Rodrigo’s Abstraction: Capitalism Inequality & Reform Over Time and Space

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INTRODUCTION

Recently, Professor Richard Delgado observed that law and capitalism define each other, as mirror images. Indeed, Professor Delgado suggests that law and capitalism "are the same thing" and that therefore "law is not a promising path" to reform capitalism. This conclusion enjoys some support from economists who now warn that the United States faces an inequality spiral that will make a mockery of the capitalist elements of meritocratic competition, as well as any notion that the economically powerful act pursuant to the constraints of the law. These economists suggest that the capitalistic norm is, in fact, increasing economic inequality and the

2. Id. at 93.
3. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 1 (Arthur Goldhammer trans., 2014) ("When the rate of return on capital exceeds the rate of growth of output and income . . . capitalism automatically generates arbitrary and unsustainable inequalities on which democratic societies are based."); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY 206 (2012) ("Growing inequality, combined with a flawed system of campaign finance, risks turning America's legal system into a travesty of justice."). Nobel laureate Joseph Stiglitz contends that great inequality directly corrodes the rule of law. See id. ("Some may still call it the 'rule of law' but in today's America the proud claim of 'justice for all' is being replaced by the more modest claim of 'justice for those who can afford it.' And the number of people who can afford it is rapidly diminishing."). According to Nobel laureate Paul Krugman, "The big idea of Capital in the Twenty-First Century is that we haven't just gone back to nineteenth-century levels of income inequality, we're also on a path back to 'patrimonial capitalism,' in which the commanding heights of the economy are controlled not by talented individuals but by family dynasties." Paul Krugman, Why We're in a New Gilded Age, N.Y. REV. BOOKS, May 8, 2014, at 15. Nobel laureate Robert Solow terms Piketty's main point a "new and powerful contribution" to understanding economic inequality. Robert M. Solow, Thomas Piketty is Right, NEW REPUBLIC, Apr. 22, 2014, at 50, 53.
concomitant corrosion of the rule of the law. Legal scholars also warn of the dangers posed today for any economic reform in America, due to historically unprecedented economic inequality.

The futile efforts to reform capitalism in the wake of the collapse of capitalism in 2007–2009 (such as the failed Dodd-Frank Act) add support to Delgado’s notion that today in America, capitalism defies reform. In sum, Professor Delgado correctly diagnoses American capitalism in 2014 (or more correctly, perhaps, “pseudo-capitalism”) as highly resistant to reform.

Nevertheless, Rodrigo’s Equation—that law equals capitalism—which conveys a level of mathematical precision and stasis, seems reductionist and unnecessarily fatalistic. Law certainly defines

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4. According to Piketty, only major events and accompanying changes in policy can disrupt capitalism’s inclination toward increasing inequality. PIKETTY, supra note 3, at 8.

5. Joseph R. Fishkin & William E. Forbath, The Anti-Oligarchy Constitution, 94 B. U. L. Rev. 669, 670–71 (2014) (arguing that Americans long understood the constitution to preclude an oligarchy or economic royalty); Paul Gowder, Equal Law in an Unequal World, 99 IOWA L. Rev. 1021, 1023 (2014) (demonstrating that poverty and extreme economic inequality are inconsistent with the rule of law); Michael J. Zimmer, Inequality, Individualized Risk, and Insecurity, 2013 Wis. L. Rev. 1, 2 (“The thesis of this Lecture is that our extreme inequality in part results from government policy, that much government policy is the result of the undue influence of money in politics, and that, before any reform is likely, the dominance of money in politics must be substantially reduced.”). Eleven years ago, I argued that economic inequality threatened growth and that racial inequality in particular was macroeconomically pernicious and irrational. Steven A. Ramirez, Bearing the Costs of Racial Inequality: Brown and the Myth of the Equality/Efficiency Trade-off, 44 Washburn L.J. 87, 88 (2004) (“Perhaps no inequality is more difficult to justify economically than racial inequality, for race is a social construct with no biological or genetic content. Racial inequality capriciously destroys the ability of individuals to economically self-actualize themselves and systematically strips society of...[its] human capital.”). The financial crisis of 2007–2009 exacerbated racial inequality. Thomas W. Mitchell, Growing Inequality and Racial Economic Gaps, 56 How. L.J. 849, 889 (2013) (“[R]ecreasing the trends in economic equality and intergenerational mobility in this country will require fundamental changes in public policy as it relates to our tax system and educational system, among other areas...”). Measured by the income share of the top .01% of the income distribution, economic inequality soared to new height immediately before the financial crisis of 2008, and recovered to exceed those highs by 2010. Derek Thompson, How You, I, and Everyone Got the Top 1 Percent All Wrong, THE ATLANTIC, Mar. 30, 2014, http://www.theatlantic.com/business/archive/2014/03/how-you-i-and-everyone-got-the-top-1-percent-all-wrong/359862/. It is this group that holds sufficient power to subvert law and regulation.


7. Thomas Piketty notes that “the history of income and wealth is always deeply political, chaotic, and unpredictable.” PIKETTY, supra note 3, at 35.
capitalism—which requires only that the means of production be privately held. Still, capitalism is not transnationally monolithic, and it evolves and devolves over time as a function of complex, even chaotic, conditions. Capitalism can be reformed (and deformed) through law. Once law redistributes power pursuant to any reform, it redefines who holds power to change law and encourages their investment in the new reform—but the institutional design of the reform matters, and the former holders of power will opportunistically work to regain their power.

Centuries ago, similar sentiments to those of Professor Delgado held great sway with respect to political power. Thus, Thomas Hobbes voiced skepticism about the fragmentation of sovereignty and limitations upon the power of the sovereign except in very narrow circumstances. Law can effectively channel and curb political power through the legal fragmentation of sovereignty and limitations on political outcomes such as individual rights.

Further, different societies may view inequalities of a given level differently and therefore adopt differing policies and laws to address inequality. "No one can foresee how these things will change in the decades to come." Id.


10. The World Bank recognizes that many reforms can serve both equity as well as growth. WORLD BANK, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT 2 (2005), available at https://openknowledge.worldbank.org/bitstream/handle/10986/5988/WDR%202006%20-%20English.pdf?sequence=3 ("[E]quity is complementary, in some fundamental respects, to the pursuit of long-term prosperity. Institutions and policies that promote a level playing field—where all members of society have similar chances to become socially active, politically influential, and economically productive—contribute to sustainable growth and development."). In accordance with this vision of an empowering capitalism, the rapid fall of extreme poverty since 1990 (as capitalism has spread around the world) suggests that capitalism is the primary mechanism available today for the alleviation of extreme poverty. Not Always with Us, ECONOMIST (June 1, 2013), http://www.economist.com/news/briefing/21578643-world-has-astonishing-chance-take-billion-people-out-extreme-poverty-2030-not (showing that since 1990 extreme poverty in the world has been cut in half). Thus, capitalism’s promise of expanding opportunity and empowerment is no pipe dream.

11. Gowder, supra note 5, at 1023–24 (noting that this principle goes back at least as far as Rousseau).


13. "But to those Lawes which the Soveraign himselfe ... maketh, he is not subject. For to be subject to Lawes, is to be subject ... to himselfe; which is not subjection, but freedom from the Lawes." Id. (footnote omitted).

14. E.g., United States v. Nixon, 418 U.S. 683, 713 (1974) (ordering a sitting President to produce tapes to a special prosecutor); Brown v. Bd. of
Monarchies brutally failed in the political sphere and now lie permanently in history's ashbin.\(^1\) Can economic power be brought to heel before law in a similar fashion, or must we accept a new economic royalty, above the law in the economic sphere and able to insulate themselves from capitalistic competition behind big government?\(^2\)

I argue that durable economic reform (sustainable curbs on those holding power) can occur within capitalist systems under certain conditions. Citizens must essentially demand accountability and competition in place of privilege, and law and regulation tethered to sound policy, rather than the narrow interests of an entrenched elite.\(^3\) I further posit that legal and regulatory frameworks can back a cultural demand for economic reform, in

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2. Unfortunately, it took the mindless catastrophe of World War I to rid the world of the last major monarchies. See Geoffrey Wawro, A Mad Catastrophe 366–85 (2014) (recounting the reckless origins and conduct of World War I and the destruction of the Russian, Austria-Hungarian, and German monarchies). The brutish and bloody recklessness of the three prewar monarchies should counsel all against the continued emergence of an economic royalty. See id. The permanent demise of monarchies arose from a broader distribution of political power pursuant to law that redefined and broadened political elites. See George Athan Billias, American Constitutionalism Heard Round the World, 1776–1989, at 14 (2009).

3. Bloomberg estimates the current value of the government's subsidy to the megabanks reigning at the summit of our economy as $83 billion per year. Remember That $83 Billion Bank Subsidy? We Weren't Kidding, BLOOMBERGVIEW (Feb. 24, 2013, 7:26 PM), http://www.bloombergview.com/articles/2013-02-24/remember-that-83-billion-bank-subsidy-we-weren-t-kidding. Essentially, this figure reflects the value of an unlimited federal guarantee of these megabanks and represents an unlimited negative equity interest held by the federal government. Id. As such, the continuation of Too Big to Fail ("TBTF") policies directly raises the question of whether the United States is, in fact, capitalistic today. See Capitalism Definition, supra note 8, and accompanying text. The travesty of TBTF continues even after the ineffective Dodd-Frank Act. Too-Big-to-Fail Is Still Too Dangerous, BLOOMBERGVIEW (Jul. 31, 2014, 2:05 PM), http://www.bloombergview.com/articles/2014-07-31/too-big-to-fail-is-still-too-dangerous. The government socializes the losses of the megabanks and that negates capitalism to the extent that government owns the losses of the megabanks. Joseph E. Stiglitz, Phony Capitalism, HARPER'S, Sept. 2014, at 14. No pure form of capitalism exists because law mediates all capitalistic systems and there is bound to be differentiation among those legal systems that provide for private ownership of substantially all property. See id.

accordance with this vision of a rule of law on a more durable basis. Law can appropriately channel and curb the exercise of economic power in the interests of a greater macroeconomy and society in general. While law cannot autonomously achieve this, the "[p]eople get the rule of law they demand," and law can express these demands through durable legal frameworks. Law can also memorialize the policy bases for curbing and channeling power productively. These are central points in Lawless Capitalism: The Subprime Crisis and the Case for an Economic Rule of Law ("Lawless Capitalism").

In this response, I extend these points in the direction of Professor Delgado. Specifically, I concur regarding the dimming possibility of capitalistic reform in the United States today. Recent events demonstrate beyond a doubt that the crisis ultimately served to further entrench corporate and financial elites. The

18. I argue that the rule of law in the economic arena can be secured through depoliticization of regulatory structures, professionalization of important economic functions (such as management of public firms), broad private rights of actions for victims of fraud and other financial skullduggery, broad educational entitlement to expand the effective labor pool to force meritocratic competition, and constitutional protection of economic human rights for the full development of the nation's human resources. See id. at 195-206.

19. See id. at 14.
20. Id. at 7.
21. See id. at 7-8.
22. See generally Id. At no point in Lawless Capitalism do I suggest that more regulation is better than less regulation. Instead I offer a series of regulatory innovations that enjoy the support of evidence that tends to show that the aggregate benefits of these particular regulations exceed the aggregate costs. See id. at 43 ("The maximization of human productivity assumes government support of the macroeconomy, and that means that all cost-justified government interventions occur and that all non-cost-justified interventions do not occur."). In any event, I will demonstrate that the quality of regulation also differs transnationally.

23. See Delgado, supra note 1, at 102. Economists and other scholars use the term "inequality trap" to denote such a high level economic inequality of income within a given nation that it begins a self-reinforcing cycle as those with power subvert law and regulation for their profit but to the detriment of economic growth. See Francois Bourguignon et al., Equity, Efficiency and Inequality Traps: A Research Agenda, 5 J. ECON. INEQUALITY 235, 236 (2007), available at http://link.springer.com/journal/l0888/5/2/page/1.

24. CEO compensation soars unabated by the financial crisis. Gretchen Morgenson, That Unstoppable Climb in C.E.O. Pay, N.Y. TIMES, June 30, 2013, at BU1; Gary Strauss et al., $100 Million Club, USA TODAY, Apr. 4, 2014, at 1A ("Median CEO compensation ... surged 13% to $10.5 million in 2013 ... ."). Corporate and financial elites now constitute about half of the top .01 percent (or one in 10,000) of the income distribution, and virtually all of the growth over the most recent decades accrued to this group. Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics 5 & n.10 (2010); see also Piketty, supra note 3, at 302 ("Recent research, based on matching declared income on tax returns with corporate compensation records, allows me to state that the vast majority (60 to 70 percent, depending on what definitions one chooses) of the
Supreme Court continues its drive towards a corporatocracy—a system whereby a handful of corporate elites manipulate a formal democratic republic for their own interests. In accordance with new learning from economics, inequality continues its historic spike to unprecedented levels—which renders reform more unlikely and imposes growing macroeconomic costs. The crisis resulted in illusory accountability at best. All of this yields one conclusion: the United States is rapidly moving towards an inegalitarian spiral that is sure to lead to the economic and political domination of corporate elites—imposed through bipartisan legislation and top 0.1 percent of the income hierarchy in 2000–2010 consist[ed] of top managers.


27. STIGLITZ, supra note 3, at xii (stating that high inequality leads to less stability, less efficiency, lower macroeconomic growth, and a legal system captured by moneyed interests); David Brodwin, Suffering Under the Weight of Inequality, USNEWS.COM (Sept. 12, 2013, 4:10 PM), http://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/12/record-high-income-inequality-threatens-us-growth.


29. I discounted the possibility of an inequality spiral in Lawless Capitalism. RAMIREZ, supra note 17, at 10–11. Substantial economic inequality inherently arises from appropriate capitalistic incentives and disincentives. At some point, however, high inequality leads to elite entrenchment and legal subversion. The point at which high inequality leads to impaired economic growth is not known with precision, and may differ from society to society. Id. at 34–39.

30. I recently put the legislative effort to insulate corporate and financial elites from the sanctions for their securities fraud (aided and abetted by the judiciary) in the 1990s in a historic and macroeconomic perspective. Steven A.
judicial fiat. I agree, consequently, that reforming capitalism today in the United States through law and regulation is not promising in the absence of aggressive action to reduce economic inequality by raising the minimum wage, massively recapitalizing universal education for all, and reimposing traditional notions of progressive taxation in the United States.

A foundational disagreement remains. I identify soaring economic inequality as the culprit. None of the resistance to reform discussed above arises inherently from capitalism. Professor Delgado wrongfully convicts capitalism and I seek to exonerate it while condemning recent legal developments in the United States that have nothing to do with capitalism but flow naturally from high economic inequality. The Supreme Court's decision in Citizens United v. FEC (by a five to four vote) was not mathematically mandated by Rodrigo's Equation and is not essential to capitalism. The Dodd-Frank Act's weak reforms are

Ramirez, The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective, 45 Loy. U. Chi. L.J. 669, 688–700 (2014). These legal indulgences on behalf of the very powerful directly fueled the massive securities fraud driving the subprime debacle. Id. at 674. Restoring private securities litigation would be key to curbing the power of corporate and financial elites, with zero regulatory effort by the federal government. See id. at 720–26.


33. The United States broadly redistributed educational opportunity after World War II and doubled college degrees granted. See RAMIREZ, supra note 17, at 209. The government achieved up to $12.50 in benefits for every dollar spent under the GI Bill. Id. at 203.

34. See Delgado, supra note 1, at 105–06.

35. I impugned excessive economic inequality as a cause of the gross failure in law that led to the crisis of 2007–2008, but I did not anticipate that it would spiral out of control as it has since 2013. See RAMIREZ, supra note 17, at 36.

36. Indeed, corporate elites seem increasingly content to abandon capitalism in order to exploit the system for unearned gains. See, e.g., US Does Not Have Capitalism Now: Stiglitz, CNBC (Jan. 19, 2010, 8:39 AM), http://www.cnbc.com/id/34921639# (decrying the U.S. economic system because it "socialize[s] the losses and privatize[s] the gains' which is not capitalism").


39. See Delgado, supra note 1.
also not an essential feature of capitalism.\textsuperscript{40} The American body politic was not commanded by the teachings of Adam Smith, nor any other oracle of capitalism, to accept the lack of criminal prosecutions in the financial sector in a docile and servile silence.\textsuperscript{41} The law clearly has controlled economic inequality in the past, and can no doubt do so in the future.\textsuperscript{42} Professor Delgado (and his fictional friend Rodrigo) may have a point in the case of the United States today. Nevertheless, history and a transnational perspective prove that capitalism can thrive and secure maximum individual opportunity and a greater social justice simultaneously when high economic inequality is controlled by the rule of law. Simply put, Rodrigo's Equation fails to account for dynamic variation in capitalism over time and space, and those variations can lead to dramatic differences in the distribution of economic power and opportunity.

I. RODRIGO'S ABSTRACTION

As explained through Rodrigo, “for all intents and purposes... 'Law = Capitalism'” and “trying to reform the one through the other is vain.”\textsuperscript{43} Law cannot reform capitalism, because a thing cannot reform itself.\textsuperscript{44} Rather, Rodrigo observes that “law comes permeated with such an intensely probusiness bias, inherent in our basic documents and traditions, that the kind of reform that would put the financial system on a different, sounder footing is practically inconceivable.”\textsuperscript{45} Instead, in order to achieve deep reform, a cataclysm like the Civil War or the Great Depression (or at least widespread demonstrations) is necessary to spur reform.\textsuperscript{46} Even then, when reform arrives it is apt to be short lived, and elites will quickly learn how to circumvent it.\textsuperscript{47} Basic reform, such as increases in the minimum wage, steeply progressive taxation, and positive civil rights like a right to education, “never arrive[] because

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\textsuperscript{41} On the contrary, Adam Smith's view of concentrated economic power was skeptical at best. Famously, he claimed that economic elites could seldom even meet without a resulting "conspiracy against the public." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 128 (Edwin Cannan ed., Modern Library ed. 1937) (1776). He also suggested that any laws favoring economic elites must be unjust since they have access to politicians, but "[w]hen the regulation... is in favour of the workmen, it is always just and equitable." Id. at 142.
\textsuperscript{42} PIKETTY, supra note 3, at 505–08.
\textsuperscript{43} Delgado, supra note 1.
\textsuperscript{44} Id. at 92–93.
\textsuperscript{45} Id. at 97.
\textsuperscript{46} Id. at 102 n.100, 119.
\textsuperscript{47} Id. at 98, 104.
it would be unthinkable." The theory is that the more central an issue is to the core capitalist system the less likely law can work durable reform.49

Professor Delgado founds his theory on insights from the civil rights movement.50 Civil rights progress proceeded only so long as the interests of oppressed minorities converged with white power elites, particularly the elites' fear of communism.51 For example, Derrick Bell theorized that Brown v. Board of Education 52 served the needs of white power elites in opposing communism by showing that the United States was not racist for the purpose of attracting the support of African, Latin American, and Asian nations.53 Mary Dudziak proved Bell's thesis by uncovering communications from the State Department pleading with the Supreme Court and the Department of Justice to support civil rights.54 When white interests in civil rights progress faded, so did civil rights progress, and a period of retrenchment took root.55 Delgado masterfully develops similar narratives in the area of immigration law and the First Amendment; ultimately, Delgado suggests that this focus on the interests of elites explains the path of reform and retrenchment generally.56

Professor Delgado himself finds this all "bleak."57 His suggestion is that those proposing reform wait in vain for forces they do not comprehend to produce reform.58 His conclusion that rationality and morality do not move the law even causes him to suggest that law professors get new jobs outside of the legal academy.59 Under this view, rather than inveigh against the exercise of power to rig the system and impose great losses upon the general economy, law professors should simply concede law to irrationality and immorality.

48. Id. at 105–06.
49. Id. at 119 n.204.
50. Id. at 119.
51. Id. at 103.
57. Delgado, supra note 1, at 109.
58. Id. at 118.
59. See id. at 119.
At this crucial juncture of U.S. history, such a concession is particularly inappropriate. After all, the financial crisis of 2007–2009 proved that the excessive concentration of economic power can lead to trillions in losses for the whole economy, while a small number of elites garner millions. At the same time, the disempowered face a system of mass incarceration that falls disproportionately on communities of color and betrays basic American values of freedom and liberty. Professor Delgado’s goal cannot be to inform all scholars that only slim hope remains at a time when law metes out such an oppressive reality. It seems unlikely that one of the great legal scholars of our age would simply concede law to irrationality and the narrow interests of elite entrenchment.

Indeed, in 2003, Professor Delgado penned a law review article that addressed circumstances that may support reform. There, Delgado posited that crises should signal to putative reformers “when the time may be right to strike for change.” After the 9/11 attacks, Delgado himself recognized the need for the United States to rebut any portrayal of itself as “hedonistic, corrupt, theocratic, and antiwoman.” Delgado argued that this visionary outlook could support reforms ranging from welfare to education to tax rates. Far from acting as a cargo cultist, Delgado understood that crises and international pressure often ignited reform cycles in the United States.

60. For example, nearly forty percent of African American children live in poverty and over thirty percent of Latino children live in poverty. See RAMIREZ, supra note 17, at 135. These facts preclude any luxury of futility. Id.
61. Id. at xi–xviii; see also STIGLITZ, supra note 3, at xix (“A political system that amplifies the voice of the wealthy provides ample opportunity for laws . . . to be designed in ways that . . . enrich the wealthy at the expense of the rest of society.”).
63. Rodrigo suggests that financial reform is “practically inconceivable.” Delgado, supra note 1, at 97. Delgado concludes that reform is likely only in response to “widespread protests and demonstrations.” Id. at 119.
64. See Richard Delgado, Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race, 82 TEX. L. REV. 121 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) and DERRICK BELL, ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH (2002)).
65. Id. at 138.
66. Id. at 142–43.
67. Id.
68. Id. at 137–38 (citing MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) and Bell, supra note 53, at 523–34) (using interest convergence and the Cold War to explain the success of the civil rights movement and the interest divergence thereafter to explain the demise of the civil rights movement); see also RAMIREZ, supra note 17, at 208–09
I posit that since 2003, the difficult calculus of determining how reform may be achieved has become more complicated by two dramatic changes in American society. First, soaring economic inequality has created a steeper road for reform because as fewer elites control more wealth, they are logically more immune from fear (critical to durable reform) and less likely to be sensitive to costs that affect society generally. Second, even more recently, the Supreme Court has redesigned the U.S. Constitution in a way that further entrenches elite power—in particular, the power of those elites managing public corporations. In the absence of these unprecedented and transient factors, I will show that capitalism can function in accordance with its promise of broader prosperity, meritocratic competition, and individual empowerment. Capitalism can operate to broadly distribute economic resources and opportunity when competition trumps privilege and when the rule of law operates to assure that the most powerful cannot short-circuit competition through government indulgences and subsidies.

II. CAPITALISM ACROSS SPACE

One means of defending capitalism and impugning excessive economic inequality would be to search for capitalist societies across the world with less inequality than the United States and test important social outcomes against outcomes in the United States, particularly insofar as the distribution of economic resources and opportunity is concerned. Perhaps these states may even lay claim to being as capitalist as the United States, in terms of economic freedom (as ranked by conservative think tanks, for example) or stock market capitalization. Ideally, to fully vindicate the thesis of Lawless Capitalism (that a gross failure in the rule of law in the United States caused the financial crisis), these nations would also feature a stronger rule of law than the United States. If such states

69. RAMIREZ, supra note 17, at 35.


71. One excellent measure of the distribution of economic opportunity is economic mobility. In the United States, as economic inequality has soared, economic mobility has declined. In fact, just as the United States has one of the highest rates of inequality among developed nations, it is now, by one method, the least economically mobile country. See STIGLITZ, supra note 3, at 18–19.

72. There is no "pure" capitalism anywhere in the world or throughout history. In fact, even in the United States, throughout the nineteenth century, the government massively subsidized railroad construction through (among other subsidies) an enormous giveaway of land to the railroads amounting to 242,000 square miles, or a landmass larger than Germany or France. ALEX MARSHALL, THE SURPRISING DESIGN OF MARKET ECONOMIES 140–41 (2012).

73. RAMIREZ, supra note 17, at 191.
exist then the culprit, in terms of reforms, looks more like high economic inequality than any immutable characteristic of capitalism.

A. The Inequality-Adjusted Human Development Index

The United Nations promulgates a proxy index for human development that operates acceptably to determine roughly how well a system performs in delivering a decent standard of living to the mass of its citizens. The Inequality-Adjusted Human Development Index ("IHDI") focuses upon economic output, educational attainment, life expectancy, and economic inequality. Adjusting for inequality allows a broad assessment of outcomes of a nation's economy for the mass of citizens, not just a few lucky individuals at the top.

The United States fares poorly on the IHDI. Its current ranking is number twenty-eight. The United States fell six places just since the publication of Lawless Capitalism in 2013. In general, the low United States ranking reflects that other countries perform better than the United States in life expectancy. When adjusted for inequality, the United States plunges in all three measures of human development. In fact, the United States IHDI plunges more than any other nation (except Iran) when adjusted for inequality. Stated differently, the United States suffers far more

74. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2014: SUSTAINING HUMAN PROGRESS: REDUCING VULNERABILITIES AND BUILDING RESILIENCE 27 (2014), available at http://hdr.undp.org/sites/default/files/hdr14-report-en-l.pdf ("The basic idea of human development is promoting equal life chances for all, based on the Kantian principle that all people are of equal worth, as enshrined in the UN Charter. All humans need to be empowered to live lives they value.").

75. Id. at 37 ("[The Inequality-adjusted HDI][ is a measure of inequality that takes into account how each country's progress is distributed in the three HDI dimensions—life expectancy, years of schooling and income. It goes beyond traditional income-based measures of inequality to consider disparities in education and health.").

76. Consider the following fact: "The 85 richest people in the world have the same [aggregate] wealth as the 3.5 billion poorest people." Id. at 21. Among the implications of this fact is that merely looking at the average (or mean) wealth of this group would mask the fact that 3.5 billion people have nearly zero wealth and eighty-five people have massive wealth. In the United States, "[t]he super-rich are pulling away from everyone by so much and at a rate so fast that the fact that incomes of many households at the bottom and in the middle have stagnated, or even fallen in constant dollars, has been obscured by ever increasing per capita income . . ." Martin J. McMahon, Jr., The Matthew Effect and Federal Taxation, 45 B.C. L. REV. 993, 996 (2004).

77. See U.N. DEV. PROGRAMME, supra note 74, at 168.

78. See RAMIREZ, supra note 17, at 2, 21.

79. See U.N. DEV. PROGRAMME, supra note 74, at 160.

80. Id. at 168.

81. Id. at 168–69.
economic inequality than any other major, well-developed capitalist
country. The United States is an outlier among developed capitalist
nations in economic inequality.

The United States suffers another human development problem
not fully reflected in the IHDI. Mass incarceration of citizens simply
cannot coexist with increasing human development over the long
term. The United States holds the highest incarceration rate in
the world. Most of these inmates did not commit violent crimes.
Instead, the racially disparate incarceration rate reflects the racially
disparate enforcement of the war on drugs. The government
currently spends over $30,000 per year per inmate for this highly
oppressive regime. These expenditures simply cannot be counted.

82. The World Factbook: Distribution of Family Income—GINI Index, CIA,
(last visited on Jan. 24, 2015). The United States has higher economic
inequality than Australia, Austria, Belgium, Canada, the Czech Republic,
Denmark, Finland, France, Greece, Germany, Hungary, Ireland, Israel, Italy,
Japan, Luxembourg, Norway, the Netherlands, Slovakia, Slovenia, South
Korea, Spain, Sweden, Switzerland, the United Kingdom, and the EU as a
whole. Each of these nations achieves an IHDI score above the United
States, except for South Korea, which is five slots below the United States, at
thirty-three. See U.N. DEV. PROGRAMME, supra note 74, at 168.

83. Mass incarceration amounts to mass destruction of human potential,
much of which is racially concentrated. This mass destruction of human
potential leads to a mass destruction of economic potential. See MICHELLE
ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF
COLORBLINDNESS 2 (2010) ("We have not ended racial caste in America; we have
merely redesigned it.").

84. Max Raskin & Ilan Kolet, U.S. Jails More People than Any Other
.com/news/2012-10-15/u-s-jails-more-people-than-any-other-country-chart-of
the-day.html ("The [United States] has the world’s highest incarceration rate,
with Department of Justice data showing more than 2.2 million people are
behind bars, equal to a city the size of Houston."). The United States spends an
enormous amount on the construction of prisons. Id. ("The U.S. also leads the
world in the number of prisons in operation at 4,575, more than four times the
number of second-place Russia at 1,029. U.S. states spent $52 billion to
construct and operate those prisons in 2011, more than quadruple the $12
billion spent in 1987 . . . ").

85. "Nonviolent offenders are 60% of our prison population.” Lisa Bloom,
When Will the U.S. Stop Mass Incarceration?, CNN (July 3, 2012, 12:21 PM),

86. HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE
IN THE UNITED STATES 1 (2009), available at http://www.hrw.org/sites/default
/files/reports/us0309webwcover_1.pdf ("In every year from 1980 to 2007, blacks
were arrested nationwide on drug charges at rates relative to population that
were 2.8 to 5.5 times higher than white arrest rates."). Whites and blacks,
however, commit drug offenses at approximately the same rate. Id.

87. The Cost of a Nation of Incarceration, CBS NEWS (Apr. 23, 2012, 5:15
cost of incarcerating one inmate in Fiscal 2010 was $31,307 per year. In states
like Connecticut, Washington state, New York, it’s anywhere from $50,000 to
$60,000 . . . ").
toward any reasonable definition of human development—in fact, inmates suffer lifelong economic stigma and disenfranchisement.\textsuperscript{88} As such, American human development must suffer a deep discount for excess, race-based incarceration.\textsuperscript{89} This madness constitutes nothing less than the wanton and reckless destruction of human resources. It is at once morally reprehensible and economically backwards, if not suicidal.\textsuperscript{90} This folly is not inherent to capitalism, as even a quick glance at incarceration rates proves.\textsuperscript{91} No other issue today betrays American notions of liberty and freedom more than the mass incarceration of citizens of color. It also demonstrates our pseudo-capitalistic reality—one that wantonly destroys economic potential based upon skin color.

Every other capitalistic nation in the world refrains from mass incarceration. Instead, many capitalist nations choose mass education\textsuperscript{92} or better care for their children.\textsuperscript{93} Thus, in accordance with capitalist teaching,\textsuperscript{94} many capitalistic nations treat human resources as highly valuable and worthy of great investment, rather than systematically destroying their human resources on specious grounds such as race-based incarceration policies or race-based childhood poverty.\textsuperscript{95} Poverty explains, in part, the lower United

\begin{itemize}
\item \textsuperscript{88} ALEXANDER, \textit{supra} note 83, at 180--82 (describing the system of mass incarceration and the "undercaste" it spawns, consisting of great numbers of young men of color).
\item \textsuperscript{89} JOHN SCHMITT \textit{ET AL.}, \textit{THE HIGH BUDGETARY COST OF INCARCERATION 2} (2010), \textit{available at} http://core.kmi.open.ac.uk/download/pdf/6414678.pdf ("In 2008 . . . governments spent about $75 billion on corrections . . . Reducing the number of non-violent offenders in our prisons and jails by half would lower this bill by $16.9 billion per year . . . "). These massive resources could easily be redeployed to pay for a higher quality education system. \textit{See id.} ("Every indication is that these savings could be achieved without any appreciable deterioration in public safety.").
\item \textsuperscript{90} HUMAN RIGHTS \textit{WATCH}, \textit{supra} note 86 ("[B]ecause black drug offenders are the principal targets in the 'war on drugs,' the burden of drug arrests and incarceration falls disproportionately on black men and women, their families and neighborhoods. The human as well as social, economic and political toll is as incalculable as it is unjust.").
\item \textsuperscript{91} The chart provided by \textit{Bloomberg} proves the point that high rates of incarceration are not inherent to capitalism, since all other capitalist countries imprison a lower rate of their population. \textit{See Raskin & Kolet, supra} note 84.
\item \textsuperscript{92} The United States is fast losing its edge in education, and today it ranks only twelve out of thirty-four developed nations in tertiary and upper secondary attainment rates. OECD, \textit{EDUCATION AT A GLANCE 2013: HIGHLIGHTS} 15 (2013), \textit{available at} http://dx.doi.org/10.1787/eag_highlights-2013-en.
\item \textsuperscript{94} Adam Smith argued long ago that any worker can become an innovator. SMITH, \textit{supra} note 41, at 9--10.
\item \textsuperscript{95} Valerie Strauss, \textit{New Census Data: Children Remain America's Poorest Citizens}, WASH. POST (Sept. 17, 2013), \textit{http://www.washingtonpost.com/blogs
States IHDI, which would plunge further if mass incarceration did not artificially fatten gross domestic product ("GDP"). Of course, greater economic inequality means the rich can shower their own progeny with more resources to the exclusion of public education or subsidized higher education for potential competitors.

In order to establish my thesis that soaring economic inequality, not capitalism, is the culprit in terms of the ability for law to express reform, I focus on two nations—Denmark and Japan—each delivering superior and broader human development outcomes to its citizens. As will be shown, each also features much less inequality and a sturdier rule of law. They are even comparably as capitalist as the United States.

B. Denmark

Denmark ranks first in the world in the World Justice Project's annual Rule of Law Index ("RLI") for 2014, eighteen spots higher than the United States. Not surprisingly, Denmark also features the broadest distribution of economic opportunity in terms of economic mobility. Such a well-functioning legal system means that the government actually attends to the needs of the people free of corruption, as reflected in Denmark's high ranking on the IHDI, twenty spots ahead of the United States. Thus, the rule of law and a system of capitalism that fosters broad human well being go hand-in-hand when law operates to curb and channel political and economic power and assure a broad distribution of opportunity.

96. See N.Y. Times Editorial Bd., supra note 62.
97. This explains why economic mobility in the United States now lags behind the rest of the developed world. See Richard Delgado, The Myth of Upward Mobility, 68 U. PITT. L. REV. 879, 907 (2007) ("Study after study shows that class membership in our society is relatively fixed, especially for those born into poor families, who are racial minorities, or who lack a college education.").
98. Denmark and Japan each outperform the United States on the IHDI. U.N. DEV. PROGRAMME, supra note 74, at 168.
99. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014, at 172, 174 (2014), available at http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf. The Rule of Law Index measures the rule of law in ninety-nine countries around the globe, based on over 100,000 household and 2400 expert surveys worldwide. Id. at 1, 162, 167. Adherence to the rule of law is measured using forty-seven indicators rooted in nine themes: "constraints on government powers; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; criminal justice; and informal justice." Id. at 1, 162–66. "Effective rule of law helps reduce corruption, improve public health, enhance education, alleviate poverty, and protect people from injustices and dangers large and small." Id. at 1.
100. "With full equality of opportunity, 20 percent of those in the bottom fifth would see their children in the bottom fifth. Denmark almost achieves that—[only] 25 percent are stuck there." STIGLITZ, supra note 3, at 18.
101. U.N. DEV. PROGRAMME, supra note 74, at 168.
Discrimination in the justice system and access to justice for the poor mars the rule of law in the United States and dramatically lowers its RLI score, while Denmark avoids any discount on these points. A corrupt legislature in the United States that responds more to money than democratically expressed policy would certainly explain and support Professor Delgado's position that law cannot reform capitalism today in the United States.

Denmark, on the other hand, boasts a remarkably non-corrupt legislature—scoring a ninety-eight percent on this factor of the RLI. This absence of corruption continues in the other branches of government, where Denmark's scores are much higher than the weak corruption scores of the United States. Another important distinction between the RLI score for Denmark and the United States is discrimination: Denmark scores no lower than seventy-four, while the United States scores as low as forty-seven on this count. Once again, the specter of racial discrimination haunts and corrupts American capitalism and holds it back from reaching a more rationalized development like Denmark.

Importantly, Denmark is probably as capitalist as the United States, at least insofar as economic freedom is concerned.

102. WORLD JUSTICE PROJECT, supra note 99, at 154.
104. Economists already recognize that at a certain point economic inequality leads to a corrupted rule of law:
We argue that inequality is detrimental to the security of property rights, and therefore to growth, because it enables the rich to subvert the political, regulatory, and legal institutions of society for their own benefit. If one person is sufficiently richer than another, and courts are corruptible, then the legal system will favor the rich, not the just. Likewise, if political and regulatory institutions can be moved by wealth or influence, they will favor the established, not the efficient. This in turn leads the initially well situated to pursue socially harmful acts, recognizing that the legal, political, and regulatory systems will not hold them accountable.
Edward Glaeser et al., The Injustice of Inequality, 50 J. MONETARY ECON. 199, 200 (2003) (finding that the Gilded Age in the United States and the transition economies of the Eastern Bloc featured high economic inequality and an accompanying erosion in the rule of law).
105. WORLD JUSTICE PROJECT, supra note 99, at 85.
106. Compare id., with id. at 154. From the point of view of power and reform in our so-called capitalist system, a non-corrupt judiciary certainly could help to facilitate rational reform. Here, Denmark scores a ninety-five compared to the United States' score of eighty-one. Id. at 85, 154. Denmark also outscores the United States in quality of regulation. Id.
107. Id.
Conservative think tanks such as the Cato Institute\textsuperscript{108} and the Heritage Foundation (in partnership with the \textit{Wall Street Journal})\textsuperscript{109} rate nations on economic freedom. The United States recently plunged in the wake of the financial crisis.\textsuperscript{110} In the Heritage Foundation ranking, Denmark scores two spots above the United States.\textsuperscript{111} According to the Cato Institute, Denmark is six places lower on its index of economic freedom.\textsuperscript{112} Both nations are ranked among the most economically free nations of the world and hold comparable ratings (United States, 7.81, versus Denmark, 7.66) in the Cato Institute’s Economic Freedom of the World Index.\textsuperscript{113} The United States suffers in these rankings due to its weak property rights\textsuperscript{114} and its monetary policies.\textsuperscript{115}

Denmark delivers astonishing services to all of its citizens and secures a high quality of living for all its citizens. Workers get five
weeks of paid vacation plus eleven paid holidays. The minimum wage is twice as high as it is in the United States. Danes enjoy universal, high-quality healthcare. College tuition is virtually free for all. While it is more difficult to become rich in Denmark, no citizen is permitted to live in poverty. Danes also enjoy a relatively short workweek, and work far fewer hours than the typical American. This all explains why surveys consistently rank the Danes as the happiest people in the world. Notably, this broad distribution of economic opportunity under law likely cannot be reversed as Danes are now broadly invested in these entitlements.

Thus, Denmark is simultaneously more egalitarian and more economically free. Denmark widely distributes economic opportunity. And the legal system in Denmark functions to impose a rule of law to channel and curb power. Law works in Denmark to reduce and control excessive economic power.

C. Japan

On the other side of the globe, Japan is ranked number twelve on the RLI, seven slots above the United States. Both Japan and the United States are rated as mostly free economies by the Heritage Foundation, with the United States edging out Japan with a score of 75.5 versus 72.4. Further, Japan has a significantly

117. Id.
118. Id.
119. Id.
120. Id.
123. Denmark illustrates the power of the key proposal of Lawless Capitalism. Specifically, I argued in favor of a modern GI Bill for everyone in exchange for a national service requirement. RAMIREZ, supra note 17, at 202–03. Certainly, such a reform would require the kind of crisis that Professor Delgado identified as a reform moment in 2003. See Delgado, supra note 64, at 138. Once such an entitlement for free college education takes root, it is very difficult to reverse. RAMIREZ, supra note 17, at 203.
124. WORLD JUSTICE PROJECT, supra note 99, at 106, 154, 172. Japan scores impressively relative to the United States on lack of corruption in its legislature (.81 versus .58) and non-discrimination in recognition of fundamental rights (.78 versus .56) and non-discrimination in criminal law (.64 versus .47). Id. at 106, 154. Japan also scores higher on quality of regulation (.78 versus .67). Id.
larger population than Denmark. In many ways, Japan exemplifies a large Asian capitalistic system, just as Denmark exemplifies European capitalism. Japan, like virtually all developed nations, features much less economic inequality than the United States.

Japan also distributes economic opportunity more broadly than the United States. In fact, Japan leads the world (along with South Korea) in tertiary educational attainment among its youth at a startling rate that approaches sixty percent. The United States stagnates on this point at closer to forty-five percent. Similarly, Japan outscores the United States on standardized tests in reading and mathematics. This broad distribution of educational attainment, and thus economic opportunity, no doubt contributes significantly to Japan's high scores on human development.

Japan's life expectancy is the most remarkable fact about capitalism as practiced in Japan. As I mentioned in Lawless Capitalism, life expectancy in Japan more than doubled, from thirty-five to eighty-two, in the last century. More recently, Japan's life expectancy stood at nearly eighty-five years, which far surpasses the United States' life expectancy. Experts attribute the rise in life expectancy in Japan to massive health care investments, universal health insurance, and ultimately to an egalitarian economy. Life expectancy soared even as Japan stagnates on this point at closer to forty-five percent.

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127. Taiwan and South Korea each feature capitalist systems similar to Japan with similar levels of inequality. See The World Factbook: Distribution of Family Income—GINI Index, supra note 82.
128. U.N. DEV. PROGRAMME, supra note 74, at 168. Thus, Austria, Belgium, France, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, the Netherlands, Norway, Slovakia, Sweden, Spain, and the United Kingdom all rank higher than the United States on the IHDI. It is therefore very likely that the European Union holds a higher IHDI ranking than the United States, although the European Union is not separately ranked as its larger constituent countries are.
129. The World Factbook: Distribution of Family Income – GINI Index, supra note 82.
130. OECD, supra note 92, at 26.
131. Id.
132. STIGLITZ, supra note 3, at 19 (noting that Hong Kong, Shanghai, Korea, Singapore, New Zealand, and Australia, among others, outscore the United States).
133. RAMIREZ, supra note 17, at 21.
became a leading capitalist nation and the Japanese stock exchange rivaled the New York Stock Exchange in market capitalization—rising dramatically since 1947.\textsuperscript{136} Japan therefore constitutes a well-developed capitalistic economy. In terms of social well-being, Japan's gains in life expectancy, relatively low inequality, and well-functioning rule of law all demonstrate again that capitalism evolves quite differently across space and that the evolution must be expressed through law.

Japan and Denmark prove capitalism can achieve broadly distributed and outstanding human development, eradicate poverty, and avert the catastrophe of mass incarceration. One may be tempted to argue that these are smaller nations than the United States with homogenous populations. Yet, the European Union as a whole consists of more people than the United States and is a composite of many ethnicities and nationalities.\textsuperscript{137} Given that Germany, France, the United Kingdom, Italy, Spain, and many other European countries outrank the United States in the IHDI, it is very likely that the European Union as a whole delivers superior economic outcomes and opportunities to its population relative to the United States.\textsuperscript{138} Further, Japan does not monopolize superior health outcomes and life expectancy; virtually every other major capitalist economy achieves superior health outcomes at a lower cost relative to the United States.\textsuperscript{139} Both Japan and Denmark serve as mere exemplars of many forms of capitalism that distribute economic resources and opportunities in a more egalitarian way than the United States, which is reflected in health outcomes, educational attainment, and economic mobility.

Each of these elements proves critical, not just for human development, but also for the robustness of capitalism itself. Investment in human capital, including health care, significantly and positively influences economic growth and development.\textsuperscript{140} Widely distributed educational attainment drives innovation and

\textsuperscript{136} Id.; Tokyo Stock Exchange (TSE), 
\textsc{Encyclopædia Britannica}, http://www.britannica.com/EBchecked/topic/598493/Tokyo-Stock-Exchange-TSE (last updated Apr. 17, 2013) ("Paralleling the phenomenal growth of the Japanese economy, TSE had become the world’s largest securities exchange by the late 1980s . . .").


\textsuperscript{138} See U.N. DEV. PROGRAMME, supra note 74, at 168.

\textsuperscript{139} Anna Edney, 

\textsuperscript{140} See RAMIREZ, supra note 17, at 30.
growth.\textsuperscript{141} Nations that broadly empower humans to innovate and participate economically achieve handsome economic dividends.\textsuperscript{142} Thus, those Asian and European nations that invest in people actually light the way for a more robust capitalism in terms of innovation and growth.

In the next Part, I will show how inequality can decrease over time, leading to rapid and durable capitalistic evolution, and increase dramatically over time, leading to rapid devolution. The worst features of the American economy today arise not from capitalism, but from the high economic inequality that took root in the United States beginning in the 1980s and which today stands at historic highs.

III. CAPITALISM ACROSS TIME IN THE UNITED STATES

The differences in capitalism across space are repeated in a review of capitalism across time in the United States. Even a cursory review of the economic history of the United States reveals radical differences over time in the basic structure of American capitalism and in the outcomes achieved by the American economy.\textsuperscript{143} While the United States holds its own individualistic ideology that may preclude it from ever being Denmark or Japan, it achieved reform in the distribution of economic power for sixty years—from 1933 to 1995.\textsuperscript{144} Indeed, the period of the greatest economic reforms—the New Deal—coincided with a historic plunge in economic inequality, while the most dramatic retrenchment of those reforms coincided with soaring inequality.\textsuperscript{145} I will highlight the major changes to demonstrate that capitalism changes in America—for better and for worse—in response to changes in economic inequality.

\textsuperscript{141} See id. at 24–28.
\textsuperscript{142} See id. at 25.
\textsuperscript{143} This is reflected in the dramatic changes in economic inequality over the past 100 years. Id. at 36. In terms of economic inequality, the top .01 percent of the U.S. income distribution controlled five percent of the nation's wealth in 1929. Id. Thereafter, it plunged rapidly and remained low for over six decades. Id. It did not soar above the pre-Depression high until 2005, after increasing over twenty-five years. Id.
\textsuperscript{144} Id.; see also Katya Assaf, Capitalism Against Freedom (June 17, 2014) (unpublished manuscript) (arguing that materialistic and individualistic values in the United States actually lead to less freedom for American citizens) available at www.researchgate.net/publication/256056105_Capitalism_against_Freedom.
\textsuperscript{145} See RAMIREZ, supra note 17, at 36.
A. The New Deal

The New Deal achieved durable and deep economic reform for over eighty years despite rapid retrenchment starting in the 1990s. Never did this become more evident than during the financial crisis of 2007–2009. In Lawless Capitalism, I demonstrate through extended narratives how financial and corporate elites chipped away at the New Deal, causing severe cutbacks in 1995, 1998, and 1999, in particular. This predictably led to the financial catastrophe.

Here, I want to include a new narrative: how the New Deal saved global capitalism in 2007–2009 and prevented a return to Depression-level unemployment. The financial crisis of 2007–2009 constitutes the greatest financial crisis in history—and should rightly be termed the Great Financial Crisis. The magnitude of a financial crisis turns upon the aggregate withdrawal of capital from the system, and the speed with which capital is withdrawn. For example, if all citizens stuff their mattresses with all of their assets (reduced to cash) at once, then capitalism collapses and we return to the Great Depression—when the economy contracted at an

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146. Economists term such reforms irreversible. E.g., GÉRARD ROLAND, TRANSITION AND ECONOMICS: POLITICS, MARKETS, AND FIRMS 86 (2000). Law can make redistributions of power irreversible through various legal and regulatory structures such as entitlements and professionalization regimes. See supra note 18. The basic concept of irreversibility is to rearrange the power structure in such a way that individuals become invested in the reform to such an extent that change is difficult. This can occur through legal innovations that change the identity of the governing elite—say from monarchs to bourgeoisie, such as property holders. See supra notes 12–14 and accompanying text. Or, less drastically, irreversibility can occur through forced investment in the reform—like the transition from the gold standard to fiat currency under the supervision of the Federal Reserve. Steven A. Ramirez, The Law and Macroeconomics of the New Deal at 70, 62 MD. L. REV. 515, 540 (2003).

147. The New Deal also greatly perpetuated racial caste. Juan F. Perea, The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act, 72 OHIO ST. L.J. 95, 98–99 (2011) ("[S]outhern congressmen wanted to exclude black employees from the New Deal . . . . President Roosevelt . . . . recognized that in order to pass any New Deal legislation at all, it was necessary to compromise with Southern Democrats intent on preserving white supremacy.").

148. See generally Ramirez, supra note 146, at 570 (assessing the successes and failings of the New Deal after seventy years and concluding, inter alia, that "the New Deal was the beginning of an experimental exercise in trying to find the optimal macroeconomic regulatory infrastructure for a modern capitalistic economy").

149. RAMIREZ, supra note 17, at 58–59, 89.

150. Id. at 61, 89.

151. Ramirez, supra note 30, at 670 n.2, 707 (quoting former Federal Reserve Chair Alan Greenspan and former Federal Reserve Chair Ben Bernanke).

152. See id. at 679–80.
unparalleled rate in U.S. history and failed to recover for a decade.\textsuperscript{153}

In 2007–2009, short-term U.S. Treasury debt securities—the safest place for cash in a modern capitalist system—plunged to negative rates of interest repeatedly because the demand for these securities drove yields to zero and beyond.\textsuperscript{154} Fear overwhelmed financial markets during the crisis of 2007–2009, which caused seasoned observers to deem it the "most virulent" financial crisis in history.\textsuperscript{155} Given the Herculean efforts of the government to prevent a financial collapse, that assessment seems accurate.

Those efforts included massive monetary policy stimulus, massive fiscal policy stimulus, and bank deposit insurance.\textsuperscript{156} The Federal Reserve—modernized during the New Deal—\textsuperscript{157} responded with dramatic interest cuts and a flood of money.\textsuperscript{158} The Federal Deposit Insurance Corporation ("FDIC")—a New Deal era creation—\textsuperscript{159} rescued banks by guaranteeing asset values and bank debt.\textsuperscript{160} The federal government—taking a Keynesian turn from the New Deal—\textsuperscript{161} pumped massive cash into the financial system and the economy generally.\textsuperscript{162} In all, the cost of the government's rescue of the economy totaled trillions of dollars.\textsuperscript{163} Even the Securities and Exchange Commission ("SEC")—another New Deal creation—\textsuperscript{164} helped save the day and set the stage for a historic Bull
Market. As a result, America averted Great Depression II. Unemployment increased to 8.5 percent in 2009 compared to twenty-five percent in 1933. Tens of millions of ordinary Americans were rescued from economic destitution.

Derrick Bell’s interest convergence theory, seasoned with consideration of substantial economic inequality, explains all of this. First, both the implementation and durability of the New Deal reflect the convergence of interests of those holding power and the broader disempowered who suffered unemployment. Second, the inevitable retrenchment of the New Deal proceeded in accordance with the subsistence of fear and the diverging interests of society’s most powerful in general due to rising inequality. Third, the parts of the New Deal remaining after the retrenchment (deposit insurance and modern monetary and fiscal policy) still protected the most powerful from severe economic collapse—and the disempowered collaterally benefitted. Fourth, the New Deal reforms occurred only after four unrelenting years of economic depression that drastically reduced economic inequality. These


166. ALAN S. BLINDER & MARK ZANDI, HOW THE GREAT RECESSION WAS BROUGHT TO AN END 1 (July 27, 2010), available at https://www.economy.com/mark-zandi/documents/end-of-great-recession.pdf (“The U.S. government’s response to the financial crisis and ensuing Great Recession included some of the most aggressive fiscal and monetary policies in history . . . . [The] effects on real GDP, jobs, and inflation are huge, and probably averted what could have been called Great Depression 2.0.”).


168. Bell, supra note 53, at 523 (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the [F]ourteenth [A]mendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior status of middle and upper class whites.”); see also RAMIREZ, supra note 17, at 208-09 (“Bell argued that fundamental reforms . . . result from the convergence of interests between elites and the disempowered . . . . Usually this convergence arises from crisis conditions that generate fear among those with economic and political power.”).

169. RAMIREZ, supra note 17, at 185 (“Consider the New Deal . . . . It imposed for the first time broad disclosure obligations and liability upon corporate and financial elites. It empowered workers and more than doubled the number of college graduates between 1940 and 1950.”).

170. See id. at 185-86 (“Only when elites exploited fading memories and the power of race in America . . . did the New Deal fail and did economic power reach pre-Depression levels of concentration and beyond.”); Harry Hutchison, Choice, Progressive Values, and Corporate Law: A Reply to Greenfield, 35 DEL. J. CORP. L. 437, 477 (2010) (“New Deal regulatory reforms reflected the willingness of individuals to accept expanded governmental authority because of fear—in this case, fear sparked by the Great Crash of 1929.”).

171. See Ramirez, supra note 146, at 539-40.
reforms remained largely intact until inequality again reached commanding heights. That point leads directly to the Reagan Revolution.

B. The Reagan Revolution and Soaring Inequality

Economist Thomas Piketty blames the tax cuts of the Reagan-Bush Era for igniting soaring inequality in the United States today. According to Piketty, these tax cuts allowed senior executives of publicly held firms to exploit deeply suboptimal corporate governance law and to appropriate huge windfall compensation payments without regard to actual performance. The gains to corporate elites arising from these perverse incentives in corporate law and the ability of corporate elites to basically set their own salaries drive U.S. inequality. 

Reagan’s victory was not compelled by capitalism. More likely, his victory was the result of the exploitation of racial divisions in America in the 1980s. Indeed, the confessions from three former GOP chairs regarding their strategy of racial divisiveness reach into the early 1980s. The confession of Lee Atwater, a former GOP chair and Reagan campaign aide, is available on the internet in an audio recording that only recently surfaced. Pollster Stanley B. Greenberg established decades ago that the so-called Reagan Democrats simply did not hold much affection for minorities and deserted the Democratic Party accordingly. The Southern Strategy successfully fuelled the GOP’s election victories for decades.

Lee Atwater explains that the purpose of racial politics was to use states’ rights rhetoric to dismantle constraints on economic power. Ultimately, this meant a very light touch on financial regulation, as financial sector lobbyists and regulators took

172. RAMIREZ, supra note 17, at 36.
173. See PIKETTY, supra note 3, at 508–12.
174. Id. at 509–10.
175. Id. at 530–32.
176. Id. at 302.
178. RAMIREZ, supra note 17, at 152.
181. Perlstein, supra note 179.
chainsaws to financial regulations.\(^\text{182}\) Democrats followed suit and soon found that deregulation brought in massive cash, particularly from Wall Street.\(^\text{183}\) Once again, the radical changes of this era coincided with inequality just as they did in the Great Depression.\(^\text{184}\) As greater economic inequality took root, the breakdown in the rule of law in the financial sector was completed during the Obama Administration.\(^\text{185}\) Specifically, after the crisis of 2007–2009, the Department of Justice failed to bring criminal charges against individuals at any of the megabanks at the center of the crisis.\(^\text{186}\) In the end, the breakdown of the rule of law over financial and corporate elites was deeply bipartisan.\(^\text{187}\)

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182. E.g., RAMIREZ, supra note 17, at 152–53 (“[T]he consequences of [Reagan’s] vision of highly limited government immediately paved the way for much of the predatory lending at the root of the subprime crisis. In 1982, he signed the Garn–St. Germain Depository Institutions Act, which operated to expand the availability of adjustable rate mortgages and eliminated mandatory loan-to-value ratios and negative amortization loans. In 1984 the Secondary Mortgage Market Enhancement Act became law, clearing the way for more expansive private securitization of mortgages . . . by preemting state securities law and authorizing a variety of financial institutions to invest in such securities.” (footnotes omitted)); Binyamin Appelbaum & Ellen Nakashima, Banking Regulator Played Advocate over Enforcer, WASH. POST, Nov. 23, 2008, at A1 (recounting that bank regulators demonstrated their commitment to deregulation by posing with a chainsaw and garden shears in hand while standing behind a stack of papers wrapped in red tape).


184. See RAMIREZ, supra note 17, at 36.

185. See supra note 28 and accompanying text.

186. RAMIREZ, supra note 17, at 192. Regardless of all its wrong turns, in the end, the Reagan-Bush years upheld the rule of law in the economic arena in terms of criminal accountability. For example, the George W. Bush Administration pursued criminal charges against Chairman Kenneth Lay, one of the central figures in the Enron securities fraud scandal of late 2001, and other senior officers at Enron, even though Lay played a key fundraising role in the Bush presidential campaign. Vikas Bajaj & Kurk Eichenwald, Kenneth L. Lay, 64, Enron Founder and Symbol of Corporate Excess, Dies, N.Y. TIMES, July 6, 2006, at C7. The former Enron CEO remains in prison. Charles Wilbanks, Ex-Enron CEO Jeff Skilling to Leave Prison Early, CBS NEWS (June 21, 2013, 4:36 PM), http://www.cbsnews.com/news/ex-enron-ceo-jeff-skilling-to-leave-prison-early/ (“Skilling could be released as early as 2017.”). The collapse of Enron in late 2001 foreshadowed the failure of regulatory infrastructure. One such failure, occurring years before the subprime crisis, was federal securities law. John R. Kroger, Enron, Fraud, and Securities Reform: An Enron Prosecutor’s Perspective, 76 U. COLO. L. REV. 57, 59–61 (2005) (condemning, among others, the SEC and the federal criminal laws). In fact, it constituted the greatest securities fraud since the Great Depression. Ramirez, supra note 30, at 700–04. At least through 2003, criminal accountability applied even to the wealthiest and most connected white-collar criminals. Law trumped power.

187. RAMIREZ, supra note 17, at 18.
politics in sparking an inequality spiral cautions against allowing racial hierarchy to fester.

The New Deal and the Reagan Revolution teach the same lesson. When economic inequality is low (as it was in 1933), economic power can be fragmented and controlled and become subject to law and regulation. When economic inequality soars (as it did after 1980), economic power frees itself from the constraints of law, and concentrated elites holding concentrated resources can subvert laws to their own ends with ease while blocking further reforms and undermining preexisting reforms, as demonstrated in Lawless Capitalism.188

IV. INEQUALITY AND CAPITALISTIC REFORM

The ebb and flow of legal and regulatory reform moves chaotically, in the sense that predicting reform will prove challenging even if certain complex mechanics and dynamics of reform can be explained in hindsight. In Lawless Capitalism, I sought to expand on Derrick Bell’s interest convergence theory by extending it to the economic arena and emphasizing the element of fear as a precondition to reform.189 While I certainly focused on the role of economic inequality in the subversion of law and regulation, I did not anticipate how spiraling inequality could pose a nearly insurmountable barrier to reform in the United States.190 Similarly, the degree of the Supreme Court’s determination to redesign the legal architecture of democracy in favor of concentrating more power in the hands of corporations and wealthy corporate elites, through a rapid redesign of the power and privileges of the corporation under the Constitution, must startle all.191

Yet, logically, the more narrowly concentrated political and economic power becomes, the more the opportunity for reform narrows. This follows from two truths. First, a narrow and concentrated elite will be desensitized to many significant costs that do not impact their more narrow interests.192 During the financial crisis, and the years preceding the crisis, financial and corporate elites actually achieved net positive payoffs.193 Their total compensation resumed its constant upward trajectory shortly after the crisis.194 Few lost their jobs, and when they did they garnered large severance packages.195 Rationally, perhaps, they now care little about general economic growth and can even profit from

188. Id. at 184–86.
189. Id. at 208–10.
190. Id. at 11.
191. See supra notes 25, 28 and accompanying text.
192. RAMIREZ, supra note 17, at xvi.
193. Id.
194. Id.
195. Id.
retarding growth. The financial crisis illustrates the divergence between the fortunes of the most economically powerful in our society and the other 99.9 percent.

Second, with sufficient wealth, elites can insulate themselves from the adverse backlash against high inequality (political pressure, crime, civil unrest, etc.), and they are thereby less likely to experience sufficient fear such that they are inspired to part with power. The failure of the Dodd-Frank Act occurred precisely because corporate and financial elites still held sufficient resources to lobby Congress and regulators to defeat many of its intended reforms. It is difficult to instill fear in those who rise above the law.

In short, an irrational and dysfunctional version of capitalism will not impose sufficient costs on those with power to cause them to support reform, and no interest convergence is probable. The holders of economic and political power will instead seek to further enhance their profits from the subversion of law and regulation as their interests diverge from the rest of society, regardless of the costs generated from the subversion. Reform may thereby become impossible and an “inegalitarian spiral” will take hold, leading to more irrational law and regulation, and more retrenchment of pre-existing reforms. This inegalitarian spiral poses the major threat to the American economy today as well as to the rule of law as a constraint on the abuse of economic power.

This grim reality makes America’s historically unprecedented economic inequality the primary arena for any reform related to our economic system. The stakes of this effort cannot be overstated. Economists have identified inequality traps as common in a number of economies with extremely negative consequences for human

196. See id. at 34–39.
197. An instructive example is America’s continued failure to achieve racial justice. The costs are staggering. But those costs are by definition concentrated among the disempowered. See Steven A. Ramirez, What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics, 54 J. LEGAL EDUC. 365, 375–76 (2004) (demonstrating that race is a multi-trillion dollar issue in America because of the continued destruction of human capital).
198. RAMIREZ, supra note 17, at 72–73.
199. See supra note 28.
200. It is noteworthy that at the time of the civil rights movement, inequality in America was low, and during the retrenchment inequality spiked. See RAMIREZ, supra note 17, at 36.
201. I previously used the term “growth-retarding elites” to denote an interest divergence between those holding concentrated power and the rest of society. Id. at 34–39. Further, according to Mancur Olson they will prevail on every issue that interests them the most, regardless of the costs to more diffuse interests. OLSON, supra note 37, at 127–28.
202. According to Olson, they can be expected to enjoy success on more issues as they control more resources. OLSON, supra note 37, at 127.
The profound lack of freedom from poverty can be expected to soar. Hostility towards communities of color and others who can be scapegoated for economic ills will increase. America will quickly fall out of the most economically developed nations. History suggests that violence, perhaps severe violence, will become likely. Thus, everything legal scholars strive to further is at stake.

In 1949, Friedrich A. Hayek wrote about the influence of “intellectuals” in the University of Chicago Law Review. Hayek recognized that professors and other thought leaders hold only a “negligible” influence in the outcomes of political elections. Nevertheless, over the long term, professors, journalists, scientists, and other highly educated voices shape public opinion. “It is no exaggeration to say that once the more active part of the intellectuals have been converted to a set of beliefs, the process by which these become generally accepted is almost automatic and irresistible.” Hayek chided conservatives for naively focusing only on immediate political gratification and persuading the individual voter, while neglecting the importance of influencing elite intellectuals.

Professor Delgado would not disagree with Hayek. In No Mercy: How Conservative Think Tanks and Foundations Changed America’s Social Agenda (“No Mercy”), Professor Delgado and co-author Jean Stefancic echo Hayek, stating that those seeking “social equity, civil rights, personal freedom” and other reforms should take note of the “professionalism and cold precision” of the right and try to duplicate their success in shaping public opinion in accordance with more conservative causes. Stefancic and Delgado correctly offer “a few lessons that progressives and liberals should glean from this book, and . . . suggestions for the kind of effort that can bring the country back into better balance.” Many of the issues highlighted in No Mercy mirror issues highlighted in Lawless Capitalism, (including race, IQ, affirmative action, tort revisionism,

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204. RAMIREZ, supra note 17, at 15.
206. Id.
207. Id. at 421.
208. Id. at 418.
210. Id. at 139.
immigration reform, and racial inequality). Lawless Capitalism has the same basic message as No Mercy.

I agree with the key points that Stefancic and Professor Delgado raised in No Mercy. Progressives should invoke leaders like Franklin Roosevelt and John Stuart Mill in the cause of reform. They should also seek to use international developments advantageously, including making immigration reform and civil rights as conditions of trade with the United States, say through the United States' influence on the WTO. Finally, progressive scholars need to shape public opinion over the long term by training college students in leadership skills, making education freely available for all, and reaching out beyond scholarly journals to recast the terms of debate.

In this context, economic inequality forms the dam which blocks any reforms requiring the redistribution of economic and political power, ranging from race and globalization to private claims for securities fraud and Too Big to Fail. Indeed, I argued in Lawless Capitalism that the excessive concentration of economic power and the deterioration of the rule of law in the economic sphere drove all aspects of the financial crisis. Today, economic inequality is the preeminent issue of our time and is the battle line between corporatocracy and our democratic traditions, and between true capitalism and pseudo-capitalism.

CONCLUSION

In the end, Rodrigo's Equation is too reductionist and simplistic. It cannot explain the dynamics of capitalism across time and space. The variations in the legal construction of economic systems meeting the essential definition of capitalism defy any theoretical mathematical equation. Further, the ability to reform capitalism—to achieve a wider distribution of economic resources and opportunity—turns upon complex factors.

In particular, high economic inequality presents a unique danger to core values of capitalism, such as meritocratic competition, sustainable economic growth, and a broad distribution of economic opportunity. Instead, elites will act to affirmatively impede economic growth anytime they can do so for profit. Those controlling greater wealth have the means and the organizational capability to rig the economy to benefit themselves regardless of

211. Id. at 70–72, 140.
212. Id. at 58–59, 131–58.
213. RAMIREZ, supra note 17, at 184–85, 202–03; STEFANCIC & DELGADO, supra note 209, at 156.
214. STEFANCIC & DELGADO, supra note 209, at 156.
215. See Ramirez, supra note 6, at 119–23.
216. RAMIREZ, supra note 17, at 3–8. The dynamics of legal reform and the dynamics of legal subversion are mirror images.
costs to society generally. This particularly holds true when a given issue leads to diffuse costs (such as harming general macroeconomic growth) and concentrated benefits for the fortunes of concentrated elites (such as subsidies for the megabanks they control). The more elites insulate themselves from the costs of an irrational macroeconomy and the violence, unrest, and oppression it spawns, the less interested they become in any reform and the more interested they become in irrational law and regulation.

The United States now faces the prospect of an entrenched elite with massive economic power and the incentive to sabotage economic growth for profit. In other words, the United States is teetering towards an inequality trap. Racial politics play a central role in the emergence of this profoundly negative economic reality because elites can exploit racial divisions to further their own economic agenda. Indeed, inequality soared beginning in the 1980s just as America started becoming increasingly diverse.\textsuperscript{217} America today is paying the toll for its failure in decades past to dismantle its racial hierarchy.

Law and capitalism in America could have taken a far different path. \textit{Citizens United} and Dodd-Frank, for example, are not an inevitable reality of American capitalism. Specifically, despite the severity of the crisis and its threat to capitalism itself, our reckless leadership simply failed to address the key role of the failure of law to curb and channel power productively. Our leaders either do not understand the dangers of high economic inequality, or they simply do not care about the decline of the United States implicit in those dangers. Legal scholars should inform the public as well as future legal leaders of this fact.

Despite severe limitations in any theory of law and capitalism, Delgado breaks new ground by spotlighting the relationship between law and capitalism. Law operates as the foundation of capitalism’s differing manifestations across time and space. At a time when the Supreme Court is redefining the political economy of capitalism (as well as our democratic republic), this discourse within law schools and legal scholarship is far past due. Tomorrow’s legal leaders need to actually contemplate the various ways that law influences the economic (and increasingly political) outcomes of capitalism in terms of their impact on actual human development within our society, as well as environmental sustainability. Law mediates capitalism in every market-based economy, and lawyers in the United States currently seem ill suited for the job, as evidenced by the Supreme Court’s determination to enhance the powers of corporate America and its CEOs in light of the financial catastrophe they spawned in 2007–2009. Hopefully, Delgado’s discourse will resonate in the legal academy, and in the law before inequality.

\textsuperscript{217} Id. at 36.
spirals so out of control that only a major catastrophe greater than the financial crisis of 2007–2009 can quell its upward trajectory. Otherwise, the United States faces an extended and deep decline relative to nations that embrace true capitalism complete with real competition, a robust rule of law, and broadly distributed economic opportunity.