritarian compared to the more liberal capitalism of the United States, these generalized tropes mask diversity too much.

Turning to the United States, the U.S. economy is variegated in many ways that mirror Chinese variegation, but with privately-owned rather than state-owned mega banks. American variegation is particularly distinguished by a large underclass economy of illegal immigrants in a service economy that meets a galaxy of needs of affluent Americans for cleaners, serving staff in mega-chains from McDonald's to Walmart, taxi drivers, carers of the young and the old, and various underground markets. Casual agricultural workers are also part of this immigrant precariat.<sup>70</sup> The success of American variegations of capitalism is significantly built on a foundation of cheap food and services for highly paid knowledge economy workers in organizations that lead the world in domains ranging from universities to information technology.

The United States has a far larger national security state than any other. Torch-bearers for neoliberalism Margaret Thatcher and Ronald Reagan did not believe in a small state when it came to national security. They spent big on armies, police, and on security hardware. Linda Weiss has persuasively documented a connection between the neoconservatism that accompanied the neoliberalism of Reagan's followers and the booming of the U.S. economy amidst the ashes of its deindustrialized wastelands.<sup>71</sup> Weiss sees the fact that the United States is a national security state as key to its economic success in recent decades.

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companies/#2147f4654da2 (last visited May 4, 2019).

69. See Chang & Sheppard, *supra* note 35; Lim, *On China's Growing Geo-Economic Influence*, *supra* note 35; Lim, *Socialism with Chinese Characteristics*, *supra* note 35; Mulvad, *supra* note 35; Peck & Zhang, *supra* note 35; Zhang & Peck, *supra* note 35.

70. See GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011).

71. WEISS, *supra* note 65.

Development of the internet was driven forward by the Pentagon and the British state. Both national economies benefitted greatly from being early movers in this, as with early movement into drone and robot technologies in this century, significantly motivated by ambitions for surveillance drones and killer robots. America invested massively in private-public partnerships in information technology, in particular when this was seen as vital to the domination of new weapons and surveillance systems. No scholar has undertaken the careful research of Weiss on other states that have invested in large ways in the technology of a national security state—the United Kingdom, France, Russia, China, Israel, South Africa (during Apartheid) and Japan (more recently). Yet it does not seem a wild hypothesis that these countries have also derived major benefits in building similar variegation into their capitalism.

While the United States is supposedly an outlier as a privatized liberal market economy, its public universities, for example, are massive exporters of higher education services to global markets. In Australia, also supposedly a liberal market economy, state universities are almost entirely responsible for the country's third biggest export industry (higher education).<sup>72</sup> The United States is like China in having a balance of publicly-driven and privately-driven variegations to its export capitalism.

The United States also has other capitalisms. These include: a micro-corporate venture capitalism that launches start-ups, some of which later become global tech corporations; a Silicon Valley capitalism of giants like Facebook and Google that have already acquired an ability to regulate globally as revealed by Natasha Tusikov;<sup>73</sup>

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72. See AUSTL. TRADE COMM'N, AUSTRALIA'S EXPORT PERFORMANCE IN FY2017, at 5 (2017), [https://www.austrade.gov.au/ArticleDocuments/5720/Australias\\_export\\_performance\\_FY2017.pdf.aspx?Embed=Y](https://www.austrade.gov.au/ArticleDocuments/5720/Australias_export_performance_FY2017.pdf.aspx?Embed=Y).

73. TUSIKOV, *supra* note 53, at 48–49.

monopoly capitalism grounded in intellectual property rights that allow monopolists of particular knowledge markets, such as pharmaceuticals, to exclude competitors;<sup>74</sup> growing “share economies” of cooperatives like Uber and Airbnb that require minimal infrastructure beyond internet and roads; and substantial remnants of the old industrial capitalism—making cars and steel, for example. The United States is the world leader in the commodification of sport, from American football to baseball, basketball, tennis, golf, and more.

As variegated as U.S. capitalism is in this narrative, it is different from authoritarian capitalist societies like China or Russia,<sup>75</sup> and from coordinated market economies like Germany. Variegated capitalism is partly about the idea that many different capitalisms co-exist in different spaces/times, or different markets within one country—a more liberal market in this sector or space, a more coordinated market in another, more authoritarian capitalism somewhere else.

While it is clear that it is important to see the variegation of capitalism and to be careful about sweeping tropes like “neoliberalism” as a description of America under the authoritarian interventionism of President Trump, it is also important to see how bits of the variegation become globally interdependent. Americans might not approve of the corporations that provide them with cheap lap-tops and smart phones by exploiting slave laborers in Congolese coltan mines. They may disapprove the exploitation of immiserated factory workers in Bangladesh that delivers their clothing brands. Yet they increasingly understand that their ability to purchase cheap clothing and smart phones, and the profits in their pension funds, depend on this. So they mostly look away from the comprador symbiosis between neoliberal and authoritarian capitalism. They

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74. PETER DRAHOS WITH JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY* (2003).

75. WILLIAM H. THORNTON & SONGOK HAN THORNTON, *TOWARD A GEOPOLITICS OF HOPE* 2–5, 49–50 (2012).

understand that the corporations that build their pensions prefer to manufacture in authoritarian countries where they can pay local managers or Communist Party fixers to deal with the bribes to make labor or environmental laws go away. Liberal capitalism in this way digs its own grave and empowers authoritarian capitalism in its competition with it.

The arrival of protectionist provocateurs beyond just Donald Trump, Vladimir Putin, and the new generation Eastern European authoritarians raises the question whether we are approaching peak globalization in the free movement of goods and services. The authoritarianism of such politicians suggests that perhaps we have already passed peak liberalism and peak democracy. There was a time when Americans thought the fall of Communism would lead to a liberal Eastern Europe, and the Arab Spring and the invasion of Iraq and Afghanistan would lead to a liberal Middle East and Central Asia. Some thought it was only a matter of time before there would be another Tiananmen Square to liberalize China. They thought that the people power revolution of 1986 in their former Philippines colony would lead to liberalism, where instead we see authoritarianism apace with President Duterte. Americans thought Aung San Su Kyi would liberalize Myanmar—instead she left it in the hands of genocidal generals and their authoritarian business cronies who own the banks and most big business.

The fastest growing economies since the Global Financial Crisis have not been the neoliberal economies. They have been large authoritarian capitalist economies like China and Bangladesh that have been growing at two or three times the rate of neoliberal economies for decades. Since the Global Financial Crisis, even more authoritarian crony capitalist economies in Asia, such as Cambodia, Vietnam, and the Philippines, have also grown at two or three times the clip of the western economies. Many of the biggest countries with populations approaching 100 million

or more have rejected neoliberalism in favor of their own version of authoritarian capitalism. Shifts from neoliberal to authoritarian capitalism have been particularly sharp in Eastern European economies such as Poland, Hungary and the former Yugoslavian republics since the Global Financial Crisis. Some other large economies are doing well as they move away from authoritarianism toward an intermediate position between liberal and authoritarian capitalism: examples of this kind of high growth economy of middling authoritarianism are Indonesia and India. Others like the United Arab Emirates and the Philippines are recording strong growth as they move in the opposite direction toward more authoritarian hybrids of capitalism. And of course, American corporate profits boomed in the first two years of the Trump presidency thanks to his tax cuts and perhaps even in the short-term to beggar-thy-neighbor aggression in trade negotiations. India is a key swing state of this contest among different liberal-authoritarian hybrids. It understands that it loses factory investment to Bangladesh and China because in these more authoritarian states it has been easier for brands to contrive to evade labor laws or environmental enforcement.

Now we will turn to consider first if it is possible to temper the power of variegated forms of financial capitalism, and second how to regulate labor standards. This will be considered across the wide global variegations of liberalism and authoritarianism we have canvassed.

## VI. TEMPERED FINANCIALIZATION OF CAPITALISM

### A. *Banks Taking Over*

Banks are hard to regulate because they own much of everything, including politicians.<sup>76</sup> Banker power has a

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76. In the United States, for example, financial firm political contributions grew much more steeply (by 300%) than industrial firms between 1990 and 2008 to rise to the top of the lists of political contributors. Nolan McCarthy, *The Politics of the Pop: The U.S. Response to the Financial Crisis and the Great Recession*, in



stronger interest than any other sector of the economy in holding down the wages share of national income.<sup>77</sup> This is because the only way for policymakers to keep the economy growing when workers do not have enough money in their pockets to sustain demand is policy settings that entice workers into deeper debt than they can sustain when times get bad. The other alternative is through export growth, that states are less able to control than debt or wage shares. The more workers borrow, the higher the profits for banks. This is why there is a positive correlation between private credit to GDP ratios in financialized economies and growth in stock prices.<sup>78</sup> While unsustainable debt suits the banks, it is bad for the rest of us. And unsustainable debt is only good for banks until there is a crash like 2008. Recent evidence suggests that a high household debt to GDP ratio may substantially increase GDP in the short term but substantially reduce it in the long term, and as that ratio increases, the dampening impact on long-run growth also increases.<sup>79</sup> Even when there is a crash, smart individuals in the financial sector move their massive bonuses from the good times into safe havens, and in the best case even make a killing by shorting the market before a crash, a crash that they can more clearly see coming than the rest of us.<sup>80</sup>

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COPING WITH THE CRISIS: GOVERNMENT REACTIONS TO THE GREAT RECESSION 201, 212 (Nancy Bermeo & Jonas Pontusson eds., 2012).

77. For recent examples of banking power in England lobbying for pay restraint, see Szu Ping Chan, *Mark Carney Says Public Sector Pay Restraint 'Understandable' Amid Bank of England Strike*, TELEGRAPH (Aug. 3, 2017, 4:10 PM), <https://www.telegraph.co.uk/business/2017/08/03/mark-carney-says-public-sector-pay-restraint-understandable/>; Larry Elliott, *Brexit Fears Have Triggered Pay Restraint, Bank of England Official Suggests*, GUARDIAN (Nov. 20, 2017, 1:34 PM), <https://www.theguardian.com/business/2017/nov/20/brexit-fears-pay-restraint-bank-of-england>.

78. See ADAIR TURNER, *BETWEEN DEBT AND THE DEVIL: MONEY, CREDIT, AND FIXING GLOBAL FINANCE* (rev. ed. 2017).

79. See Marco J. Lombardi et al., *The Real Effects of Household Debt in the Short and Long Run* (Bank for Int'l Settlements, Working Paper No. 607, 2017).

80. See MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE passim* (2015).

Regardless of the more complex long-term veracity of a causal relationship between private debt and bank profitability, the important thing is that banks act as if they believe the relationship exists by paying employees huge bonuses for selling more debt. Several econometric studies suggest an inverted-U relationship between economic growth and the size of the financial sector. Beyond a tipping point when financialization gets too dominant relative to the rest of the economy, economic growth starts to decline as financialization grows, for reasons that are not yet clear.<sup>81</sup>

There are many definitions of the recent surge in the financialization of capitalism. I like Rudolf Hilferding's<sup>82</sup> century-old definition of financialization as increasing political and economic power of banks and the rentier class (rentiers are those who live off income from investments in property or securities rather than from producing anything). Financial profits as a share of U.S. GDP were about 10 percent in the 1950s.<sup>83</sup> By the early 2000s, financial profits hit an all-time high of about 40 percent of total profits.<sup>84</sup> This figure fell back to less than 30 per cent after the Global

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81. See, e.g., Stephen G. Cecchetti & Enisse Kharroubi, *Reassessing the Impact of Finance on Growth* (Bank for Int'l Settlements, Working Paper No. 381, 2012) (examining this inverted U-shaped trend and tipping point); Gerald E. Epstein, *Financialization*, in AN INTRODUCTION TO MACROECONOMICS: A HETERODOX APPROACH TO ECONOMIC ANALYSIS 319 (Louis-Philippe Rochon & Sergio Rossi eds., 2016); Michael Kumhof et al., *Inequality, Leverage, and Crises*, 105 AM. ECON. REV. 1217 (2015) (focusing on the indebtedness of poor and middle income people in conditions of high inequality as a proximate cause of major crises). Russo, Ricetti, and Gallegati argue that compensating for the negative impact of high inequality on growth by replacing wages income with debt incomes in workers' pockets for fueling demand increases growth in the short-term while increasing financial instability and the risk of a major unemployment crisis. Alberto Russo, Luca Riccetti & Mauro Gallegati, *Increasing Inequality, Consumer Credit and Financial Fragility in an Agent Based Macroeconomic Model*, 26 J. EVOLUTIONARY ECON. 25, 26 (2016).

82. See Greta R. Krippner, *The Financialization of the American Economy*, 3 SOCIO-ECON. REV. 173 (2005) (discussing Hilferding's definition of financialization).

83. Epstein, *supra* note 81, at 322.

84. *Id.*

Financial Crisis, but has now surged well past 30 per cent again.<sup>85</sup> Financialization is a particularly strong trend in command economies. In the Forbes 2000 list of the most powerful corporations in the world for 2018, the first, second, fifth, ninth, and tenth places are occupied by Communist Chinese banks that are mostly state owned.<sup>86</sup> When Australians look at their pension portfolios and note that their biggest investments by far are in the Big Four Australian banks, they think the Australian economy has become highly financialized compared with the era when mining and industrial corporations dominated their portfolios. In fact, however, foreign banks, particularly HSBC, JP Morgan, and Citicorp own a hefty proportion of Australian banks. Australia's Big Four banks in turn own more than a quarter of all ASX companies,<sup>87</sup> with another substantial proportion of ASX companies being owned by smaller Australian banks, foreign banks, or mega insurance companies.<sup>88</sup>

#### B. *Micro-Regulation of Financial Capital*

While there was an encouraging surge in global regulation of banks after the 2008 crisis, this represented quite moderate regulatory growth.<sup>89</sup> It was prudent for Basel to require all large international banks to have higher

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85. *Id.* at 322–23.

86. *Global 2000: The World's Largest Public Companies*, FORBES (Jun. 6, 2018, 6:00 PM), <https://www.forbes.com/global2000/#4b8b2a3f335d>.

87. James Fernyhough, *The Australian Companies You Didn't Know Were Owned by the Big Four Banks*, NEW DAILY (last updated Mar. 2, 2018, 4:17 PM), <https://thenewdaily.com.au/money/finance-news/2018/03/01/big-four-banks-disguised-subsidiaries/>.

88. A particularly major owner has been AMP (Australian Mutual Provident). *Id.*

89. For criticism of U.S. regulatory developments in the wake of the crisis, see ANAT ADMATI & MARTIN HELLWIG, *THE BANKERS' NEW CLOTHES: WHAT'S WRONG WITH BANKING AND WHAT TO DO ABOUT IT* (2013); Ismail Ertürk, *Financialization, Bank Business Models and the Limits of Post-Crisis Bank Regulation*, 17 J. BANKING REG. 60 (2016).

reserves as a cushion for future shocks, to be less trusting of markets to decide on the veracity of financial products, and wise to seek national commitments to curtail the irresponsible activities of financial institutions. That said, financial regulation cannot be effective unless it is highly variegated and adaptive to context and to new financial engineering innovations. One salutary lesson of the Global Financial Crisis in this respect came from Poland. Polish financial regulators were without hubris in the mid-2000s; they adopted the view that they were not a financially sophisticated economy and their regulatory capacities were less developed than in big economies.<sup>90</sup> While it could make sense in Britain and the United States for regulators to license banks that traded in complex derivatives, it was more prudent for Poland to tell its banks that it would not renew their licenses if they traded significantly in complex financial products that their regulators did not understand. These decisions left Poland's banks less touched by derivatives tainted with sliced and diced U.S. sub-prime mortgages than in the rest of Europe, and Poland recovered from 2008 with higher growth rates than any other European country.<sup>91</sup> Many individual banks in Canada, Australia, and Asia (where so many had been burnt by the 1998 Asian Financial

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90. The Polish financial regulators managed risks instead of shifting them. Godziszewski and Kruszka point out that unlike in more sophisticated European banking systems, Polish banks were required to verify the incomes of those taking loans. See Bartosz Godziszewski & Michal Kruszka, *Stability of Banking System in Poland and Activity of the KNF—Polish Financial Supervision Authority*, CESIFO F., Spring 2013, at 29, available at <https://www.cesifo-group.de/DocDL/forum1-13-focus5.pdf>. The authors note that “[d]espite weak labour market conditions, the number of non-performing loans did not rise sharply [during and after the crisis],” and Polish banks had “virtually no OTC (over-the-counter) derivatives.” *Id.* at 33. Polish banks remained well capitalized during the crisis; none failed or required recapitalization using public funds. *Id.*

91. See Fred Pleitgen & Catriona Davies, *How Poland Became Only EU Nation to Avoid Recession*, CNN (June 29, 2010), <http://edition.cnn.com/2010/WORLD/europe/06/29/poland.economy.recession/index.html>; Dominique Strauss-Kahn, Managing Director, IMF, Address at the Warsaw School of Economics: After the Global Financial Crisis—The Road Ahead (Mar. 29, 2010), <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp032910>.

Crisis) adopted the same humility as the Polish regulators. In the case of Australia, there was a high level of securitization of housing loans by the big banks, but these were overwhelmingly Australian loans which were well-understood and understood to be prudent by world standards in 2008. Even at Lehman Brothers in the 2000s there were a number of prominent humble senior bankers who thought the firm was becoming too highly leveraged into too many derivatives that were not sufficiently transparent in their relationship to complex risks in real estate markets. These people were marginalized, with their views seen as a risk to short-run profits and bonuses; in some instances, they left because no one was listening to their pleas to temper the hubris.<sup>92</sup>

It is the most sophisticated, aggressive, bonus-driven and liberal finance markets in New York and London that are most difficult to temper. They pose the deepest global risks. Yet even within the United States there are more and less aggressive, more and less innovative and risk-taking institutions. In tempering banking power, one size cannot fit all. Responsive regulatory theory suggests that a relational species of regulation with a significant portion of restorative justice can be a helpful first port of call for strengthening the hand of the temperate, ethical insiders before they are pushed towards the door.<sup>93</sup>

I have argued that the global financial crisis might have been prevented this way.<sup>94</sup> The FBI from 2004, if not considerably earlier, was seeing a great deal of evidence of an epidemic of mortgage fraud in fraud monitoring

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92. *Rear Vision: The Legacy of the Global Financial Crisis*, ABC RN (Sept. 16, 2018, 12:05 PM) (audio download available at <http://www.abc.net.au/radionational/programs/rearvision/the-legacy-of-the-global-financial-crisis/10195876>).

93. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); BRAITHWAITE, *supra* note 10; Braithwaite, *supra* note 48.

94. Braithwaite, *supra* note 48.

databases.<sup>95</sup> FBI leaders suffered from the pathology of being a prosecutorial rather than a preventive regulator. The FBI did not see it as a prosecutorial priority to confront the petty frauds of lenders who said they had a job when they did not. Had they embraced a more preventive orientation, they might have discussed with prudential regulators whether this massive upsurge in petty fraud causing housing loan defaults was a red flag of risk for American finance. Eventually they might have found that investors on Wall

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95. Nguyen and Pontell made a strong case that corporate crime played an important role in these waves of mortgage fraud. Particularly telling in Nguyen and Pontell's account was the 2006 Federal Financial Crimes Enforcement Network (FinCEN) report of a 1,411% increase in mortgage-related suspicious activity reports between 1997 and 2005, 66% of which involved material misrepresentation or false documents. Then another 44% increase was reported between 2005 and 2006. A BasePoint Analytics analysis of three million loans, which indicated that 70% of early payment defaults had fraudulent misrepresentations on their original loan applications, was another early warning signal discussed by Nguyen and Pontell that the mortgage issue was a crime problem. These data also demonstrated that it was a consequential problem, as the loans with fraudulent misrepresentations were five times as likely to go into default. The Federal Bureau of Investigation began issuing public warnings in 2004, claiming that it was seeing a spike in mortgage fraud cases in the mid-2000s. Even earlier than that, a more abstract early warning drew on the lessons of the history of the savings and loans debacle from Nguyen and Pontell and fellow scholars such as Bill Black. Of course, other layers of causation were found in the structures of the derivatives market, the bonus culture on Wall Street, the captured ratings agencies that failed to do their job, the structural imbalances of American indebtedness to China to pay for Chinese exports to the United States, and the defective quantitative risk models applied by the financial industry. Yet Nguyen and Pontell's emphasis on the proximate causes in mortgage fraud is well-placed because the deeper layers of causation were much harder to fix. See Tomson H. Nguyen & Henry N. Pontell, *Mortgage Origination Fraud and the Global Economic Crisis: A Criminological Analysis*, 9 CRIMINOLOGY & PUB. POL'Y 591 (2010); WILLIAM K. BLACK, *THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY* (2005); Interview by Bill Moyers with William K. Black on PBS (Apr. 3, 2009) (transcript available at <http://www.pbs.org/moyers/journal/04032009/transcript1.html>); Kitty Calavita, Robert Tillman & Henry N. Pontell, *The Savings and Loan Debacle, Financial Crime, and the State*, 23 ANN. REV. SOC. 19 (1997); Simon Johnson, *The Quiet Coup*, ATLANTIC (May, 2009), <http://www.theatlantic.com/doc/200905/imf-advice>; PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); JUSTIN O'BRIEN, *ENGINEERING A FINANCIAL BLOODBATH* (2009); FRANK PARTNOY, *INFECTIOUS GREED: HOW DECEIT AND GREED CORRUPTED THE FINANCIAL MARKETS* (2003).

Street who were looking at the same data were setting themselves for a killing with “The Big Short” of those securitized bad loans.<sup>96</sup> Relational regulators might then have sat down with the banks that were approving the greatest numbers of defaulting loans and asked them why they were so much worse than other banks and what could they do to repair this harm. We know now that this would have revealed a systemic pattern of “liar loans” in which working class people were groomed to exaggerate their incomes. Then these banks sliced and diced the loans into securities and sold unmanaged risks far and wide. At the very least, the depth of the global recession could have been reduced through this kind of relational regulation, a type of regulation that did not waste time on prosecutions with cooperating banks but focused instead on preventing ever-growing numbers of poor people being foisted with debts they could not sustain. Yes, more bankers should have gone to prison by 2019, but in 2004 the priority was relational prevention of more people being bankrupted into poverty.

With a stringent enough focus of regulatory pressure, most banks would likely have played ball with relational regulation by hiring independent auditors to report honestly on what was going wrong with their lending practices. Most banks probably would have voluntarily complied with regulatory demands to reform their lending practices, dispense with culpable brokers, discipline their own staff, and repair damage by helping to restructure loans that were impossible for poor people to repay. Many, however, would have refused to do these things and stonewalled regulators. Financial regulators have no shortage of powers in such circumstances to march in and do their own audit of bad loans. When this escalation did not evoke cooperation and de-escalation to relational regulation, they could escalate further by starting to launch prosecutions against banks and individual executives for fraud. If cooperation then occurred,

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96. See LEWIS, *supra* note 80.

prosecutions could be deferred, contingent on the quality of the reforms and the offer of help to poor lenders who were in trouble. If compassionate support for struggling families was not even forthcoming after that, regulators could have made an example of these banks by securing mug shots of their chief executives on the front page of the *Wall Street Journal*. Responsive regulation underwrites the presumptive preference for relational and compassionate regulation with escalation to tough stuff at the peak of the regulatory pyramid.<sup>97</sup> In the very worst cases of fraud and intransigence to reform, corporate capital punishment is a more robust remedy before the collapse of banks: withdrawal of their license, state takeover, and restructuring of the bank's affairs.

### C. *Responsive Structural Regulation of Financial Capital*

After the event, in 2008 and 2009, financial institutions had collapsed as a result of their folly. What then? It follows from the financialization of capitalism that the largest banks in big economies can be too big to fail. The U.S. government made the correct decision in saving Bear Stearns and other systemically important financial institutions from collapse. It probably should have gone further and also used taxpayer funds to save Lehman Brothers from going under, because that was the immediate trigger of a global freezing up of capital markets. Likewise, British Prime Minister Gordon Brown did the right thing in bailing out his big banks. Yet in the long run, political leaders must not privatize capitalism's profits and socialize its losses. In one important sense, the United Kingdom (and other European governments such as Germany's) did a better job than the United States, because Britain insisted on taxholder equity in failing banks like Lloyds. These shares could be sold when the market inevitably rose again.<sup>98</sup> Even if the British taxpayer might

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97. AYRES & BRAITHWAITE, *supra* note 93, at 4–5, 35–41.

98. Andrew MacAskill, *Lloyds New Era Begins as Government Sells Off Final*



sell these shares at a loss, one solution is making up the shortfall later by a special tax on banks of the kind Australia imposed in 2017.<sup>99</sup> In a related way, if China and other authoritarian capitalist states are willing to pull socialist levers to deal proactively with crises, and neoliberal economies like the United Kingdom and United States are not, it is the authoritarian capitalist economies that may survive in the long run.

In their own ways, these governments showed that only resort to temporary socialist solutions can save capitalism in a major crisis. Obama was quite assertively socialist when he bailed out General Motors. General Motors (and Chrysler) came to him in 2008 with the message that he had no alternative but to bail them out. Presidents had done this in past crises, where they were later rewarded by fat campaign contributions as the auto industry returned to profit. Obama behaved differently than past Presidents in 2008. He did deploy vast taxpayer funds to temporarily socialize the auto industry's losses. But in the process, he fired the General Motors CEO Rick Wagoner.<sup>100</sup> He announced that he wanted renewed top management that would give the auto industry states of Michigan and Ohio a sustainable future by greening the industry. This was an apt response to sclerosis in a business that had learnt it was cheaper to invest in political lobbying than in innovation. By 2013, Obama had seen the release of a General Motors environmental sustainability report card that revealed some progress toward greener factories that produce greener cars. This enterprise has

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*Shares*, REUTERS (May 17, 2017, 2:20 AM), <https://uk.reuters.com/article/uk-lloyds-sale/lloyds-new-era-begins-as-government-sells-off-final-shares-idUKKCN18D0GZ>.

99. Carrington Clarke, *Federal Budget 2017: How the New Bank Tax Will Work*, ABC NEWS (May 10, 2017, 12:29 AM), <http://www.abc.net.au/news/story-streams/federal-budget-2017/2017-05-10/federal-budget-2017-bank-tax-explained/8513264>.

100. Sheryl Gay Stolberg & Bill Vlasic, *U.S. Lays Down Terms for Auto Bailout*, N.Y. TIMES (Mar. 30, 2009), <https://www.nytimes.com/2009/03/30/business/30auto.html>.

continued: despite Donald Trump's avowals to kill off Obama's sustainability agenda,<sup>101</sup> General Motors made a commitment in 2016 that it would source all electrical power for its 350 operations in 59 countries with renewable energy by 2050.<sup>102</sup> Partly because of these governance changes, American autos became more competitive with European and Asian cars. Voters of Michigan and Ohio were grateful to Obama in the 2012 Presidential election for saving their economies.

Neither Obama nor Brown were tough enough with banks that by 2019 had returned to impressive profitability. It would have been just and economically sound to introduce something like the 2017 Australian special tax on banks to force British and U.S. banks to pay their taxpayers back for their generous support during the years of crisis. This would have forced banks to cover their externalities. The problem is the banks have political power to which cautious social democrats like Obama, the Clintons, Brown, and Tony Blair have always deferred. These politicians scorned the "bank-bashing populism" of social democrats like Bernie Sanders, Elizabeth Warren, and Jeremy Corbyn. But if Hilary Clinton had moved more in that principled, apparently "populist" direction, she might have defeated Donald Trump. Had she focused on how Obama won Michigan and Ohio by saving auto industry jobs (but not the GM CEO Wagoner) she might have fared better. In the longer run of the Obama administration, while the President's Chief of Staff Rahm Emanuel said "you never want a serious crisis to go to waste,"<sup>103</sup> the opportunity presented by the crisis was, after

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101. Joe Arvai, *Why Trump's Vow to Kill Obama's Sustainability Agenda Will Lead Business to Step in and Save It*, THE CONVERSATION (Nov. 15, 2016, 9:55 PM), <https://theconversation.com/why-trumps-vow-to-kill-obamas-sustainability-agenda-will-lead-business-to-step-in-and-save-it-68616>.

102. Press Release, General Motors, GM Commits to 100 Percent Renewable Energy by 2050 (Sept. 14, 2016), <https://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2016/sep/0914-renewable-energy.html>. 2050 is not so fast, critics can rightly point out.

103. Wall Street Journal, *Rahm Emanuel on the Opportunities of Crisis*,

all, wasted. The administration eventually succumbed to the hegemony of the financialization of capitalism, sustained an overly-indebted economy, kept wages down, and missed the opportunity for a Green New Deal.<sup>104</sup>

In Australia, it took a conservative Prime Minister, Malcolm Turnbull, who was struggling against a social democratic tide and who himself had been a super-rich investment banker, to realize how hated banks were and impose the special one-off punitive tax on Australia's super-profitable banks in 2017. He also pushed back on the deep resistance of his own Liberal Party elite to establish a Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry,<sup>105</sup> called for by the National Party (a conservative, rural, farmer's party), the Labor Party, and the Greens. A retired High Court judge used the extraordinary powers of royal commissions in Australia to reveal deeply entrenched practices of financial abuse against disadvantaged consumers, farmers, and middle-class consumers alike.

The securities regulator (the Australian Securities and Investment Commission) responded to criticism of it by the Royal Commission by planting a resident member of its enforcement staff permanently inside the four big banks and AMP, the largest insurance company (all of which were outed for exploitative law-breaking during Commission hearings).<sup>106</sup> As in the United States and United Kingdom,

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YOUTUBE (Nov. 19, 2008) [https://www.youtube.com/watch?v=\\_mzcbXi1Tk](https://www.youtube.com/watch?v=_mzcbXi1Tk).

104. See KYLA TIENHAARA, GREEN KEYNESIANISM AND THE GLOBAL FINANCIAL CRISIS (2018); PHILIP A. WALLACH, TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS (2015); Alan B. Krueger & Eric Posner, Opinion, *Corporate America Is Suppressing Wages for Many Workers*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/opinion/corporate-america-suppressing-wages.html>.

105. ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY, <https://financialservices.royalcommission.gov.au/Pages/default.aspx> (last visited May 26, 2019).

106. See Gareth Hutchens, *Banking Royal Commission: All You Need To Know—So Far*, THE GUARDIAN (Apr. 19, 2018, 6:42 PM),

Australian citizens have extremely low trust in the integrity of financial institutions.<sup>107</sup> Citizens have been justified in distrusting banks. Wave after wave of popular outrage against Australian banks across the past forty years has afflicted the banks with one high-profile public enquiry into the Australian financial system after another which revealed terrible abuses,<sup>108</sup> regulatory failure, and recommended regulatory reform in response.<sup>109</sup> Paradoxically, Australia's endless cycle of scandal<sup>110</sup> has served it reasonably well. Modest degrees of ethical renewal, regulatory renewal of prevention strategies, and enforcement renewal, occurs in each wave of inquiry<sup>111</sup>—even as seemingly pro-business, pro-banker appointments are made to conduct each inquiry by politicians fearful of the money power of banks. Renewal is always very partial and inadequate. Banks move forward to support the politicians who were against “bank bashing” and cut off those who did not.

Nevertheless, there is compelling evidence that as more

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<https://www.theguardian.com/australia-news/2018/apr/20/banking-royal-commission-all-you-need-to-know-so-far>.

107. Emily Cadman, *A Decade of Banks Behaving Badly Is Being Laid Bare in Australia*, BLOOMBERG (29 Apr. 2018, 7:42 PM), <https://www.bloomberg.com/news/articles/2018-04-29/decade-of-banks-behaving-badly-laid-bare-in-australian-inquiry>.

108. The abuses revealed after the collapse of Australia's then-largest insurer, HIH, in 2001 were particularly shocking (its chief executive went to prison). For information specific to HIH, see Claudio Damiani et al., *The HIH Claims Support Scheme*, in THE TREASURY ECONOMIC ROUNDUP 37 (Australian Treasury, 2015), [https://static.treasury.gov.au/uploads/sites/1/2017/06/Roundup\\_Issue-1\\_2015\\_Combined.pdf](https://static.treasury.gov.au/uploads/sites/1/2017/06/Roundup_Issue-1_2015_Combined.pdf).

109. For a recent, non-exhaustive summary of Australia's financial services inquiries, see Thomas Clarke, *A History of Failed Reform: Why Australia Needs a Banking Royal Commission*, THE CONVERSATION (Sept. 11, 2016, 4:10 PM), <https://theconversation.com/a-history-of-failed-reform-why-australia-needs-a-banking-royal-commission-64803>.

110. See LAWRENCE W. SHERMAN, SCANDAL AND REFORM: CONTROLLING POLICE CORRUPTION (1978).

111. This is the recipe in Sherman's book for scandal to lead to reform, as opposed to hunkering down until the adverse publicity blows over then return to corrupted business as normal. See *id.*

layers have been put in the enforcement pyramids of Australian financial regulators, they have accomplished genuinely more transparent markets (compared to, for example, New Zealand's, in one analysis).<sup>112</sup> This fits with the international literature showing that it is not so much high levels of regulatory deterrence that prevent corporate crime, but use of a strengthened, diverse regulatory mix.<sup>113</sup> There is also evidence that relational regulation of shocking financial crimes against consumers has delivered on the one hand helpful regulatory reform, and helped the

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112. Ka Wai Choi et al., *Responsive Enforcement Strategy and Corporate Compliance with Disclosure Regulations* (Austl. Nat'l Univ. & Macquarie Univ., Working Paper, 2016), <http://ssrn.com/abstract=2722923>. This analysis showed that as successive regulatory crises and law reform surges progressively equipped ASIC with new layers of more varied arrows in its law enforcement quiver the effectiveness of ASIC enforcement progressively increased. The difference-in-difference analysis with the impact of New Zealand securities and financial market regulation reinforced this result. The study investigated the effectiveness of securities regulation in making markets more transparent to investors and therefore more efficient and hopefully less prone to the burst of artificial bubbles. The ASIC outcome of concern was change in financial analysts' information environment and market liquidity. Hence, Choi and his colleagues measured the impact of the Australian and New Zealand financial disclosure regimes by variables such as reduction in analysts' forecast errors, forecast dispersion, bid-ask spread, and increase in the turnover rate from the market liquidity test. The ASIC budget and enforcement intensity (measured by prosecution counts) helped analysts to reduce forecast errors for future profits, with the responsive regulation effect increasing predictive accuracy over and above those impacts on the integrity of markets. The leverage in such data was formidable with an Australian sample of 148,498 firm-month observations (with each observation based on the median for a number of analysts) and a New Zealand sample of 116,585. Not only does this study have the strength of a multi-construct multi-method move to a pooled time-series cross-sectional analysis of all major corporations in an economy on an outcome that securities enforcement is designed to deliver, combined with a difference-in-difference analysis of two whole economies, it also delivers a larger number of observations than normally experienced with empirical socio-legal research.

113. See Natalie Schell-Busey et al., *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL'Y 387 (2016); John Braithwaite, *In Search of Donald Campbell: Mix and Multimethods*, 15 CRIMINOLOGY & PUB. POL'Y 417 (2016) (discussing Schell-Busey et al., *supra*). On the theory of why this might be so, see NEIL GUNNINGHAM ET AL., SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY (1998).

disadvantaged victims of those transgressions.<sup>114</sup> Critics rightly point out that, as in the United States and United Kingdom, there have not been enough criminal prosecutions of bankers.<sup>115</sup> While this is the case, it is important to note also the evidence that “enforceable undertakings” negotiated through relational regulation are more effective than critics who push for consistently punitive measures like imprisonment allege.<sup>116</sup> So while Australians have good reasons for thinking poorly of banks, the frequency of Australia’s cycles of scandal and reform have actually made its banks rather better than in many other countries. More importantly, quite unlike in other countries, the political hold of the banks has been significantly lessened not only on the social democratic side of politics, but on the conservative side; not only on the authoritarian populist right (One Nation) and the rural right (the National Party), but also in the neoliberal party of business donors (the Liberal Party).

No Australian bank has been bailed out by taxpayers this century, nor in the final years of the last century. The Labor government did promise that it would socialize bank losses if it had to in 2008, and provided an unlimited government guarantee for all bank deposits to discourage withdrawals and to restore confidence to depositing and lending. It ratcheted up deficit spending more aggressively than all the economies that were in deeper trouble in 2008

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114. See BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* (1993); Christine Parker, *Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings*, 67 MOD. L. REV. 209 (2004).

115. See Patrick Durkin, ‘Why Me?’ Allan Fels Scolds ANZ Bank after Cartel Charges, FIN. REV. (June 4, 2018, 11:00 PM), <https://www.afr.com/business/banking-and-finance/why-me-allan-fels-scolds-anz-bank-after-cartel-charges-20180604-h10xmx>; Ian Verrender, *Crime and Misdemeanours: A Tale of Two Law Enforcement Agencies*, ABC NEWS (June 3, 2018, 4:21 PM), <http://www.abc.net.au/news/2018-06-04/crime-as-misdemeanours-tale-of-two-law-enforcement-agencies/9830742>.

116. MARINA NEHME ET AL., *CTR. FOR LAW, MKTS. & REGULATION, UNIV. OF NEW SOUTH WALES, THE GENERAL DETERRENCE EFFECTS OF ENFORCEABLE UNDERTAKINGS ON FINANCIAL SERVICES AND CREDIT PROVIDERS* (2018).

and 2009. As a result, the Australian economy grew in every quarter of the Global Financial Crisis,<sup>117</sup> grew more than any OECD country in that period,<sup>118</sup> and indeed has grown every quarter for a record in the developed world of 28 years.<sup>119</sup> Joseph Stiglitz described the Australian policy response to the financial crisis with a little hyperbole as “one of the most impressive economic policies I have seen, ever.”<sup>120</sup>

Despite these positives, a good argument can be made that (as argued by the principal author of the architecture of the contemporary Australian financial system, Paul Keating)<sup>121</sup> Australian banking is controlled with excessive oligopoly by its big four banks, even for the comparative smallness of its economy. Keating believes that competition policy has been too permissive in allowing these banks to take over their most threatening competitors (such as the St. George Building Society and Aussie Home Loans), and that contestability from foreign banks has not been robust enough in a political game sewn up by the big four.<sup>122</sup> Australia’s chief of competition regulation during the 1990s, Allan Fels,<sup>123</sup> has urged that a regulatory separation of deposit taking and investment advice to customers is required.<sup>124</sup>

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117. Edmund Tang, *Australia Has Experienced the Longest Period of Economic Growth in the Developed World*, AUSTRALIAN TRADE & INVESTMENT COMMISSION BLOG (Mar. 29, 2017), <https://www.austrade.gov.au/News/Economic-analysis/australia-has-experienced-the-longest-economic-growth-among-major-developed-world>.

118. OECD, OECD ECONOMIC OUTLOOK 252 (2010).

119. The last quarter of negative growth in Australia was June 1991. See Tang, *supra* note 117.

120. Quoted in WAYNE SWAN, *THE GOOD FIGHT: SIX YEARS, TWO PRIME MINISTERS AND STARING DOWN THE GREAT RECESSION* (2014).

121. Australian Treasurer from 1983 to 1991 and Prime Minister from 1991 to 1996.

122. Eric Johnston, *Banks Given Too Much Power, Says Keating*, THE SYDNEY MORNING HERALD (Sept. 23, 2009, 12:00 AM), <https://www.smh.com.au/business/banks-given-too-much-power-says-keating-20090922-g0km.html>.

123. Chair of Australian Competition and Consumer Commission from its inception in 1995 until June 30th, 2003.

124. Jessica Irvine et al., ‘Stamp Out This Behaviour’—Banks Should Not

That is, banks should not be able to put their depositors into investment products in which the bank concerned is itself an investor. Fels also believes that both of Australia's financial regulators, the Australian Prudential Regulatory Authority and the Australian Securities and Investment Commission have been too reluctant to launch criminal prosecutions and put bankers in jail. This is a fair comment. During Fels' era as Chair of the Australian Competition and Consumer Commission, this body took many tough enforcement actions to compensate for the consumer protection weaknesses of the financial regulators, though mainly through enforceable undertakings that included compensation for consumers, financial penalties, and mandated compliance reforms rather than through criminal prosecutions.<sup>125</sup>

When regulators have failed to prevent a financial crisis, the regulatory pyramid shown to banks in the aftermath could be useful in responding to failures of post-crisis reform. One good regulatory change could be the separation of deposit-taking from investment advice, or at least from any advice to invest in a product in which the bank is implicated. This could escalate to total separation of deposit-taking banking from all investment banking, as the United States put in place with the 1933 Glass-Steagall Act<sup>126</sup> during the New Deal. More recently, John McCain and Elizabeth

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*Offer Advice Says Fels*, THE SYDNEY MORNING HERALD (Apr. 18, 2018, 6:16 PM), <https://www.smh.com.au/business/banking-and-finance/stamp-out-this-behaviour-banks-should-not-offer-advice-says-fels-20180418-p4zacb.html>.

125. Regulatory redundancy and inefficiency can have a virtue in checking and balancing regulatory capture against the power of big banks. I was able to observe this during ten years serving as a part-time Commissioner on Fels's Commission. After Fels's time at the ACCC helm ended in 2003, a memorandum of understanding was developed that defined more clearly which rip-offs of consumers would be ACCC and which would be ASIC matters. There was efficiency in this. But because of the correct criticism that ASIC has always had a less robust enforcement culture than the ACCC, part of the policy debate around the Royal Commission was whether the ACCC should be re-weaponized to prosecute banks.

126. Banking Act of 1933 (Glass-Steagall Act), Pub. L. No. 73-66, 48 Stat. 162. See generally *Glass-Steagall Act*, INVESTOPEDIA (last updated Apr. 1, 2019), [https://www.investopedia.com/terms/g/glass\\_steagall\\_act.asp](https://www.investopedia.com/terms/g/glass_steagall_act.asp).



Warren were among those who drafted a bill for a “21st Century Glass-Steagall Act,” which sought a separation of deposit-taking activities from investment banks, hedge funds, insurance, and private equity firms within a five-year transition timeframe. The incentives behind the act were twofold: to drive de-monopolization in the banking sector and to enable banks to be more secure and trusted by depositors.

In Australia, as everywhere, the selection of the best regulatory structure should be responsive to the particularities of histories of failure. The optimum number of big banks also depends on the size of an economy. At this point in Australia’s financial history, a good case can be made that it would be better off with five big banks than four—it can be significantly harder to effect market collusion in oligopolies when just one new oligopolist is added.<sup>127</sup> For this reason, a good option for Australia could be to insert the option of state takeover of one of the smaller competitors to the big four into its post-crisis pyramid. The government could invest taxpayer funds into this fringe competitor to build it into a state-owned big fifth bank. Its charter could increase the competitiveness of the banking system by undercutting the interest rates, beating the quality of service, from the big four, and promising better compliance with consumer protection laws. The big fifth bank could later be privatized. There would be no need to rush to do this before a good sale price could be optimized for taxpayers because the evidence does not suggest that economies perform worse with higher percentages of banking in state hands.<sup>128</sup> The fiscal benefit to taxpayers when the shares

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127. AYRES & BRAITHWAITE, *supra* note 93, at 139; *see also* ERIC RASMUSEN, GAMES AND INFORMATION (1989); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

128. *See* Thomas Marois, *State-Owned Banks and Development: Dispelling mainstream myths*, in HANDBOOK OF RESEARCH ON COMPARATIVE ECONOMIC DEVELOPMENT PERSPECTIVES ON EUROPE AND THE MENA REGION 52 (M. Mustafa Erdogdu & Bryan Christiansen eds., 2016); Svetlana Addrianova et al., *Is Government Ownership of Banks Really Harmful to Growth?* (Brunel Univ. Dep’t of Econ. and Fin., Working Paper No. 09-20, May 2009). Countries with a high

were sold would likely be huge, given the excess profitability of the oligopolistic Australian banks. The long-term legacy of the period of reform would be a private big five, instead of four, and hopefully an improved regulatory culture<sup>129</sup> and a diminished Australian national debt.

This particular reform would be deeply resisted in liberal Australia because it is “socialist,” even if only temporarily so. That does not mean it is pointless for social democrats and Greens<sup>130</sup> to signal it as an option if banks continue to behave so poorly and continue to lose the trust of the people. It would be good politics to do so. Despite the suitability of this idea to an Australian context, a policy option like this in a U.S. regulatory pyramid could never make sense even as a political option, nor perhaps as good policy because of the American variegation of financialization.<sup>131</sup> The mix needed for one country, one sector of capitalism within a country, one period of its history, will always be different from another

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percentage of public ownership of banking such as Germany are inclined, rightly or wrongly, to see this more as a strength than a weakness. *See, e.g.*, Daniel Detzer, *Financial Systems in Financial Crisis: An Analysis of Banking Systems in the EU*, 2 INTERECONOMICS 56 (2014).

129. *See* Meidinger, *supra* note 26.

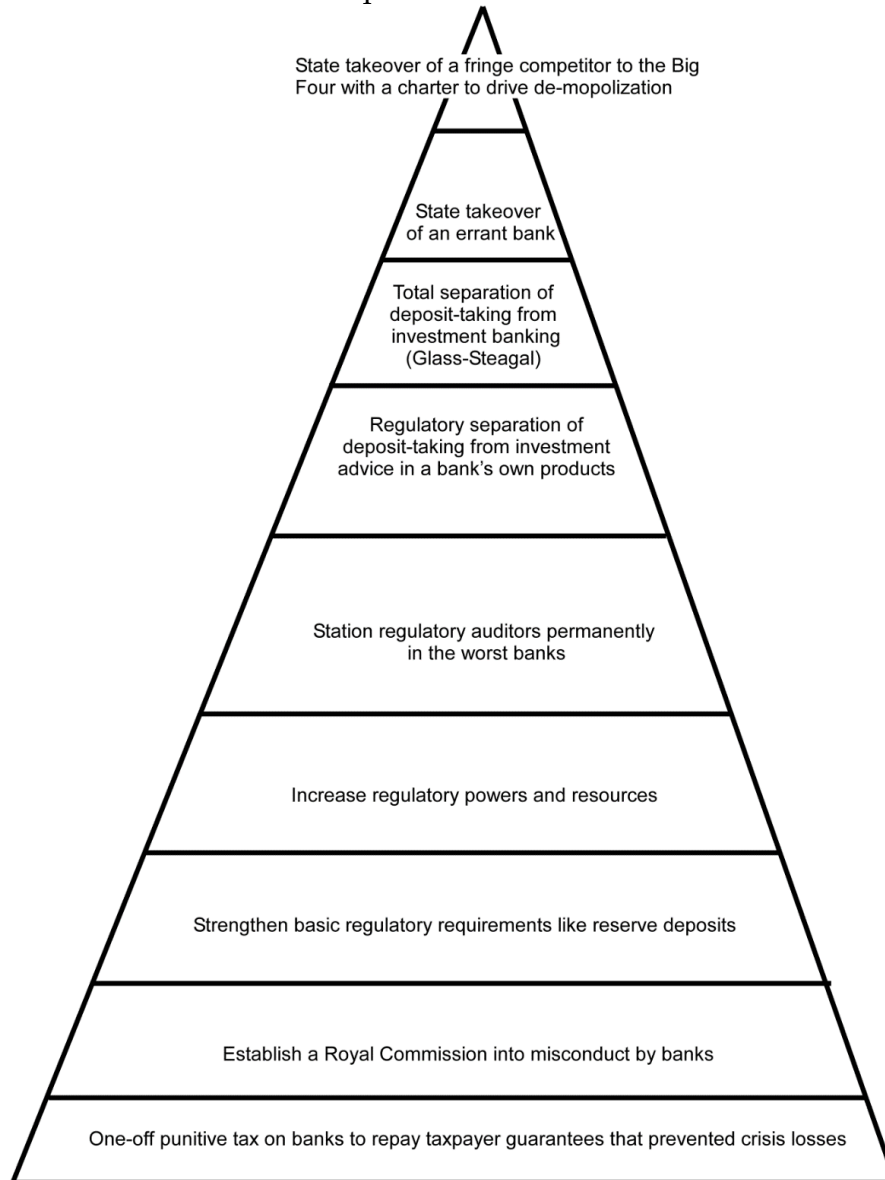
130. The Greens have signaled it as a political option they favor. *See* Amy Remeikis, *Which Bank? Richard Di Natale Says Australia Needs a ‘People’s Bank’*, THE GUARDIAN (Apr. 3, 2018, 2:01 PM), <https://www.theguardian.com/australia-news/2018/apr/04/which-bank-richard-di-natale-says-australia-needs-a-peoples-bank> (covering Richard Di Natale’s National Press Club address in April 2018).

131. It is nevertheless true that U.S. state governments have often sought to sustain competitive pressure from smaller banks in their state by depositing state government funds in them. AYRES & BRAITHWAITE, *supra* note 93, at 139. Ayres and Braithwaite advocate a monopsony standard for this kind of governmental partial-industry intervention. The United States would not meet this standard with public funding for a competing bank, but Australia quite likely would. Private sector firms and defense departments alike act to create a second or third source when they are not getting enough competition in their supply chain. A monopsony standard provides a limiting principle on when the state should not intervene (when private monopsony would not). In economic circumstances where a monopsonist private corporation would support the creation of a competitor for second-sourcing, states should also consider it. *See id.* ch. 5.

country, another sector, another time. Our job in the academy is to eschew the political realism that assumes the banks will always be too politically powerful to allow anything like Figure 1. Our job is to prepare for the next crisis, for perhaps a really shocking one during which fascists capitalize by attacking “Jewish bankers.” Our job is to ensure that the future John McCains and Elizabeth Warrens of a more principled financialization of capitalism have some ideas in their top drawer for deeper reform.

Figure 1 displays these options for an Australian post-crisis pyramid of structural responses to lost confidence in banks.

**FIGURE 1:** Options for an Australian post-crisis pyramid of structural responses to lost confidence



The bottom five rungs of this pyramid have in effect already been put in place in Australia. The next two rungs up have been under discussion in the response to the Royal Commission, but are unlikely to happen during the current

reform cycle. The top two rungs are decidedly intervention steps too far for Australian politics today, especially given the country's past (of a Labor government that lost power and stayed out of power for 23 years after it sought to nationalize all banks).<sup>132</sup> The inappropriateness of the design of this enforcement pyramid in the United States, United Kingdom, or the distinctive context of Poland<sup>133</sup> discussed above confirms the imperative for variegated responses to different catastrophes of different capitalisms.

## VII. TEMPERING THE PROFIT SHARE

The last section demonstrated how banks mobilize their influence to structurally increase the profit share of finance by pushing debt upon people. To do this, they engage in consumer fraud, which can become systemic. Bankers think this fraud can sustain the demand that keeps capitalism pumping. The alternative solution to secure the same outcome—reducing debt and increasing wages—is unattractive to finance capital. In this section, I explore reducing debt and increasing wages as the alternative that can make life better for poorer people, while also more effectively proofing capitalism against crashes.

Banks share interests with their most powerful corporate clients in that they both seek to suppress global regulation of labor standards. Natasha Tusikov's *Chokepoints* reveals that in China, manufacturers received ten dollars in direct payments for wages per iPad, which was a wages share of 1.8 percent of the value of an iPad.<sup>134</sup> In this context, we also know production for Western brands is

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132. This was the Chifley Labor government in 1949. The Mitterrand government also had to reverse its disastrous foray into nationalizing France's major banks in 1982, but survived after abandoning the policy.

133. Though Poland did have a state bank during the Global Financial Crisis that accounted for twenty percent of the banking market. It helped considerably with crisis management by pumping up lending in the public interest when the private Polish banks were pulling back from lending.

134. TUSIKOV, *supra* note 53, at 9.

moving from China because Chinese wages are getting too high. Apple could pay its manufacturing workers fifty percent more and thereby increase the price of iPads by less than one percent. Bearing in mind that better paid workers might be better workers, Apple can afford to pay a living wage without greatly denting its profits. On the optimistic side, this datum reveals that industrial capital does not have as strong an interest in oppressive suppression of the wages share that finance capital has.

Economists used to be almost as ambivalent as bankers about increasing the wages share of national income. There is considerable consensus among economists now, however, that the wage share of national incomes has fallen too far to reliably sustain long-run job creation, especially when inevitable shocks deliver downturns. Sustainable long-term demand that keeps unemployment shocks at bay requires higher average wages than we see in economies like the United States.<sup>135</sup> The best way to accomplish this with social justice is to increase minimum wages. This would also push up the incomes of those earning above the minimum wage, as they and their unions demand a correspondingly higher salary to accord with their higher skill levels, education, or experience. Statistically, declining unionization and declining minimum wages in the United States account for the majority of its rise in wage inequality during the past half century.<sup>136</sup> At the same time, a political strategy of raising minimum wages is the best way of ensuring that most of the benefit of a shift from the profit share to the wages share of national income would go to the poorest

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135. See Eckhard Hein & Nina Dodig, *Finance-Dominated Capitalism, Distribution, Growth and Crisis—Long-Run Tendencies*, in *THE DEMISE OF FINANCE-DOMINATED CAPITALISM: EXPLAINING THE FINANCIAL AND ECONOMIC CRISES* 54 (Eckhard Hein, Daniel Detzer & Nina Dodig eds., 2015); BRINK LINDSEY & STEVEN M. TELES, *THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY* (2017).

136. SHELLEY MARSHALL, *LIVING WAGE: REGULATORY SOLUTIONS TO INFORMAL AND PRECARIOUS WORK IN GLOBAL SUPPLY CHAINS* 14 (2019). The discussion in the following paragraphs draws heavily on this work by Marshall.

workers and to women of the precariat in particular.

Securing this result is difficult without an internationalist struggle for a living wage that complements national policy, national campaigns, and local campaigns. Shelley Marshall has brilliantly argued how such a campaign for a global living wage might be conducted pragmatically and incrementally. Her strategy requires the trade union movement to reinvent its relevance. She suggests that unions shift from focus on national campaigns to a global social movement for wage justice. In Errol Meidinger's terms, this requires the International Confederation of Free Trade Unions to show the lead and pull the levers to build a more globalized "regulatory community"<sup>137</sup> for interscalar global and local wage justice.

A centerpiece of the Marshall strategy would be an International Labor Organization (ILO) agreement for signatory countries to increase their minimum wage each year, with the countries with the lowest minimum wages in Purchasing Power Parity terms (adjusted for local living costs) agreeing to the highest annual percentage increases. Perhaps these might be two percent in real terms.<sup>138</sup> Unions in wealthy countries would shift some of their resources to unions in very poor countries so that those unions could support the campaigns of politicians who commit to increasing minimum wages. Relatively modest contributions from unions in wealthy countries like the United States and Germany could buy a great deal of political campaigning and worker political mobilization in the world's poorest economies. So might crowd funding in rich countries. For unions in rich countries this investment would be an indirect strategy for ratcheting up minimum wages in their own country. An alternative would be to design the ratchet based on the size of the gap between the minimum wage and the

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137. See Meidinger, *supra* note 26.

138. Some sentences here and in the paragraphs that follow are taken from my Foreword to Marshall's (2019) book. MARSHALL, *supra* note 136, at vii-ix.

median wage.

Marshall's global strategy is about workers of all countries helping one another to ratchet up minimum wages and therefore the wages share of income across all countries. Each national success would help ratchet up minimum wages in all other nations. One way this could happen could be as follows. Assume a regime where the countries with the lowest ratios between minimum and median wages are required to implement the biggest increase in their minimum wage; an intermediate group of countries by an intermediate percentage; and the countries with the highest ratios of minimum to median wages are only required to implement the lowest percentage increase. After a number of years being required to make the biggest increases to real minimum wages, the worst countries would no longer find themselves at the bottom of this triage. As some countries move up from the middle to the highest group, others will be pushed down to the middle group. Then the progress in middle group countries will ratchet up minimum wages in the countries that start with the highest minimum wages. Likewise, improvement in the worst group of counties would ratchet up improvement in the middle group as members of that group are pushed down into the lowest group. In the next year those countries that were formerly in the middle group will have to accomplish a bigger increase. So, the lower group ratchets up the middle group and the middle group ratchets up the higher minimum wage group over time. This is the politics of what makes it sensible for unions in the highest wage countries to fund campaigns in lowest wage countries to sign up to the regime.

Once the campaign had succeeded in getting a critical mass of countries to sign up to the ILO Global Living Wage Agreement, campaigning would shift from supporting political leaders who lead ratification campaigns to targeting hold-outs and saboteurs of the regime who reduce minimum wages. Regime saboteurs in Shelley's model would be targeted punitively by consumer and union boycotts, Fair



Trade decertification, strikes at multinational companies who invest in black-listed low wage countries, and a global fund to support strikers campaigning for a Living Wage in non-signatory countries. Once many international companies had agreed to renounce new investment in black-listed countries, and once many of the most powerful states had signed the agreement, then they would have a strategic trade interest in persuading competing firms and companies to follow them rather than undercut them.<sup>139</sup>

Transnational corporations would be lobbied to sign a pledge to do business preferentially with “Living Wage List” suppliers and states. The strategy would target the most inegalitarian of political parties and firms, but only after a long period of regime-building in which none are levied with punishment but targeted instead with relational regulation and political rewards for joining the regime. Only those states and firms that are particularly corrupt and persistent in their non-enforcement of minima should be punished. If the worst few countries and firms were successfully targeted every few years, in the next few years the regime could raise the bar by targeting the next worst few firms and the next worst few countries. By this point in the evolution of such a regime, the majority of producer organizations might even join the majority of trade unions in supporting the targeting, for the strategic trade reasons outlined above. Raising the bar by rewarding many and punishing few is the way to give progressive realization of ILO labor rights more strategic edge than it currently has.

Marshall’s strategy integrates innovative sub-national approaches to improving labor standards and wages into the global ratchets, making it a truly glocal (global and local) step-by-step implementation strategy. Her approach recursively allows locally responsive strategies to strengthen

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139. See BRAITHWAITE & DRAHOS, *supra* note 10, on how strategic trade interests have enabled some big structural changes to capitalism in the past, such as the abolition of the eighteenth-century international slave trade, and the 1987 Montreal Protocol.

national safety nets, and the national to strengthen the local. She argues that there are already incipient examples of her proposed strategy in the Asian Floor Wage Alliance, the Brazil National Slave Eradication Pact “dirty list” of 300 companies benefiting from slave labor, and ILO’s Joint Maritime Commission statutory determination of international minimum wages for seafaring maritime workers.

Marshall’s scholarship shows pathways for weaving variegated thin reeds together to craft a resilient fabric of transformation. The general direction for the struggle it plots is for trade unions to ally with sympathetic civil society groups, sympathetic economists and commentators in the mass media, social media and crowd sourcing to complement national labor regulation with local, regional and industry-level regimes. Civil society engagement is critical for building this regulatory community and achieving normative acceptance of the justice of a living wage. It strengthens the International Labor Organization to become a meta-regulator of national regulators by sequencing regulatory ratchets in multi-level governance. All levels of ratchets in Marshall’s policy design allow each ratchet upwards in interscalar governance to be meshed with lower- and higher-level governance ratchets. These settings make it difficult for one ratchet to ratchet down another. Conversely, some ratchets up automatically move others up also. This might seem quite abstract when framed like this, yet Marshall’s book makes the idea practical and concrete. My discussion of Marshall’s book has been lengthy because it is a light on the hill for a pragmatic regulatory politics of moving from worst-best to second-best outcomes. Other advocates of global social justice strategies, like Oxfam and Citizens for Tax Justice, can learn much from Marshall’s ideas about building positively a list of ally countries and firms before turning to punitive global targeting via a black list of corporations and countries.

Among the strengths of the work, a significant one is the

way it combines this reconfigured global strategy for equality with fine-grained ethnography of four sub-national experiments—from India, Australia, Cambodia and Bulgaria. These are experiments in increasing minimum wages, health and other conditions for the precariat of these countries, the most marginalized of their informal workers.<sup>140</sup> Marshall diagnoses the successes of these experiments, which are limited but real, as dependent on a combination of factors, including attunement of design to local employment realities and integration of the strategy with any strengths in the national labor standards. This integration recursively allows for the local to strengthen national safety nets and the national to strengthen more local safety nets. Marshall also frames the studies as different iterations of smart regulation and responsive regulation.<sup>141</sup> She uses a “medically-inflected” hybrid model of regulation in the framing of her research. The Bulgarian experiment is a “stent,” widening the arteries that flow to the poor. Australia experimented with “pacemaker” innovation to stimulate a system of living wage justice. India experimented with an institutional “by-pass,” an alternate institutional path to living wages. This is a virtuoso re-imagining of the theory of smart regulation.<sup>142</sup>

As with financialization, different capitalisms are radically variegated in labor markets according to local conditions. In India, Marshall studies the circumstances of the country’s huge precariat of head-load (*Mathadi*) workers who wander the ports, railway yards, and markets of cities in search of cash-in-hand work, a lot of which involves stacking, weighing, and loading as well as head-load carrying. This labor market developed in response to local conditions, being partly a result of the way British

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140. Local initiatives are shown to be especially important for informal workers who are not meshed into global supply chains.

141. See GUNNINGHAM ET AL., *supra* note 113 (on smart regulation); AYRES & BRAITHWAITE, *supra* note 93 (on responsive regulation).

142. See GUNNINGHAM ET AL., *supra* note 113.

colonialism stripped peasants of land, creating a desperate land-poor class who migrated to cities in search of any kind of labor. There is no labor market in the United States like this. In the United States, the informal sector is a significant but marginal variegation of capitalism that especially employs the minority of illegal immigrants; in India, most employment is informal and not integrated into global supply chains that are regulated by labor law.<sup>143</sup>

Marshall confined her study to the state of Maharashtra, where there are 500,000 *Mathadi* workers, and over 200,000 in Mumbai alone. The heavy loads these workers carry (usually 100 kg) almost always cause break-down of their capacity to work within 15–20 years from back problems. Regionally, *Mathadi* labor is regulated by the Mathadi, Hamal and other Manual Workers (Regulation of Employment and Welfare) Act of 1969, which introduced a system of *Mathadi* Boards. The act was designed “to secure basic protective social security for the unorganised workers by ‘regularising’ their intermittently available continuous work.”<sup>144</sup> The associated Boards target locally specific variegations of *Mathadi* work: one for the docks, one for the markets, and so on. The *Mathadi* Boards not only set labor standards; they also act as a labor hire corporation, socializing what had been a privatized system of labor hire and exploitation. They transform working conditions by proactively restructuring the market rather than by command and control enforcement of non-compliance with labor laws. The law and the Boards cover standard pay and conditions as well as pension funds, leave wages, medical benefits and compensation for injury, making for a local formalization of an informal sector. The Boards also set up community kitchens to improve the nutritional circumstances that had long afflicted these impoverished

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143. MARSHALL, *supra* note 136, ch. 4.

144. Ramesh C. Datta, *Public Action, Social Security and Unorganised Sector*, ECON. & POL. WKLY., May 30, 1998, at L2–L5.

workers who are often remote from their homes. They built two hospitals that specialize in medical services for the problems of *Mathadi*, such as their back injuries. Boards also assist with the education of workers.

Marshall considers the *Mathadi* Board system of regional regulation as a partial but formidable success, one which lays a foundation for social mobility that sees many “sons and daughters of *mathadi* workers [become] medical doctors, lawyers, IT professionals and the like.”<sup>145</sup> Other Indian states have emulated this Maharashtra innovation in de-casualizing and empowering labor. Marshall reports that the Maharashtra case has commonalities with other cases of regional Indian regulation such as the Welfare Boards of Kerala, and other geographically local labor regulation modalities in other countries. Some of the compassionate and relational regulation of the Kerala and Maharashtra Boards have been picked up nationally in the Indian Unorganised Workers’ Social Security Act (2008).<sup>146</sup>

Marshall’s research shows the clear need for regulation that is variegated to the changing conditions at regional, national, and sectoral levels, as well as the nodal levels of particular ports, markets, and railway yards. Part of the beauty of the case is in the compassionate character of the regulatory law this enables.

#### VIII. CONSTITUTIONAL META-REGULATION: AN ACCOUNTABILITY AND INTEGRITY BRANCH

This section shifts focus to the role of Constitutional law in tempering power and enabling and holding accountable reforms of the kinds discussed in earlier sections.

One of the deepest structural dilemmas in the struggle for alleviation of the suffering caused by banks is that banks have interests in keeping debts high and wages low. So do

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145. MARSHALL, *supra* note 136, at 70.

146. *Id.* at 71; *see also id.* ch. 4.

brands that exploit impoverished workers. They also have an interest in persuading regulators and their political masters that what's good for JP Morgan and Apple is good for America. One approach to remedy can be found in ancient Confucian thought about state capture and corruption. One ancient Chinese remedy was the institution of an independent examinations branch of governance. To be appointed as a civil servant, prosecutor, or judge, in an era that pre-dated universities, one had to pass an exacting examination tailored to the professional demands of the examinations branch. The branch served as an ancient Chinese method of constitutionally regulating poor governance and for ensuring competence in state administration. The idea of independent branches that could regulate the executive government was also evident in the office of the Censor (御史; *yù shǐ*) under the Qin and Han dynasties, which influenced the modern constitutional thought of Sun Yat Sen.<sup>147</sup> Later, the Sui and Tang dynasties established the office of the *tái* (臺), which supervised the conduct of civil servants and military officers.<sup>148</sup>

In Sun Yat Sen's Republic of China constitution that was voted for in 1928, but not implemented until 1947, this tradition was picked up in an innovative adaptation of western republican thought to regulate the anarchic conflicts for power in the early republic.<sup>149</sup> That constitution provided for five semi-autonomous branches of government: a legislature, an executive, a judiciary, an examinations branch, and an accountability and integrity branch called the Control Yuan. The Control Yuan was elected until a 1992 revision to the Constitution and Clause 90 of the 1947 Constitution defined it as "the highest supervisory organ of

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147. John Braithwaite, *Learning to Scale Up Restorative Justice*, in *RESTORATIVE JUSTICE IN TRANSITIONAL SETTINGS* 173, 180 (Kerry Clamp ed., 2016).

148. *Id.*

149. WILLIAM L. TUNG, *THE POLITICAL INSTITUTIONS OF MODERN CHINA* 118–20 (1964).

the state.” Fundamental to thinking about the Control Yuan was that it would check capture and abuse of power not only by regulatory agencies in the executive branch, but also by the legislature and judiciary. Instead of allowing these branches to impeach their own wayward members, the accountability and integrity branch would independently adjudge impeachment. The Constitutional realities of the 1947 Constitution have meant that censure and “corrective measures” are speedier and more potent than impeachment.<sup>150</sup> In the thirty years since the demise of martial law in Taiwan, there have been only 541 impeachment cases.<sup>151</sup> Sun Yat Sen’s original thinking on the separation of powers had a sixth branch, the Auditing Yuan. However, in 1931 the Auditing Yuan was subsumed as the Ministry of Audit into the Control Yuan. Contemporary re-investigations of this Chinese republican thought could be considered for the next constitutional revolution that occurs in a Western democracy. This is particularly so for a contemporary west where financialization has captured politics and the regulation of capital in a way that is dangerous to the sustainability of freedom. The job of an independent regulation and accountability branch is the regulation of the state, meta-governance (the governance of governance),<sup>152</sup> or meta-regulation.<sup>153</sup>

Sun Yat Sen’s five branches of governance persist in the Taiwan (Republic of China) constitution today.<sup>154</sup> During

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150. Herbert Han-Pao Ma, *Chinese Control Yuan: An Independent Supervisory Organ of the State*, 1963 WASH. U. L. Q. 401, 411–12.

151. Ernest Caldwell, *Widening the Constitutional Gap in China and Taiwan: History, Reform, and the Transformation of the Control Yuan*, 2017 U. ILL. L. REV. 739, 757.

152. See Eva Sørensen, *Metagovernance: The Changing Role of Politicians in Processes of Democratic Governance*, 36 AM. REV. PUB. ADMIN. 98 (2006).

153. See CHRISTINE PARKER, *THE OPEN CORPORATION* 245–46 (2002); Peter Grabosky, *Meta-Regulation*, in *REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS* 149 (Peter Drahos ed., 2017).

154. MINGUO XIANFA chs. V–IX (2005) (Taiwan) (English translation available

Chiang Kai-shek's long rule of militarized authoritarianism, Sun Yat Sen ideals were gutted and the Control Yuan became a puppet of executive rule even as Taiwan turned back to democracy. While calls to weaken or abolish the Control Yuan are incessant, in recent democratic renewal of Taiwan, the Control Yuan does some useful meta-regulatory work, such as implementing the Sunshine Acts to ensure transparency, regulating political donations, and maintaining registers of assets held by public officials.<sup>155</sup> In addition to supervising what would be called the Auditor-General function in the west, the Taiwan Control Yuan supervises the integrity and independence of the other four branches by way of the Control Yuan Committee on Anti-Corruption. Other Committees exist for other purposes. There is a Control Yuan Committee on Human Rights with functions similar to western human rights commissions. There is a Standing Committee on Judicial Affairs and Prison Administration, performing the functions judicial self-regulation performs in the west as well as prison ombudsman and prison inspectorate functions. The Control Yuan also has an oversight Standing Committee for National Defence and Intelligence Affairs, as well as a committee with oversight of procurement by all branches of governance. A separate standing committee looks after ethnic minority affairs. Although the Control Yuan, as in white-settler societies, has a class interest in upholding Han Chinese interests over those of the original indigenous minority owners of the land, it does seem a visionary idea to have a sub-branch of governance with the job of holding the other branches to account on questions of indigenous rights and indigenous reconciliation. More so one that has a high proportion of indigenous staff members and that is

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at <https://english.president.gov.tw/Page/94>).

155. For a survey of the history of the Control Yuan and its changing powers, see Ernest Caldwell, *Widening the Constitutional Gap in China and Taiwan: History, Reform, and the Transformation of the Control Yuan*, 2017 U. ILL. L. REV 739.



independent of the (majoritarian) judiciary.

Thailand is the only country to have emulated the Taiwan constitutional architecture of an accountability and integrity branch. The 1997 “People’s Constitution” was a radical document in terms of public participation and rights accountability. It was dismantled by the 2006 military coup and the 2007 Constitution promulgated by the Council for National Security, which made it a crime to criticize the draft constitution.<sup>156</sup> It is perhaps testimony to the virtues of this architecture that tyrants found it so dangerous. Members of the fourth inspection branch of the 1997 Thai Constitution oversaw impeachment in the other three branches, the election commission, the human rights commission, ombudsman, audit and anti-corruption functions, as in the Taiwan Control Yuan. The 1997 Thai Constitution involved the further innovation that membership of this fourth branch was only elected from candidates who were not members of political parties and for one term only. This served as a prudent check against progressive capture by parties and business cronies that dominate the executive and legislature and stack the judiciary.

There is something attractive about tempering power through Sun Yat Sen’s architecture of a fourth accountability branch of governance comprised of many branches within it. This is so even though his law that was written for all of China was pushed aside by the Communist Party and only embraced (and corrupted) by the military dictatorship in Taiwan for window dressing, and then cast aside again after the only genuine attempt at emulation when a military coup afflicted Thailand in 2006. For societies where settlers have forced indigenous landowners off their country, there is appeal in one of Taiwan’s branches being elected from indigenous peoples for oversight of the other branches in

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156. See Somroutai Sapsomboon & Supalak G. Khundee, *Referendum Law or Penalty Law?*, THE NATION (THAILAND) (July 6, 2007), <http://www.webcitation.org/6EK01rNZ>.

terms of the *longue durée* of reconciliation. This in the context of histories of indigenous dispossession and mass atrocity, disproportionate contemporary imprisonment, and abuse of indigenous rights more broadly. Constitutionally empowering this kind of compassionate entrenchment of indigenous regulatory authority is appealing and novel.<sup>157</sup> For societies ruled by banker power, the idea of independent meta-regulation of banking regulators, central banks, and labor regulators to ensure they are not captured or corrupted by capital or by politicians on the prowl for campaign contributions is an attractive one to have ready in the top drawer after the next crisis. Promising experiments in republican governance for the future from our study of the past might include those that never fully blossomed, especially so with institutions for checking domination killed off by the tyrannies of militaries, monarchs, and party machines.

#### IX. CONCLUDING HYPOTHESES

Totalizing tropes like neoliberalism can inhibit the analytic imagination from grasping the variegation of capitalism. Likewise, it can inhibit the regulatory imagination from crafting regulation that can be responsive to plural capitalism. I have argued that actioning this is not a craft of destroying the power of capital, but of tempering it so it becomes stronger in the form of a hybrid governance consisting of many branches of power.<sup>158</sup> It is a craft of building and progressively strengthening a strong constitution, strong government, strong markets, strong civil

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157. It is also consistent with the proposals in the Uluru Statement from the Heart, which came about after a dialogue of Australian indigenous leaders in 2017. 2017 FIRST NATIONS NATIONAL CONSTITUTIONAL CONVENTION, REFERENDUM COUNCIL, ULURU STATEMENT FROM THE HEART, REFERENDUM COUNCIL (May 26, 2017), [https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart\\_0.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF).

158. On the concept of hybridity, see HYBRIDITY ON THE GROUND IN PEACEBUILDING AND DEVELOPMENT (Joanne Wallis et al. eds., 2018).

society, strong individuals, each enabling and checking the other. The article has sought to illustrate the relevance of a tempering power framework to the most commanding institutions of contemporary capitalism: financial markets, information markets, labor markets, constitutions, and the regulation of war and peace (illustrated with Timor-Leste).

Contemporary liberal democracies are at risk of a dangerous short-termism fuelled by financialization. This is a capitalism that allows puppeteers of bank power to succumb to an ethic of ruthlessness. In the extreme case, bankers accumulate short-term bonuses that they disinvest from their own banks when the time is right, short the disastrous future prospects of bank stocks after they get out, allow taxpayers to bail banks out, and then start another merry-go-round of untempered power.<sup>159</sup> Financialization creates an unjust society that refuses a fair share of the nation's wealth to those who earn their living from wages. This society burdens our children and grandchildren with debt, national and personal, more debt than is prudent. Institutional catastrophe may then open a door to crisis and authoritarianism. The Global Financial Crisis of 2008, in a smaller way than German hyperinflation after the global crash from 1929, has delivered impetus to authoritarian politics of varying but considerable degrees across Western states today. In the long term we must learn to conquer this problem or it will conquer us. Authoritarian capitalism might or might not continue to displace liberal capitalism to take over the world.

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159. The "make hay while the sun shines" and then "pass the parcel" mentality was well documented by ethnographic insights about the crisis, particularly from the ratings agencies. One Standard & Poor's executive said before the crash, "let's hope we are all wealthy and retired by the time this house of cards falters"; another said "We rate every deal. It could be structured by cows and we would rate it"; another: "Profits were running the show." O'BRIEN, *supra* note 95, at 78. We know now that there was a widespread Wall Street belief that the party of unaccountable profiteering would crash, but that the only option was to maximize profits until the crash came, securing as much of your bonus earnings as you could in safe havens for when the music stopped.

Regulation, it is hypothesized, has more potential to be just and effective in response to the challenges of financialization when it:

- is motivated by an explicit philosophy of tempering power, an accountability that renders power less arbitrary, more compassionate and relational;
- is variegated to be responsive to the variegation of capitalism across space, time, sectors, firms, and nodes of governance;
- is constitutionally meta-regulated for accountability and integrity of tempered power;
- can escalate from relational justice to deterrent legal formalism;<sup>160</sup>
- is on guard against the risk that authoritarian capitalism could prove more sustainable than liberal capitalism for the challenge of steering demand without unmanageable debt and while paying adequate wages;
- is on guard against the way liberal capitalism nurtures internal variegations of authoritarian capitalism inside the service sectors of their own “liberal” societies, as in the exploitation of illegal immigrants or guest workers;
- understands the danger of corporate power becoming liberalism’s fifth column when firms proactively prefer to locate production in authoritarian societies that crush rights, underpay workers, and endanger the environment. Untempered corporate power is encouraged by ruthless investors to invent new technologies of surveillance and military domination for the defense of authoritarianism. Liberal capitalism therefore paradoxically strengthens authoritarian capitalism in its competition with

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160. On this, see more detail in Braithwaite, *supra* note 6.

liberal capitalism.

There is of course an even bigger challenge in the face of which liberal capitalism may prove unsustainable. This is how to prevent ecological collapse. Regulation must shift the shape of the economy so that the demand that averts economic crisis and authoritarianism is not demand for material goods, but for more human services such as health, aged care, education, and demand for regulatory steering of capitalism itself.<sup>161</sup> There are no guarantees that liberal capitalism will prove more capable than authoritarian capitalism at navigating the challenges of regulating finance and guaranteeing a fair labor share of national income. Likewise there is no guarantee that it will be more effective at averting ecological collapse. That larger challenge for republican governance is one I will wrestle with in future work. This journey will likewise be lit by forty years of illuminating Baldy scholarship on environmental governance.

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161. See RICHARD DENNISS, *CURING AFFLUENZA: HOW TO BUY LESS STUFF AND SAVE THE WORLD* (2017); *RESTORATIVE AND RESPONSIVE REGULATION OF HUMAN SERVICES* (Gale Burford, John Braithwaite & Valerie Braithwaite eds., 2019).