



## Social Democratic Constitutionalism, New Economic Theory, and the Dangers of Neoliberalism's Attacks on Rational Government Regulation

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### Abstract

*This paper examines the foundations of economic neoliberalism and underlines the implications of the foundations of this economic theory in its reliance on economic value as ownership, property, and commodity which misdirects economic inquiry from the real value of human capital as the proper foundation of a viable economic system. It focuses on the role of a selective emphasis on rules of international law for the protection of private property. These rules indirectly influence economic theory in general in the sense that commodity is made to be near absolute, and to be insulated from regulation. The paper explores these ideas in the context of major neoliberal theorists and stresses flaws of the theory of ownership as well as the flaws in the myth of the market as a form of economic activity immune to rational regulation. The paper goes on to stress the emphasis of the destruction of the so called "deep state." The attack on the deep state is reinforced by an academic interest group loosely styled "The Law and Economics Movement." The paper emphasizes the politico economic costs of the the demolition of the so called deep state, which is essentially a social democratic state. One of the consequences of this form of economic advocacy is the possibility of rule by plutocracy. This will mean the destruction of the constitutional foundations of the state. The paper also underlines an important aspect of the jurisprudence of neoliberalism which is rooted in the theory that law must be done from the point of view of the bad man and be completely separated from basic morality and values. This is applied to economic theory and makes for a sharp chasm and basic human rights values. There is clearly a need for more effective forms of interest representation representing the vital importance of human capital.*

### 1. Introduction

At the present time, we live in a culture dominated by the forces of globalization.

The emphasis of globalization in the political and economic sphere has been highly contested and ideologically driven by conflicts of global theoretical and practical political-economic dimensions.

In the economic sphere, the conflict of global economic priority is focused on the United Nations, which emphasized the idea of a new international economic order. This was opposed by the re-emergence of an economic theory founded on market fundamentalism, efficiency and the primacy of private property holdings sustained by natural law and a weakened form of state control. This emphasis emerged as the economic theory of contemporary neoliberalism. It is currently the dominating economic paradigm from a global point of view. It aspires to be the new normal of global economic organization.

Economic globalization today is, in effect, a reinvention of laissez-faire economics that was fashionable in the 19<sup>th</sup> century. After the Great Depression and consequences of the failings of the market system, which led to massive inequality, unlivable cities, pollution and decay, these policies were largely rejected by many industrializing societies. The laissez-faire advocates claimed that markets were self-regulating and, after sometime, prosperity would resume. According to Keynes, markets are not self-regulating and in the time frame of the fundamental market protagonist we would all be dead.

Neoliberalism radically emphasizes the primacy of private property and market efficiency in opposition to state regulation of the economy. The new international economic order and its derivatives in the form of new economic theory focus on the centrality and importance of human capital as a starting point for a realistic and socially responsible economic theory.

The ascendancy of economic neoliberalism has been generated by organized political forces using academic positions as bases of power to promote the values behind economic neoliberalism. This includes a powerful aggregation of academic economist-lawyers whose self-identification is “the Law and Economics Movement”. The important gloss that they bring to economic, political and legal theory is that they are deeply committed to the abolition of most of the regulatory foundations of the social democratic form of American government. Their particular skill has been to unpack what they believe to be the cost of regulation, and then construe this as a form of the taking of economic interests of the holders of private property affected by regulation. The broader consequences of their success result in the transfer of economic power from the public interest of the state to the private interest of private parties. In short, their attack on regulation and the weakening of public interest power does not mean that the aggregate power is diminished.

On the contrary, it is simply transferred from some form of public accountability to a significant interest in non-accountability by the private sector. Economic neoliberalism cannot provide an effective framework for managing power if the social democratic constitution is extinguished. This group of academics represents powerful interest articulation, backed by a cascade of academic commentary, which often does not invite critical appraisal. When confronted with critical appraisal, they tend to collectively ignore it.

Alongside the “Law and Economics Movement” is a society of conservative legal practitioners and judges, organized into the so-called federalist society. They provide added punch to the academic apologists but are more explicit in their call for the destruction of

the New Deal state, essentially, the destruction of the social democratic constitution of the modern era. If we destroy the New Deal state, we are left essentially with the rule by, of and for the plutocracy. This is a dangerous course to take. There is no evidence that these extreme views are subject to some measure of moderation. It can be concluded here that the extreme form of economic neoliberalism may well represent the most profound threat to the survival of American democracy and its rule of law foundations.

## 2. The Political Economy of Neoliberalism

Neoliberalism has its foundations in classical economic theory with a focus on value, property, market, supply and demand, and efficiency. Modern neoliberalism emerged from a meeting organized in Mont Pèlerin, Switzerland, which included major intellectuals from the UK, the USA, and Austria. These intellectuals were concerned about the emerging socialist-Stalinist form of command control economics. The Stalinist approach stressed the extinction of private property and the monopoly and legitimacy of state control over the economy and the means of production.

These intellectuals saw the extinction of private property as coextensive with the extinction of freedom. This included economic and political freedom.

In their view, the solution to economic theory was a radically reduced role for the state in the regulation of economic affairs and a restricted role focused principally on the protection of private property. This included the importance of private property and efficiency in market exchanges and therefore also stressed an extremely minimal role for the state in regulating the market. In short, “the market functions best when left to the practices that facilitate unregulated market transactions and events.” One of the tenets of neoliberalism is that it aspires to make private property vested with the attributes of “private sector sovereign capabilities.” This serves as a partial barrier to public sovereign regulation, which neoliberalism considers to be a form of creeping expropriation of vested private property. Additionally, it is argued that such purported takings must be fully compensated by the public sector represented by the public interest.

This is a matter that became a central ideological focus of the UK under Thatcher and the USA under Reagan. At the intellectual level, neoliberalism was the spearhead of the work of Milton Friedman (*Capitalism and Freedom*)<sup>1</sup> and the Department of Economics at the University of Chicago.

## 3. Private Sector Attacks Versus Public Sovereign Regulation in the International Context

These issues emerge in the documentary foundations of modern international law.

The initial emphasis of this approach was reflected in the scale and scope of global decolonization. Since colonial economic interests controlled and regulated the vast resources of newly decolonized states, these states were confronted with the problem of neocolonialism.<sup>2</sup>

This meant they had formal freedom politically, but their economies were still under colonial control; colonial control often came in the form of transnational business enterprises.

The response to this is explained in several sequential documents emerging from the General Assembly of the UN. The following are included as illustration: United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources (1962); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965); The United Nations Declaration on the Right to Development (1966); United Nations General Assembly Resolution 3171 on Permanent Sovereignty over Natural Resources (1973); Programme of Action on the Establishment of a New International Economic Order (1974); Declaration on the Establishment of a New Economic Order (1974); Charter of Economic Rights and Duties of States (1974); Draft Code of Conduct on Transnational Corporations (1988).

The most controversial provision in the Resolution of Permanent Sovereignty involved the sovereign taking of private foreign investment. The Resolution stipulates that the taking should be for a public purpose and the compensation, which may give rise to controversy, shall be measured according to the principle of appropriate compensation and that controversies should in the first instance be resolved according to the law of the taking state.\* The appropriate(ness) standard was a significant departure from the approach of traditional international law of capital exporting countries. These countries maintained that expropriation of property is lawful only if the taking is for public purpose, is not discriminatory, and is supported by the principle of full compensation. States from the communist world saw the taking of property as a part of the state's legitimate power over the means of production. The newly decolonized states asserted the right to take foreign owned property subject to just or appropriate compensation, but the term "appropriate" could cover a wide variety of circumstances, including the context of colonial exploitation.

#### **4. The Third World Approach and the Support of International Law**

The Charter of Economic Rights and Duties of States, which had the support of decolonized states, declares a right in each state, "to nationalize, expropriate or to transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing state and its tribunals..."†

This relaxed standard regarding takings and compensation caused a fire storm in the capital exporting world. Clearly, the capital exporting states wanted as tough a standard as possible to restrain takings and to ensure maximum compensation. In short, they were reaffirming a near absolutist legal standard for the protection of private property in international law.

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\* Hyde, James N. "Permanent sovereignty over natural wealth and resources." *American Journal of International Law* 50 (1956): 854.

† Assembly, United Nations General. "Charter of Economic Rights and Duties of States." A/RES/29/3281 – Charter of Economic Rights and Duties of States – UN Documents: Gathering a body of global agreements. <http://www.un-documents.net/a29r3281.htm>.

## 5. Protection of Private Property in International Law: The Act of State Doctrine

The protection of private investment in the wake of decolonization was considered to be under threat by the emerging approach to the protection of foreign investment in the global environment. From a juridical standpoint, the matter appeared to reach an apex in a leading Supreme Court case, *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398 (1964).<sup>\*</sup> In this case, Castro's government by state decree in Cuba nationalized parts of the sugar industry. The proceeds of the sale of sugar were present in the New York Bank and the former owners of the sugar interests filed an *in rem* action seizing the proceeds of the sale of sugar and placed it in the hands of a New York trustee, Sabbatino, while they litigated the ownership of the proceeds.

In this case the Supreme Court ruled that since the standard with regard to takings was still a dispute in international law, it was prudent for the court to not intervene. It justified its non-intervention by invoking a sovereignty informed doctrine: The Act of State Doctrine. Under this doctrine, a taking based on the domestic law of the state with regard to property in the state could not be contested in the foreign courts of another state. In effect, Castro kept the proceeds of nationalization. In subsequent cases, without disposing of the Act of State Doctrine, the court radically weakened its scope of applicability. The battle lines were now drawn. Essentially, neoliberals fought tooth and nail to prevent the sovereignty of the state from taking private property, except under rigorous conditions.

The Sabbatino case caused a tornado in the American business community. The business interests prevailed on the U.S. Congress to pass an amendment to the Foreign Assistance Act. One can see this as the neoliberal fight back for the inviolability of property rights. Under the Second Hickenlooper Amendment, it was provided that "No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state...based upon... a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law."<sup>†</sup>

The initial implications of the roll back of the Act of State Doctrine led to the emergence of the "Hot" Goods Doctrine, which enlarged the scope of private remedies for protecting private property in international law.<sup>‡</sup> Under this theory, if the taken property or its assets were physically present in another state, the private corporation could file an *in rem* action, seize the property, claim legitimate ownership of the property or its value. The State of Chile had its copper or copper assets seized in this way and nearly brought the Chilean economy to its knees.<sup>3</sup>

<sup>\*</sup>"*Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398 (1964)." *Justia Law*. <https://supreme.justia.com/cases/federal/us/376/398/case.html>.

<sup>†</sup> Legal, Inc. US. "US Legal." Acts of State laws. <https://actsofstatelaws.uslegal.com/the-act-of-state-doctrine-article/>.

<sup>‡</sup> Deines, Brooke. "HOT GOODS AND COLD CASH: Hot Goods Laws, The Joint Employment Doctrine and Retailer Liability Under the Fair Labor Standards Act of 1938." (2006).

Foreign investment now became infused with an international law theory of the inviolability of property rights. Since third-world countries were dependent on foreign investment, they could get foreign investment only under rigorous standards that protected private property for foreign investors. To a large extent, these matters were supplemented by standards set up by the government of the US to secure foreign investment as a condition of foreign investment, and this was supplemented by the practice and procedures of the World Bank and the IMF.

In addition to the Hickenlooper Amendment, a number of exceptions emerged in US practice to further limit the Act of State Doctrine. One of those important interpretations was that the Act of State Doctrine could not be used to block human rights cases. This provides an overview of the little-known (to the economists) factual legal background that solidified the near absolute status of property in the context of global law.

## **6. Consolidation of Neoliberalism & Law in its Expansion in International Economic Matters**

Essentially, the culture of foreign investment and the absolutist idea of private property fell in line with the demands of the global financial community and capital underwritten by the World Bank or the IMF came with stringent conditions that sought to weaken the state's regulatory role.

To give one illustration, an 80 billion dollar loan from the IMF required a massive deregulation of protections of domestic manufacturing and the outflow of capital from South Africa. These regulations seem to contribute to accelerated poverty, inequality and unemployment.\* The evolution of ideology behind a non-regulatory state into the ideology that regulations, which impact on foreign investment, may constitute an unlawful taking in international law is illustrated in the case of *Methanex v. The United States* (2002).†

## **7. The Background to Methanex**

The background to this in NAFTA was an explicit commitment of big business to “roll back the New Deal.” The background to this was the *Lochner v. New York* case,‡ decided by the Supreme Court in 1905. The New York law required a 10 hour work day for bakery workers. The *Lochner* case ruled that this regulation deprived the bakery owners of their property rights. The following history of *Lochner* showed the court invalidating over 200 state and federal statutes (income tax, minimum wage laws, health and safety regulations, workers' rights to organize independent unions, etc.).§

In 1937 the composition of the Supreme Court had changed and *Lochner* was overturned. The court supported a constitutional obligation to protect society's health and welfare and

\* “Southern Africa: Apartheid Debt.” Southern Africa: Apartheid Debt. July 27, 1998. <http://www.africafocus.org/docs98/debt9807.php>.

† “*Methanex Corp. v. United States of America*.” U.S. Department of State. <https://www.state.gov/s/l/c5818.htm>.

‡ *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

§ *Ibid.*

used “police powers” to justify the intrusions into the private sphere. Public necessity came before property rights.

Although *Lochner* was dead, its ghost continued to survive. Recently, the Federalist society organized a law conference on rolling back the New Deal. Epstein, a University of Chicago Law professor, provided a novel interpretation of the Fifth Amendment: “Regulations should be properly understood as ‘takings’ under the Fifth Amendment, so government must pay those businesses or individuals whose property value is in some way diminished by public actions.”<sup>\*</sup> This is a breathtaking interpretation of the protection of property under the Fifth Amendment. The implications are that neoliberalism has near limitless boundaries. More than that, in this sense it is an engine of dynamic political change, the consequences of which could undermine the juridical and economic foundations of social democratic governance and the constitutive process that underpins it.

## **8. The Methanex Case**

People in California began to recognize a foul taste in their drinking water and local authorities had to shut down water supplies and purchase clean water from elsewhere. It was established that the pollution came from MTBE, a methanol based gasoline additive, which creates cleaner burning fuel and reduces pollution. If small amounts of MTBE leak into the water supply, the water becomes unfit to drink and hard to clean. It was determined that the additive was also carcinogenic.

The governor of California made an executive order requiring the phase out of MTBE. A few months after this, a Canadian company filed a 970 million dollar law suit for compensations against California because the regulation inflicted losses on its future profits. They argued that Chapter 11 of the North American Free Trade Agreement (NAFTA) permitted them to sue if their company’s property assets were damaged by laws and regulations of any kind. The proceedings before a NAFTA tribunal are held in secret. It is true NAFTA arbitrators cannot overturn domestic law, but billion-dollar damage awards can chill local lawmaking. This could imply a million dollar consequence of chapter 11 of NAFTA. This vastly expanded the absolutist sense of private property. Although Methanex ultimately lost this case, it was a matter that still has a backing of the multi-national business community. The story here has not ended.

## **9. Milton Friedman, the Significant Architect of Neoliberalism (*Capitalism and Freedom*)**

Friedman was the key right-wing intellectual adversary of Keynesian economics. He theorized that there existed a “natural” rate of unemployment. Friedman promoted an alternative macroeconomic viewpoint known as “monetarism”, and argued that a steady, small expansion of the money supply was the preferred policy. His ideas concerning monetary policy, taxation, privatization and deregulation influenced government policies, especially

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<sup>\*</sup> “The Fifth Amendment and Takings of Private Property.” <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/takings.htm>.

during the 1980s.\* His influence in economic theory was to radically delegitimize the science of macroeconomics using the methodology of the pure market and market efficiency and monetarism. His monetary theory influenced the Federal Reserve's response to the global financial crisis of 2008.

Friedman's views were echoed in the Reaganomics era when Reagan declared, quite bluntly, that the government was the problem. This introduced a powerful emphasis in federal politics. This was an emphasis that called for reducing taxes on the rich, reducing government expenditures for social and health services, reductions for education, environmental issues. In short, any effective regulatory function of the federal government was a fair target for the total free enterprise movement.

One of Friedman's greatest successes came from the Clinton administration and involved a massive deregulation of the banking industry, that is to say the repeal of the Glass-Steagall act. Financial commentators regard this as a major cause of the 2008 financial crisis. With the repeal of Glass-Steagall came the large-scale financialization of the US economy and those countries connected to the US economy.<sup>4</sup> Donald Trump has promised to "undo" the laws which were enacted to reinstate Glass-Steagall type regulations.

Even with the reintroduction of the regulatory regime for the banking industry, every element of reform was and remains contested. Fundamentally, neoliberalism and the financialization of the economy supported by the legal foundations of the inviolability of private property provided a powerful economic theory, a powerful economic constituency, and a powerful force of professional apologists.

The fundamentals of Friedman's theory were formed around centrality of private property as a cornerstone of human freedom. In this sense, private property should be juridically protected by a preemptory legal norm that gave it near absolute status along the lines of the *Lochner* case. Private property as a commodity functioned within a market that should so far as possible be immune from state regulation or control. In this sense, the market was so crucial to the exchange of good services and commodities that the implicit assumption that it was self-regulating or that it was regulated by an invisible hand, elevated the status of the market to the status of a protective natural law analogous to the right to property in *Lochner*.

Friedman's views here have been subject to vigorous and coherent assault by many theorists. Many see the notion of the market in Friedman's sense as not an appropriate framework within which to properly understand economic interactions in the real world. The framework is suited to pseudo-scientific academic theorizing far removed from experience. It therefore obscures malfunctions and imperfections that are correctible in the market. Essentially, the market works very well for a focus on academic interests far removed from reality. Consider the following:

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\* "Publications." Publications—Dallasfed.org. <https://www.dallasfed.org/en/pubs.aspx>. <https://www.federalreserve.gov/PubS/feds/2011/201126/201126pap.pdf>

“You have to know that academic economists today are not even interested in the real world. In the economic profession today, interest in the real world is an indirect admission that you are not very good. If you are really smart you do really abstract mathematical modeling. If you are a bit less good you do econometrics, basically manipulating statistics. If you are really down in the pits you are interested in the real world...It’s strange academic culture...when you say these uncomfortable things, people refuse to listen to you.”\*

Bjorkman unpacks the myth of the market by demonstrating that there is no invisible hand or a self-moving institution of exchange. He demonstrates that the market is first of all not a static social event, but an institution fed by an internal constitutional process which under the influence of decision makers seeks to shape the market in ways that are fair and socially responsible. This view is in stark contrast to the idea that the market is a sort of automated machine.

One of the important outcomes of proper market dynamics is that the market will always generate many alternative and constructive possibilities to improve performance to meet social responsibilities. In short, the market is a man-made and self-organizing system and is guided by its own constitutional foundations. For example, the constitutive rules of the market include the definition of property or corporate rights.

Friedman scores an important point in recognizing that freedom is diminished without reasonable access to property and one of the most important aspects of property is earning capacity. However, earnings from labor, if not supplemented by access to other forms of property, leave the individual incapable of robust participation in a democratic society. During the time of the founding of the United States, access to land provided an important substitute to augment earnings. Today under the neoliberal approach accelerating inequality which produces hardships endured by the least well-off demonstrates that wealth concentration is slanted in favor of the property earning class and not the class which experiences diminishing earnings in the wage labor market.

In a modern capitalist economy, industrial capital is owned by mega corporations. This has replaced land as a supplement to the earning capacity of labor. This essentially means diminished freedom for the laboring classes. To understand this we must appreciate the inextricable relationship between property rights and economics. The market’s role in this regard via wealth enhancing transactions essentially means that property begets more property and more freedom for the property owners and less freedom for the laborers. This then raises the question whether the exchange between labor and property in the market requires the market to have an ethical standard to moderate and secure a better distribution from the wealth maximizing standard of the market.

The free exchange principle behind the market generates unfree results. In other words, the idea of private property should be enhanced with an ethical and moral restraint on the license implied in the free exchange market principles. The philosopher John Locke suggested three basic principles of ethical morality that should inform the nature of property. First, universal

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\* Ha-Joon Chang, cited in “The Market Myth” by Tomas Bjorkman, *Cadmus*, Volume 2, Issue 6 (May 2016).

participation—in current situations this does not exist. Second, the distribution or sharing in the market mechanism is focused on actual production and voluntary exchanges. Thirdly, ethics and morality require constraints and property to secure the rights of others and society in general. These foundations of the nature of property in the context of market exchanges mean no barriers to market entry, voluntary exchanges, and constraints on monopoly. This therefore means that the bargaining power of individuals needs more than an invisible hand.

In short, the market's ethical standards that constitute the market require rules to ensure that economic conditions and perfect market competitions are interdependent. Without these rules of ethics and morality, property generates concentration, monopoly and the abuse of property. Voluntary exchanges in the market are simply eroded by the concentration of private property in the field.

Friedman's approach here makes a cosmetic attempt at competitive equal opportunity but the operation of code of Friedman's system demonstrates that acquiring opportunities in proportion to wealth and property favors the wealthy over the poor. It would therefore seem imperative that the state's role in framing the constitution of the market requires a state to secure the moral and ethical foundations of property itself. If there is no real competitive opportunity to acquire property and voluntarily engage in exchanges, the middle class and the poor suffer great duress and the wealthier market players experience favored treatment. It would seem that Friedman's instrumental justification of his capitalist ethic and wealth maximization without restraint, is both freedom denying and politically dangerous.

An elucidation of the interrelationship between money, finance, property and economics is summarized by Pascal van Griethuysen.\* He summarizes the directing force of property economics with the right perspective.

*Figure 1: Directing Force of Property Economics<sup>5</sup>*

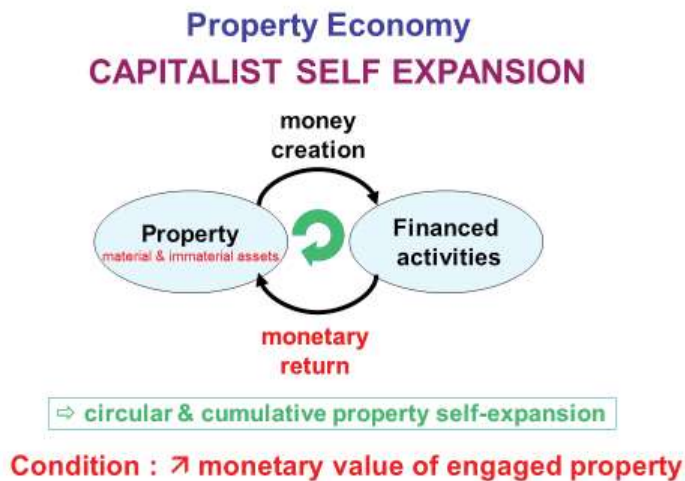
- **Veblen (1904), Heinsohn & Steiger (1996), Soto (2000)**
- **property: constitutive institution of capitalism**
- **property dual potential**
  - **material: concrete exploitation of resources (direct income)**
  - **financial: engaging property in capitalisation processes (indirect)**
- **proprietors' cumulative enrichment**
- **capitalist self-expansionary nature**

The position of property in the market unconstrained by moral or ethical factors and sustained by the emergence of a natural law influenced on both property and the mechanisms

\* Presented by Pascal van Griethuysen at the Post-graduate Certificate Course/Roundtable in "Human Centered Economics" from February 1-3, 2017 at Inter-University Centre, Dubrovnik, Croatia [https://youtu.be/H\\_Btj15J57w](https://youtu.be/H_Btj15J57w)

of market exchanges has meant that both property and the mechanism of exchange have near absolute status and resist even the implicit constitutional rules of the market itself. This approach triggers capitalist self-expansion via an unrestrained notion of capital and exchange.

Figure 2: Capitalist Self-expansion<sup>6</sup>



We should understand that property is essentially a matter of commodities and commodities, which are converted to monetary growth. The following diagram clarifies and demonstrates the ease of flow from property to capitalization to concentration:

Figure 3: Flow from Property to Capitalization to Concentration<sup>7</sup>

**END : ↗ property value = monetary growth**

**MEANS ?**

- **physical growth** ( spatial expansion, biotic resources overexploitation, industrialisation, mineral resources depletion )
- **commercial strategies** ( lay-off, delocalisation, marketing, advertising )
- **institutional strategies** ( commodification, enclosure, market creation; selective deregulation & liberalisation )
- **profit driven innovations** ( technical, commercial, financial & institutional )
- **property capitalisation & concentration** ( acquisitions & fusions )

These diagrammatic outlines of property, economy, commodification, money and markets sustain the outcomes of wealth concentration and lowering of the economic position of the middle and lower classes. This model sustains its stability by the explicit or implicit juridicalization of the notion that property is an absolute, or a near absolute private right (Lochner), and the mechanism of the market is a related near absolute rightly sustained by natural law and resisting political authority to intervene or modify (Lochner). The idea of contract as a property right and a legal absolute and by implication the market mechanism has a similar juridical underpinning.

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*“Investors dabbling in the various kinds of derivatives are simply gambling according to the throw of the dice.”*

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## **10. Friedman and the Nature of Property in the Market**

We have discussed the problem of the ethical limitations of property in Friedman’s neo-liberal theory. However, lack of ethics and morality has not been thought to be a serious limitation on the drive to privatized absolutism regarding property and the market. The entire sub-discipline of law and economics is devoted to deregulation and the minimal state and the natural law basis of the market and private property.

The fundamentals of economic neoliberalism insist upon a radical privatization of property and value in society. In short: if a matter may be privatized, it should be privatized. Additionally, economic neoliberalism favored the notion of the minimal state. In short: the more deregulation and limitation on the state’s power to regulate, the better. A strong belief in corporate tax cuts and reduced taxes for the wealthy. A strong belief in trade liberalization and open markets. Finally, with regard to the minimal state, there would be a massive diminution of the role of government in society.

The writer Tayyab Mahmud describes a summary of economic neoliberalism as follows:

*“The neoliberal project is to turn the “nation-state,” one with the primary agenda of facilitating global capital accumulation unburdened from any legal regulations aimed at assuring welfare of citizens. In summary, neoliberalism seeks unbridled accumulation of capital through a rollback of the state, and limits its functions to minimal security and maintenance of law, fiscal and monetary discipline, flexible labor markets, and liberalization of trade and capital flows.”<sup>8</sup>*

## **11. The Nature of Property as a Foundation of an Allegedly Free and Efficient Market**

The financialization of the economy led to the creation and recognition of many forms of new property. The system encouraged the investment of property in property and the generation of “new property”.

New forms of property emerged in the financial markets. Several of these forms were based on derivatives, others on credit default swaps and other exotic ideas. In short, the speculation in derivatives permits investment because the outcome of the derivative is a new form of property. The problem is how to identify the property and determine its potential risk or economic value. In order to understand derivatives, it is generally recommended that the investor take a course in calculus. If one passes the course, this may still not be enough to understand the complex logarithms that are supposed to represent the form of capital value which may be traded in the financial markets. In short, investors dabbling in the various kinds of derivatives are simply gambling according to the throw of the dice.

Neoliberalism became a critical ideological strut for the ascendance of new financial mechanisms, driving the accretion of wealth to insiders. The financial mechanisms were facilitated by ingenious ways in which property interest and securities could be invented or created. This gave dynamism to the financial markets as these new instruments became a cornerstone for market trading. Non-regulation permitted the generation of new forms of property without restraint.<sup>9</sup> Laws which gave a high priority to the protection of private property ensured the insulation of these innovations from regulation and accountability.

The process by which paper assets could be manipulated and marketed essentially resulted in a ton of paper assets generated by new financial instrumentalities such as derivatives. The reproduction of paper property ran amok. This made for a huge gap between finance capital and capital generated by the real economy. The securitization, bundling and marketing of mortgage obligations and the growth of sub-prime lending in this regard accelerated the gap between financial capital and the real economy.

This gap proved to be unsustainable and the financial bubble burst, creating a major economic crisis in the economy of the United States and other leading economic powers.

The financial sector remains a backbone of the real economy and the collapse of the financial market impacted upon the viability of the real economy. Thus, the recession impacted on the global political economy of all states with resultant impacts for socio-economic justice. When national economies struggle, that struggle is reflected in the depreciation of living standards (accelerated inequality, unemployment and poverty).

## **12. Market Theory, Political Culture and Regulation**

To put these developments into a broader context of governance and political perspectives, it is important to recognize that the UN system inspired by the four freedoms, which were in turn influenced by the New Deal, had developed a greater confidence in the role of government in moderating the negative effects of free market capitalism. Macroeconomics was a real science.

In this sense the role of governance and regulation was at least implicitly apparent in setting up a global mechanism of limited but important global normative guidance in the form of the UN Charter. When Roosevelt expressed the war aims of the allies in terms of the four freedoms, he was also expressing those aims of a social democratic form of governance

which as a global matter was engaged in a war with totalitarianism. In the totalitarian state, the assumption of omnipotent powers could be seen as powers which extinguish freedom.

### **13. Neoliberal Legal, Political and Economic Culture: Implications for Freedom and Justice**

In 1944, the scholar Karl Polanyi provided a critical meditation on the role of governance and regulation in the context of human freedom. He distinguished two kinds of freedom: a form of good freedom, and the other a form of bad freedom. Bad freedom involved the freedom to exploit others.<sup>10</sup> The freedom to take disproportionate benefits without commensurate service to the community, the freedom to appropriate technological invention without use for public benefit and the freedom to exploit social disaster for private benefit.

With regard to the good side of freedom, Polanyi stated: “The market economy under which these freedoms thrive also produced freedoms we prize highly; Freedom of conscience, freedom of speech, freedom of meeting, freedom of association, freedom to choose one’s own job.” These freedoms are the product of the conditions that also give us the bad freedoms. Polanyi speculated, interestingly, on a post market economy and its capacity to enhance freedom. According to Polanyi, the passing of the market economy can become the beginning of an era of unprecedented freedom.

Juridical and functional freedom can be made wider and more general than ever before; regulation and control can achieve freedom not only for the few, but for all. Freedom is not an appurtenance of privilege, tainted at the source, but a prescriptive right extending far beyond the narrow confines of the political sphere into the intimate organization of society itself.

Thus will old freedoms and civic rights be added to the fund of new freedoms generated by the leisure and security that industrial society offers to all. Such a society can afford to be both just and free. Polanyi also noted that an important impediment to such a future was the moral obstacle of liberal utopianism. He refers to Hayek as a key figure in this area. According to Polanyi, “Planning and control are being attacked as a denial of freedom”. This is a fundamental postulate of the social democratic state. Free enterprise and private ownership are declared to be essentials of freedom. No society built on other foundations is said to deserve to be called free. The freedom that regulation creates is denounced as unfreedom; the justice, liberty and welfare are decried as a camouflage of slavery.\* Polanyi’s view of neoliberalism is that it is doomed. It has the seed of authoritarianism and fascism. Thus, the good freedoms are destroyed and the bad ones are ascended. According to neoliberalism, an alternative perspective of social democratic culture is that of good and bad freedom and the role of the state in maximizing the good and minimizing the bad is an important insight into the modern industrial state influenced by social democratic political principles. It is very consistent with Roosevelt’s view that severe economic deprivation and poverty diminish the freedom of the person deprived. The view of Roosevelt’s social democratic political culture is that the disparities between the elite rich and the deprived poor are moderated by regulation which has the consequence of enhancing good freedom and moderating bad freedom or

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\* Ibid.

political license. Thus, regulation in this view is not an oppressive state-centered invention, but part of the complex process of using the state to manage power in ways that enhance the aggregate position of the individual in terms of equality, freedom and dignity. This idea is reflected internationally in the International Bill of Rights. The development of human rights codes, regulations and practices are not instruments of repression but instruments that enhance human freedom and liberation. In this sense, the UN Charter and Roosevelt's four freedoms reflect social democratic perspective about the values which guide and animate governance and regulation at the international level as well.

## **14. Climate Change and Sustainable Development**

This now brings us to the problem of neoliberalism and the challenge of climate change and sustainable development. On September 25, 2015, the UN adopted a sustainable economic and political global policy in the shadow of the perceived dangers of climate change. There were three essential points:

1. Ending poverty
2. Ecological responsibility for protecting the planet
3. Global prosperity for all

The following are the 17 UN sustainable development goals:

1. End poverty in all its forms everywhere
2. End hunger, achieve food security and improved nutrition, and promote sustainable agriculture
3. Ensure healthy lives and promote well-being for all at all ages
4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
5. Achieve gender equality and empower all women and girls
6. Ensure availability and sustainable management of water and sanitation for all
7. Ensure access to affordable, reliable, sustainable and modern energy for all
8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
10. Reduce inequality within and among countries
11. Make cities and human settlements inclusive, safe, resilient and sustainable
12. Ensure sustainable consumption and production patterns
13. Take urgent action to combat climate change and its impacts
14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development

15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
17. Strengthen the means of implementation and revitalize the global partnership for sustainable development\*

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*“The role of law in seeking to marginalize the authoritative processes of economic regulation must become more responsible to a range of values broader than mere efficiency and the worship of natural law based market fundamentalism.”*

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## 15. Climate Change and the 17 UN Goals

The looming crisis of climate change has generated a stress on the importance of responsible economic development, that is to say sustainable development. Implicit in sustainable development is the notion that such development does not accelerate climate change and the risk to the entire eco-social system.

To destroy the ecosystem would clearly risk the survivability of humanity. The question of survivability implicates the entire International Bill of Rights. These challenges are stark and mandate new thinking. Such thinking minimally must include a new realism about a global economic context that is truly eco-social in scope. It must also include a scientific understanding of human social processes and power relations that are global in impact.

Finally the role of law in seeking to marginalize the authoritative processes of economic regulation must become more responsible to a range of values broader than mere efficiency and the worship of natural law based market fundamentalism. These matters implicate values of global eco-social scope and they provide challenges to deepening our understanding of vital choices that we must take to save humanity.

## 16. Human Rights Values and Eco-Social Responsibility as Guides to Global Choice

The new economic theory has its primary focus on the vital importance of human capital for a viable human-centered new economic theory. The foundation of this theory is rooted in socio-economic realism. Human beings are activated and energized to pursue desired values and compelling needs through human institutions sustained by human resources including law. What drives these human beings in their pursuit of values is the following:

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\*See Transforming our world: the 2030 Agenda for Sustainable Development, G.A. RES/70/1, UN Doc A/RES/70/1 (Sep 25 2015), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)

*“Society is a teeming ocean of human energies and capacities, unorganized but latent with unlimited productive potential. The organization of social energies and capacities converts social potential into Social Capital. Each member of society is a microcosm of human potential—an unorganized reservoir of energies, aspirations, and capacities. The organization of the energies and capacities of each member of society converts human potential into Human Capital. The formed Individual is the summit of social evolution where Human Capital and Social Capital intersect and become infinitely productive. The Individual is a product of the past evolution of society who internalizes its accumulated knowledge and capacities, attunes himself to the emerging aspirations and potentials of society, and applies his energies at critical points for personal accomplishment and collective progress. Thus, we find repeatedly in history that one individual can change the world.”<sup>11</sup>*

In short, human beings as central participators in social processes bring the energy of humans directed at the satisfaction of value needs, wants and desires. The values that human capital seeks to advance are the values encapsulated in the entire International Bill of Rights and implicit in the UN’s 17 Sustainable Development Goals. The specific values are values that are interdependent and they often inter-determine the range and efficacy of all other values. We list these values as follows: Power, Wealth, Respect, Health and Well-being, Skill, Rectitude, Affection, and Aesthetics.

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*“Unemployment is neither inevitable nor necessary.”*

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The responsibility of all in social process is to facilitate maximizing the production and fair distribution of all the values to secure the dignity worthy of the individual and the integrity of the earth-space system. If we consider the individual human being as a critical unit of human capital, then the production and distribution of values with a critical role for human capital is the best assurance of the development that will advance and defend the prosperity of the subjects of human capital.

The specific human rights dimension implicated in the role of human capital is the value of opportunity freedom and capability freedom. Without opportunity, human capital is depreciated. Without capability freedom, the potentials of human capital are diminished or obliterated.

In the context of current global economic order, the world community faces a crisis of radical inequality and a vast expansion of radical unemployment.\*

## 17. Unemployment

The central issue for conventional neoliberalism appears to be that unemployment is a necessary byproduct of generating higher profits in the commercial sector; it is natural and inevitable. What is ignored is that unemployment radically undermines the capacity of

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\* The appendix to these notes includes portions of an earlier article dealing with radical inequality and radical unemployment.

human beings to be energized and contribute to economic prosperity. What unemployment does is that it extinguishes opportunity freedoms and without opportunity freedoms, no capability freedoms can be exercised, thus guaranteeing a wastage of human energy. There are innumerable theories that show that unemployment can be eliminated by wise judicious policymaking with a concern for the full utilization of human capital. Unemployment is neither inevitable nor necessary.

If we conceptualize the right to employment and labor as encapsulated in the value of skill, it is possible to briefly map the way in which skill is a base of power for securing other articulate human rights values. For example, skill in terms of access to power is a base that is critical to the shaping and sharing of power. In this sense, skill is a critical value for protecting human rights interests tied up with the exercise of political power. Similarly, skill is an important base to acquire wealth and related economic values and is therefore critical for economic justice. Skill is also a base for access to education and enlightenment which are central to human development. Skill is also a base for access to health and well-being as well as to the institutions of social rectitude. Thus, employment rights including access and performance influence every other human rights value. Similarly, every other human rights value will influence the shaping and the sharing of labor and skill values. With this in mind, we examine the problem of full employment as a human right. It may be at the outset better to see this in terms of the political will and articulate ideology of the state and state responsibility. From this perspective it is self-evident that governments routinely intervene in matters that directly affect the economic status of the individual. Such interventions may well influence both quantity of employment opportunities available as well as the nature of these opportunities. Some obvious examples of governmental policy influencing these issues are its role in setting interest rates, its approach to budget deficits, the expansive or restrictive nature of its import and export policy, its tax policies, its military expenditure, its immigration policies, its approach to industrial development, its investment in the society, its licensing policies, its environmental regulations, and a good deal more. One illustration of the way in which an ostensibly neutral tax policy could influence employment patterns is the regulation that provides incentives for capital investment in the form of depreciation while providing disincentives to employment in the payroll tax. This suggests a partiality to investing in technology rather than labor.

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*“The right to employment may be seen as the critical foundation of economic democracy.”*

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To the extent that employment is one of the most important mechanisms for the allocation of purchasing power to the individual, the right to employment may be seen as the critical foundation of economic democracy. If society cannot assure the survival of all citizens through employment access, it may be that the state has a special obligation to provide employment opportunities for all. In short, the right to employment is not a privilege, it is a right. To the extent that economic survival is critically sustained by employment it could be argued that the right to employment has the character of a fundamental human right. The critical question then is: How strategically should the state act to secure this fundamental right to economic

survival? The International Commission on Peace and Food provided a report to the UN on this matter in 1994. Its principal point was that there had to be a universal affirmation of and commitment to the delivery of fundamental economic rights to all. According to the International Commission there should be an approach which recognizes:

*“.. [t]he right of every citizen to employment is the essential basis and the most effective strategy for generating the necessary political will to provide jobs for all. What is needed is not another job generation program, but a change in social values that will accelerate the natural and inevitable evolution of society, from one in which labor is regarded as a dispensable resource to one based on full human rights and the enormous productive potential of the human being. The type and magnitude of change needed today is comparable to that embodied in President Roosevelt’s New Deal for the American people during the Great Depression at a time when 25 percent of the work force was unemployed, to the Indian Government’s decision to launch the Green Revolution in the mid-1960s to achieve self-sufficiency in food grains at a time when the country was highly dependent on imported food to stave off famine, and to Mikhail Gorbachev’s initiatives late in the 1980s to end the Cold War and transform Soviet society.”<sup>12</sup>*

There are many skeptics in political circles as well as academic and scientific circles who genuinely believe that full employment is simply an unfeasible policy. It is very possible that this outlook has a corrosive effect which initiates this discourse with an assumption of futility. Thus, a critical part of initiating this dialogue is the assumption that a full employment society is a realistic prediction if there is a plausible and wide-spread acceptance of the necessity of this in economic terms as well as the importance of this commitment in juridical and moral terms. In this sense, more may be required to fully explore all the ramifications of the notion of employment itself. This could include not simply the market value of labor but other components of labor that deal with the very nature of human development. An approach is suggested in the Human Development Report of 1990 which stresses that a significant element of the dynamic of employment is embedded in the “capability approach.” This approach suggests that economic measures of labor value are insufficient. For example, a measure like the GDP may unintentionally distort our view of the critical value of employment to individual and social well-being. It may be that the notion of employment seen through the lens of capability would emphasize the production and distribution of freedom as a better indication of human value. According to the Human Development Report, “the basic objective of development is to create an enabling environment for people to enjoy long healthy and creative lives. This may appear to be simple truth but it is often forgotten in the immediate concern with accumulation of commodities and financial wealth.” Central to the capability approach is the insight that social and economic arrangements should have as a key objective the expansion of human capability. This includes the freedom to defend and enhance valuable activity. Central therefore to the emphasis on capability is the expansion of human freedom in the aggregate in the economic sector. It also permits a clearer link to the fundamental human rights standards which are now the foundation of modern social

organization. In short, what is central then to the human rights approach to employment is the recognition of “opportunity freedom” (capability) and “process freedom.” These freedoms are then cornerstones of the dynamic of employment both in terms of the conditions of access and performance. The challenge that a focused human rights approach generates is that it compels a discourse about the values which implicate human rights and are part of the culture of labor, skill and employment. This carries a further implication that these values must in turn provide compelling normative guidance for a newer approach to the problem of a commitment to full employment. It may be assumed that the current flavor of dominant economic policy is one that either tolerates or may even tacitly encourage unemployment as an economically efficient mechanism for stabilizing the market, and the dominant business values of self-interest behind it. This means that we must generate a change in the discourse of our values and then look toward a process of those changes being reflected in a wide framework of decision making at all levels for the promotion of full employment. This view is also taken by the International Commission as follows:

*“We must recognize that the present status and functioning of our economies is the result of specific choices that have been made in the past, based on priorities and values that were relevant or dominant at the time, but which we certainly are not obliged to live with indefinitely, and, in fact, are continuously in the process of discarding in favor of new values and priorities. The rapid adoption of environmentally-friendly policies around the world is positive proof of how quickly the rules, even economic rules, can change when there is a concerted will for a breakthrough.”<sup>13</sup>*

## **18. Inequality and the Neoliberal Aspects of the American Economy**

The most notorious fact about the American economy is that for decades we have experienced an inexorable drive to move the overwhelming majority of American citizens to the bottom of the economic system. In short, the expansion of inequality has been an extraordinary fact of the politically inspired economic policies of the neoliberal economists. Radical inequality has the consequence of diminishing opportunity freedoms, thus undermining human capital. By undermining opportunity freedoms, we correspondingly undermine capability freedoms, which further diminishes the value of a human capital economy.

*“The success and the genius of American civilization has been its belief in human capacity and the critical importance of human resources for national prosperity.”<sup>14</sup>*

Let us start at the top. Reputable economists tell us that one percent of the American population takes one quarter of the its income. One percent of the American population controls forty percent of the nation’s wealth. One percent of the American population has seen their incomes rise by over eighteen percent. The central political question is whether this kind of outcome is desirable and in the national interest of the United States. If this is desirable, is there a sound reason to justify it? There have been marginal economic theories

which suggest that the one percent who have benefited so mightily are simply better than the rest of the nation. Many people whom we consider talented and who have made enormous contributions and inventions to modern society have not necessarily benefited from this. The financial wizards who almost destroyed the United States' economy were in fact rewarded with performance bonuses. Although to their credit, they saw the irony in this and changed the label to retention bonuses. Meanwhile, those at the bottom of the economic ladder were not candidates for any form of retention. They were candidates for pink slips. One of the assumptions of neoliberal economists is that if there exists a bigger economic pie there will be more to go around. Unfortunately, the arithmetic is the other way around. The bigger the pie, the less the American citizens share in its bounty. It would seem that American economic growth is essentially a growth that is downwards in the direction of inequality. This means there exists an exponential growth in lost opportunity for the American people. The extinction of opportunity for the people is a major social and economic loss because the success and the genius of American civilization has been its belief in human capacity and the critical importance of human resources for national prosperity.<sup>15</sup> This means that when we depreciate human resources we are attacking the recipe, which is at the heart of American genius. There is of course enough blame here for everyone. However, I think most of the blame must lie with the neoliberal apologists. They have historically been the most frenetic defenders of economic monopoly. Additionally, they have been successful in hijacking rational tax policy debate. No new taxes means that the weaker members of the body politic still pay while the special interests, which fund the neoliberals, the well-healed financial oligarchs prevail with outrageous tax holidays. Indeed, a recent survey about the fairness of the tax system showed only twelve percent believing it was fair and eighty eight percent believing it was unfair.

The consequence of these outrageous benefits to those who already have an excess of resources is that they also promote the idea that national investment in education and human resources, investment in technical innovation and sound infrastructure is a waste of scarce resources. Their version of appropriate national incentives is driven by an intense desire to discourage investment in the future based on basic research and the central importance of our transportation and infrastructure system. Essentially, neoliberal policies have hugely empowered the financial oligarchs while undermining the participation of the overwhelming majority of citizen stakeholders in the process. They promote no version of a national common interest and see only the vista of narrow special selfish interests. Greed is king. They attack labor unions, promote the replacement of labor with technology and export jobs abroad because foreign labor is cheap. American labor is a liability. It is too expensive for the oligarchs. Hence, their mantra about jobs is "send jobs abroad." The government is the problem, is the enemy because it is the critical restraint on the unfettered power of economic oligarchs. Now the present agenda appears to be clearer: do what we need to do to keep our wealth and get more of it. Demonize the government as a moderator between extremism and the people; extinguish the opposition such as the labor unions and the independent media and most critical of all, no taxes on the rich. Probably the most impressive victory of the financial oligarchs was their promotion of the economic theories of neoliberalism. The center point of this approach was to oppose any and all government regulation.

The great success was the deregulation of the financial sector. With the financial benefits, which they acquired through a non-regulatory state, they could use their bounty of wealth as a base of power to control a good deal of law making, and they did. Their successes have permitted a huge scale of financial manipulation in a no-financial rules context—the context they in effect purchased. This was a good financial investment. After the *Citizens United* case, a major Supreme Court blunder, the corporate sector could now begin the process of purchasing the government without spending limits. In short, the Supreme Court solidified the nexus between wealth concentration and its capacity to control the government in an almost complete form. One illustration of many will suffice. Big Pharma was able to squeeze a trillion dollar boondoggle out of the government by the neoliberal drive to block the government from bargaining with Pharma about the price of drugs. The neoliberals have their eyes on other temptations such as Medicare, Medicaid Security. What is it that drives the neoliberals to destroy highly popular social safety nets? The answer to the above question is to be found in the longstanding neoliberal nightmare called the New Deal. The New Deal produced popular policies and its political success was reflected in Roosevelt being elected four times. After his death neoliberals considered that the New Deal was popular and an important base of power for the Democrats. The problem they confronted was that the New Deal programs were popular and could not be directly attacked. Their agenda focused on foreign fears and anti-communism. However, the lingering fear of New Deal institutions was finally frontally assaulted by the brilliant Ronald Reagan. The critical neoliberal strategy would now be to run up huge deficits so that there would be no funds to pay for New Deal programs. Moreover, if the Democrats came back to power, they would find that there is no money in the state bank to fund their programs. So fiscal conservatives ran up huge deficits, and borrowed billions, which they could now distribute as governmental socialism to neoliberal business and defense interests. This left us with a deficit nightmare and a mighty recession. With a great deal of political amnesia neoliberals now proclaim the morality of living within our economic means. You cannot spend funds if your bank account has no funds in it. They are the architects of this approach and the creators of the monumental deficit. Few heard from the deficit hawks during the Bush spending spree, fueled with money borrowed from China. We still do not hear the neoliberals willing to acknowledge their budgetary scam. Meanwhile, the United States is in a spiral towards radical inequality and there is a diminishing of our national values. Perhaps national economic oligarchs should be reminded of the wisdom of Alexis de Tocqueville who saw the key idea behind the American genius as “self-interest properly understood.” By this he meant that by taking care of your own self-interests you simultaneously express a concern for the other person’s self-interest as well.

There is strong popular endorsement of economic neoliberalism. A change here could have global implications for the evolution of a political economy whose foundations are rooted in human capital and human rights. It should be noted that President Roosevelt insisted that economic deprivation meant the extinction of human liberty.

President Roosevelt commissioned a draft of fundamental economic rights. This was precocious and came long before we had the foundations of an economic bill of rights at the global level. Certainly, the rights indicated in this draft are rights that could be adopted and amplified to meet the current needs for fully utilizing human capital on a global basis:

- The right to work, usefully and creatively through the productive years;
- The right to fair play, adequate to command the necessities and amenities of life in exchange for work, ideas, thrift and other socially valuable services;
- The right to adequate food, clothing, shelter and medical care;
- The right to security, with freedom from fear of old age, want, dependency, sickness, unemployment and accident; The right to live in a system of free enterprise, free from compulsory labor, irresponsible state power, arbitrary public authority and unregulated monopolies;
- The right to come and go, to speak or to be silent, free from the spying of secret political police;
- The right to equality before the law, with equal access to justice in fact;
- The right to education, for work, for citizenship and for personal growth and happiness; and
- The right to rest, recreation and adventure, the opportunity to enjoy life and take part in advancing civilization.

## 19. Neoliberalism and Global Inequality

A recent report from Oxfam indicates that eight of the world's richest men own as much of the world's wealth as 3.6 billion people.<sup>16</sup> Oxfam maintains that the gap between the super rich and the very poor is far greater than it was a year ago. Very few of the apologists for neoliberalism consider this a matter of global importance. But Oxfam believes that this crisis of inequality will be the harbinger of seismic political changes. According to Oxfam, "it is obscene for so much wealth to be in the hands of so few when one out of ten people survive on less than two dollars per day." Also "inequality is trapping hundreds of millions of people in poverty, it is fracturing our societies and undermining our democracies." Oxfam has relied on information from the Swiss bank, Credit Suisse. Indeed, they also used the Forbes list to determine that Bill Gates, the Microsoft founder, is the richest individual in the world, worth 75 billion dollars. Others in this league include Amancio Ortega, Warren Buffet, Carlos Slim, Jeff Bezos, Mark Zuckerberg, Larry Ellison, and Michael Bloomberg, former mayor of New York. It should be noted that Gates has called upon the billionaire class to pay their taxes. The Oxfam reports suggest that such rampant inequality erodes trust in the basic institutions of global financial governance.

*"The implications of the global trust crisis are deep and wide-ranging. It began with the Great Recession of 2008, but like the second and third waves of a tsunami, globalization and technological change have further weakened people's trust in global institutions. The consequence is virulent populism and nationalism as the mass population has taken control away from the elites."\**

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\* Ibid.

## 20. Towards Theoretical and Methodological Foundations of NET

The new economic theory requires a comprehensive focus that does the following:

1. The focus must transcend narrow disciplinary boundaries.
2. The focus must be interrelated, interdependent and defy solution by partial, sectoral approaches.
3. The focus must be eco-social and global in scope and cannot be fully addressed without coordinated actions of international society.
4. Recognition that a multitude of approaches resolving these issues and challenges are subject to conflicting claims, priorities and interests.
5. These ideas and those that follow although somewhat different are overall compatible with those supported by the Nobel prize winning economist Joseph Stiglitz, *Globalization and Its Discontents* (2002).<sup>17</sup> He suggests an important role for NET lawyer economists.

The importance of new economic thinking is that the problems are often interrelated with larger society values and interests. Economics, for example, cannot be isolated from political power or the value of respect, or issues of health and well-being, or issues of skill, positive sentiment, or morality and rectitude. The following is a partial listing crying out for new paradigm thinking:

1. Economy and Employment: How can global food security, full employment, and abolition of poverty be achieved within a decade?
2. Energy and Ecology: How can global living standards be raised to middle class levels without depleting or destroying the environment or depriving future generations of the capacity to sustain these achievements?
3. Human Capital, Education, Health and Welfare: How can global levels of education and public health be raised to OECD level?
4. Money and Finance: How can the necessary financial resources be generated and mobilized to achieve the goals described in the first three questions?
5. Security: How can we permanently eliminate war and WMD that threaten to destroy all other development achievements?
6. Global Power and Governance: How can we design and implement systems of global governance capable of implementing necessary measures to achieve the other five goals for the welfare and well-being of all?

The necessary elements for new paradigm thinking must include the following:

1. It must be contextual, i.e., it must perceive all features of the social process of immediate concern in relation to the manifold events comprising the relevant whole.

2. It must be problem-oriented.
3. It must be multi-method.
4. It must be interdisciplinary with a focus on the dynamics of global interdependence and global inter-determination.
5. It must be guided by the normative values of the Global Bill of Rights.

## **21. The Context of Ecological Values**

There was a time when the conventional wisdom in economics was that nature and related environmental resources were unlimited. Today, the reality of climate change challenges this earlier level of idealism. A new economics must consider both the potentials and the limits of the ecology of the planet. The ecology of the planet, therefore, is a crucial factor of context for a new political economy. This must be understood in terms of the creative capacity of human capital.

## **22. The Context of Global Social Interaction**

Global social interaction involves the shaping and sharing of all values. The outcomes of this process generate the aggregate statistics of human development or the lack of human development. One of the most important problems that emerges from global social interaction is the problem of effective power and social conflict. However, the new economic theory must have a useable model of the global social process in order to fully appreciate the problems it generates on a global basis for all values. This process raises the important issue of the role of law and its institutions in facilitating the evolution and development of human capital as a positive global resource.

## **23. The Context of the Global Process of Effective Power**

The global social process reproduces the institutions and imperfections of the production and distribution of global power. It is well understood that the outcomes of global power represent conflict and competition. Additionally, the expression of global power in society is done through the process of decision-making itself. We can call this decision-making according to naked power. Since power expresses itself in terms of conflict, war and often violence, it will be obvious that peace and security are critical foundations for a social process that seeks to maximize its human capital resources. In short, war consumes human capital resources, and does not enhance or reproduce them. The new economic theory must, therefore, account for the global processes that generate and sustain human conflict, since these processes generate deficits in development.

Stiglitz has suggested that the entire law and economics profession is a special interest group for the plutocracy and they have done this by fierce advocacy targeting rational state policy and regulation. This suggests that progressive law and economics lawyers should contest the negative professional class and they should vigorously assert the value of a rule of law based constitutional order based on social realism and human rights values. The strength

of this perspective should be based on the authority of the people as a whole, sustaining a new constitutional order based on the authority and human capital of the people itself. This would seem to be the surest way to evolve creative value based institutions to affirm human progress and to avoid human tragedy. Providing markets the license to run amok has been a global disaster. Clearly the challenge of economic globalization is a challenge for progressive lawyers and their allies to design more enduring and promising patterns of international infrastructure to save capitalism from itself. Enrique Carrasco insists that scholarship in law and economics now addresses economic globalization taking broader factors into account like distributive justice, human rights, social and constitutional development. Stiglitz and others insist that dysfunctional global economics provides a serious challenge for lawyers as economic, political, and social engineers to provide a more effective international economic structure to salvage capitalism.

## **24. The Context of the Evolution of Power into Behavioral & Documentary Constitutional Processes**

Conflicts about power do not always endure indefinitely. Indeed, there are periods when the power broker contestants in conflict may see that the continuance of conflict may only result in zero sum losses. This realization may generate the elements of inter-elite collaboration from which understandings may emerge about how to manage power in ways that avoid conflict and promote collaboration. If this happens, a society may emerge with a series of understandings about how power is to be distributed, indeed allocated among the power broker contestants. This level of institutionalization of power will reflect the emergence of the power dynamics constrained by distributions, which have the support of the authority of community members. When there is a form of constitutional process, we effectually have expectations about institutionalizing the forms of authorized decisions about decision-making itself. This is the foundation for the establishment of a system of public order in which all the values are distributed and produced via the authorized institutions of society.

It would, therefore, be appropriate that the new economic theory develop and map the constitutive process (local to global) because it provides the framework of authorized decision-making regarding all the basic values in society including wealth. In this sense, a constitutional order that has a working capacity has an approximation to the idea of the rule of law. And the constitutive process is made operative by the constitutive functions of decision-making. Thus, constitutive decision-making may both directly and indirectly influence development and progress. Additionally, a theory of economic novelty would have to account for the decision-making functions.

## **25. The Functions of Decision-making Relevant to a New Economic Paradigm**

The architecture and functions of decision-making listed below apply to all value processes, which are demanded in a dynamic global social process.

1. Intelligence. Intelligence, which includes gathering information relevant to making decisions and its processing, storage, retrieval, and distribution to all participators performing decision functions.
2. Promotion. The decision-making function of promotion requires agitation and recommendation of certain policies, which in the form of prescription have the quality of law. In this sense, promotion is a critical component in decision for directly changing the common interest. It is in this sense that we cannot look at economics as value-free.
3. Prescription. This decision function implicates the formulation and adoption of certain policies as authoritative pronouncements in appropriate sectors of the social process.
4. Invocation. This function of decision-making is essentially a provisional decision function that characterizes behavior as incompatible with the law and goals of the community. Those who perform the invocation function raise the question of what initiatives enhance or violate community prescriptions.
5. Application. This is the authoritative characterization of conduct as lawful or unlawful. To secure lawful ends, the applier must use tools of some form of sanction to secure appropriate application. In terms of the objectives of development, the consequences of development may be critically related to the actual applicative performance. The new economic initiative must, therefore, give careful attention to the idea of application if development goals are to be real.
6. Termination. The decision function of termination means the termination of something in the status quo and its replacement by something that changes the status quo. New economic theory must ensure the termination of dysfunctional traditional standards and embrace new thinking.
7. Appraisal. The theory of decision-making as applied to economic policy requires that there be constant measures that may be appraised in terms of advancing toward progressive economic goals and avoiding the regression to the opposite.

## **26. Decision-making Challenges for Value Processes**

For us to develop an approach that permits us to identify where we are and where we want to go, we would have to measure development in terms of the existent state and potentials for transformation of at least the following nine values: power, wealth, enlightenment, skill, well-being, affection, respect, rectitude and aesthetics.

1. Power. The most important expression of power as decision is the understanding of the institution within which it expresses itself. For example, globally, power is significantly decentralized. This means an economic paradigm of global salience runs into the problem of the degree of lack of institutionalization of power. It is probably true that the most power-deprived are the least well-off in global society. The new theory must be able to map global power and to appreciate its capacity to be mobilized for rational developmental objectives.

2. **Wealth.** In general, this refers to the aggregate volume and composition of what a society produces. It may refer to income in the community and also to the notion of an aggregate resource base. In general, when wealth is developed, the outcome is an increase in the volume and composition of products without depleting the resource base.  $(P+I) \div R$
3. **Enlightenment.** What we mean by enlightenment is the prescription and application of education in social and economic development. The nature of enlightenment as social capital is evident when education in a society leads to development. A society with an increased education-knowledge base uses enlightenment to extend development through informed decision-making. Decision-makers would make decisions based on informed enlightenment.
4. **Well-being.** Well-being including health refers to the state or condition of a society and its members. The well-being of a society is directly proportional to the level of “life expectancy” and indirectly proportional to the expectancy of disease occurrence in that society. The optimum level of well-being, however, is dependent on other values in that society.
5. **Skill.** Skill is the ability to perform tasks (especially employment or professional tasks), as a function of human capital development. The skill value is for the benefit of society. Skill development is a consequence of an increase in the strength of the “skill pool” in a society where skills are directed towards development. Skill is a critical component of individual and social capital.
6. **Affection.** Affection is a form of positive sentiment and underlines the loyalty of individuals and associations to the group. Being a basic value, it has tremendous social capital. The increase in scope of positive sentiments in a society increases developmental achievements and goals.
7. **Respect.** Showing regard for other individuals within a society is crucial to development. A lack of respect gives rise to discrimination, which in turn becomes a direct cause of retarded development.
8. **Rectitude.** Rectitude drives moral behavior in society. When the rectitude of individuals within a society matches its development goals, there emerges what we call rectitude development.
9. **Aesthetics.** Aesthetics is rooted in human creativity and in human creative capacity. A culture of strong aesthetics will inspire economic development objectives.

## **27. The Jurisprudence of Economic Neoliberalism**

Since we stressed the vital importance of the human agents of choice at all levels of our eco-social process, it would be worth while to have a better understanding of the jurisprudence that animates and justifies neoliberalism and that segment of legal culture that seeks to justify and cement its presence.

In the early nineteenth century law, just like economics, became influenced by the philosophy of science known as positivism. To make economics a science meant a reduction in the context of accounting for values, ethics, and morality. Science was searching for an objective theory of economics, uncontaminated by the subjectivity of normative value analysis. This philosophy also influenced law. It gave birth to the conventional theory of law as the command of a sovereign imposed by a sanction administered by the sovereign. This approach radically distinguished between law properly so-called and morality.

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*“Science was searching for an objective theory of economics, uncontaminated by the subjectivity of normative value analysis. This philosophy also influenced law.”*

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Positivism influenced the US strongly in the latter part of the nineteenth century. The clearest expression of the American version of the objectivity of law and its separation from morality came from Oliver Wendell Holmes of the US Supreme Court. He had, in seeking to purge morality and its contamination of objective law, suggested that the most important way to look at law was to look at it from the point of view of the “bad man”. The “bad man” is the starting point. When he consults his lawyer, he is moved by self-interest. If he has made a deal and he wants to get out of the deal he is completely uninterested in the morality of deal making. He wants to know what is the cost of breach. In this sense, the “bad man”, who is essentially an economic operator, is moved by one important interest and that is self-interest. In short, the only question the bad man wants to answer is, what is the risk that I might get away with? The bad man therefore is essentially a businessman whose exclusive objective is to maximize self-interest. This is what law should be about as well.

Alexis de Tocqueville suggested that in American culture self-interest should be more cautiously understood. Self-interest has to include the interest of the self and the public interest. However, this latter interest appears not to be a part of the neoliberal project.<sup>18</sup>

The consequence has been that generations of lawyers are trained to serve as the “bad men”. They service tax avoidance. They service the defense of corporate monopoly. They service deregulation. They service the absolute sense of property, the non-regulation of the market, including financial markets, and they furnish and socially engineer a legal architecture to reinforce self interest, greed and a depreciation of the public interest concerns of the profession. The recently proposed budget is an indication of this trend. To gut the American government and the administrative apparatus that ensures leadership in the world can hardly be seen as ‘making America great again.’ In fact, a radical weakening of the federal government cannot conceivably be in the public interest. Only few powers would support this achievement.

The effort to destroy the regulatory apparatus of American government has been supported by the creation of a powerful legal constituency: the law and economics movement bent on a destruction of the juridical economic and political foundations of the New Deal state and its

offshoot, the modern social democratic state. The challenge here is to reassert the primacy of the constitutional foundations of the social democratic state and to engineer the institutions and architecture for the purpose of globalizing this effort. A new generation of lawyers is required for this.

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*“Franklin Delano Roosevelt acknowledged that the unregulated aspect of the market was in fact not the product of metaphysical forces but the product of practical human choices. If choice could make the mess, then choice could unmake the mess.”*

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## **28. The Social Democratic Constitution in Distress, the Threat of Plutocracy**

In this part of the paper we provide a summary of the principal threat to the United States’ social democratic constitution, a threat fueled by economic neoliberalism and sustained by such constituencies as the Federalist Society and the law and economics movement.

Recently, the Principal Advisor to President Trump, Steve Bannon, told a reactionary audience that the prime objective in terms of policy-making for this administration was the complete demolition of the so-called ‘administrative state.’ The implications of this directive are quite far-reaching because the substantial removal of the administrative architecture of the social democratic constitutional state will effectually result in the collapse of the constitution itself. Let us put this in historical perspective.\* At the turn of the last century President Theodore Roosevelt began to see the threat posed to the Federal Union and American democracy by the emergence of oligarchic business trends. He saw the threat to our constitution and its democratic principles as coming from the emergence of large scale corporate monopolies. If this were to be unchallenged, the Constitution would come under the influence and political control of an unelected plutocracy. In his time, he saw plutocracy as the greatest threat to American values.

In 1929 we had the Great Depression. Plutocratic interest was able to cement itself via the Supreme Court ruling in *Lochner v. New York*<sup>19</sup>, which made private property a fundamental and nearly unchallenged constitutional right. The unregulated free market economy, protected by the elevation of private property to near absolute status, resulted in forms of egregious speculation, which resulted in capitalism consuming itself.

When Franklin Delano Roosevelt was elected in the early 1930s, he acknowledged that the unregulated aspect of the market was in fact not the product of metaphysical forces but the product of practical human choices. If choice could make the mess, then choice could unmake the mess. Roosevelt faced incredible resistance to any form of regulatory measures to salvage capitalism from itself.

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\* The strategy of the current White House in weakening the alleged “deep state” may have profound consequences for the future of American Democracy.  
<https://www.foreignaffairs.com/articles/2017-08-15/trump-and-deep-state>

However, the *Lochner* case and the Supreme Court succeeded in overturning over 200 efforts at regulating various aspects of the economy. The result was that the plutocratic elite had learned nothing from capitalistic cannibalism and were now going to destroy the emerging New Deal state which sought to save capitalism from itself.

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*“The impact of neoliberal unregulated economic policy in the US and globally represents an astonishing crisis of global and national unemployment and a significant accentuation of radical inequality.”*

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When the composition of the Supreme Court changed, important New Deal initiatives emerged to stabilize and improve the American economy. These developments received enormous support as a consequence of World War II. The necessity of national security compelled the plutocrats and the government to work through a collaborative economic partnership, which benefitted capital, labor, government and the American people. The problem Theodore Roosevelt faced about oligarchic tendencies was moderated by the army of lawyers generated in Ivy League schools who were trained to challenge the scope and reach of antitrust law. These and other factors permitted a slower but important accretion of economic monopoly.

The University of Chicago and its economic department promoted a revived theory of a non-regulatory economic system. Milton Friedman argued that the Great Depression was not a flawed free market but a flawed system of governmental liquidity. From these developments there emerged a new normal for political economy, loosely styled ‘neoliberalism.’ According to neoliberals, the Stalinist state, which extinguished private property, was an almost complete extinction of human freedom. The regulatory initiatives of the social democratic state was a creeping form of state control and a creeping form of the denial of human freedom. Fundamental to neoliberalism was the idea that any aspect of value which could be privatized should be privatized, and, in privatized form, such value should be protected from governmental interference by the emergence of an absolutist jurisprudential protection of private property.

The weakening of financial regulation led to a massive collapse of the financial underpinnings of the world economy. Deregulation seemed not to learn much from 1929.

The evidence of the impact of neoliberal unregulated economic policy in the US and globally represents an astonishing crisis of global and national unemployment and a significant accentuation of radical inequality. Notwithstanding, Trump has already made it an objective to repeal vital regulatory standards for the financial markets. In short, the prospect of accentuated unemployment and inequality from an unregulated state looms large in the future of the world community. What is important to note here is that, at the intellectual level, the law and economics movement has made it an explicit objective to destroy the New

Deal state. They have done this by the ferocious attacks on all forms of state regulation in virtually every sphere of life. Additionally, they vigorously assert the idea that a regulatory state can rarely include rational regulation and, as a consequence, it is a destroyer of freedom. In the meanwhile, the evidence of the non-regulatory state accentuates radical inequality and extended unemployment.

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*“Without a constructive role for lawyers in the global economic process, we are doomed to repeat the failures of flawed market theory and the commitment to myopic, narrowly formulated principles of economic efficiency.”*

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The current challenge for Trump is whether he can deliver a better form of health care which is left purely to the market and which excludes as much regulation as possible. American people see this as Trump searching for a black cat in a dark hole that is not there. At the same time, the real agenda has now been made explicit: the elimination of the administrative state is the elimination of the architecture of constitutional social democracy. The elimination of constitutional social democracy will leave the American people in a legal and political void. In this void, it is the plutocrats who will rule without restraints of the rule of law. In short, the approach of current leaders seems to be in the direction of government of the plutocracy, for the plutocracy, by the plutocracy.

Simultaneously, we have the looming Russian scandal. In Russia, we have a form of governance by, of and for the oligarchy. In this context, there are no real Russian state interests, there are the interests of the oligarchy represented by the chief oligarch. In the US, the struggle to destroy the administrative state challenged basic values that are irrelevant to the plutocracy. It seems that in the future, if greedy leaders succeed, there will be no foreign policy representing state interests and values, there will be plutocratic and oligarchical interests done with a handshake and a wink. In this sense, the only conflicts between Russia and the US are the plutocratic and oligarchic interests and not the broader framework of values of the social democratic constitution and the UN Charter. If self-serving interests win in destroying the social democratic state, we must be prepared for governance that sidelines ethics and morality and we will join the Russian oligarchs in representing a form of international influence also devoid of ethics or morality. This would imply a farewell to the most fundamental values of governance and accountability. Indeed, the demise of the Bill of Rights and human rights in general.

## 29. Conclusion

This paper has tried to stress that, without a constructive role for lawyers in the global economic process, we are doomed to repeat the failures of flawed market theory and the commitment to myopic, narrowly formulated principles of economic efficiency. Law thus far, has served to provide effective advocacy and flawed scholarship to sustain market

fundamentalist myth. Here it would be useful to record the support of Stiglitz to repudiate this short-sighted professional blunder. According to Stiglitz, “Basically, the call is to restructure the legal and regulatory foundation of globalization to better reflect the teachings of economic science as opposed to free market ideology. Institutions need to be structured and to be more democratic and more resistant to special interest influences. Constituencies that have little power or voice in globalization need to be heard to assure a more nuanced, culturally sensitive and politically sustainable set of globalization policies. States that are exposed to full globalization must have adequate social, physical, and regulatory infrastructure in place to allow markets to thrive to the maximum extent possible. Most importantly, the world appears to be woefully under-educating its human resources.” This last point stresses the salience of human capital, the importance of education in cultivating human capital and the tragic losses to humanity by educational policies that conspire to under-educate them as a condition of fictitious market efficiency.

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