

Reclaiming the Commons: Law, Rhetoric, and C.S. Peirce's Pragmatic Philosophy

by

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This dissertation provides a pragmatic legal framework based on the rhetorical theory and philosophy of C.S. Peirce. It then analyses lower level judicial opinions that have come out of four contemporary movements for economic justice: Occupy Wall Street, Climate, Reparations, and Labor. Throughout, it identifies rhetorical arguments for reclaiming the commons from privatization.

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For my parents

يا على

1.0 C.S. Peirce's Pragmatic Philosophy

Published in 1988, Roberta Kevelson's *The Law as a System of Signs* was the first attempt to bring C.S. Peirce to legal studies. Although by many accounts the rightful founder of American pragmatism, Peirce is usually better known as a philosopher and a scientist. During his lifetime, he wrote thousands of manuscripts, published and unpublished, on such wide-ranging topics as the philosophy of mind, mathematics, and cosmology. Peirce's life was marked by impressive intellectual contributions despite long periods of inactivity due to a painful neurological illness he had inherited from his father, the famous mathematician Benjamin Peirce, as well as drug addiction, reckless gambling, and difficulty working with others.¹ Mid-life, he was forced to leave a promising academic post at Johns Hopkins and eventually became a recluse in Milford, Pennsylvania, supporting himself by editing dictionaries and accepting money from his friend William James, whose version of pragmatism he virulently insulted in a rare public appearance a few years before his death. Since much of his thinking was done in isolation, often without the benefit of a community who would help make his work intelligible, Peirce's oeuvre is scattered, unwieldy, and at times even incoherent. With Peirce perhaps even more so than with other philosophers, it is necessary to keep vigilant when selecting which manuscripts to rely on. At the same time, however, Peirce was a special kind of pragmatist and philosopher, one who was uniquely attuned to the importance of language and communication in our practical affairs. This, as well as his irreverence and willingness to think on a cosmological

¹ Joseph Brent, *Charles Sanders Peirce: A Life* (Bloomington: Indiana University Press, 1993).

scale, make reading his work a worthwhile adventure, especially for those of us trying to find new ways of addressing social and economic injustice.

This dissertation addresses a big and almost unanswerable question – what is justice? – by beginning with Peirce and the pragmatic tradition in the late 1860s, in the middle of what he would later come to call the ‘Economical Century.’ Peirce had just joined the Metaphysical Club, a group of prominent Boston intellectuals that met to discuss “the very tallest and broadest questions”² which was comprised of three lawyers, Oliver Wendell Holmes, Nicholas St. John Green, and Joseph Warner, and three experimental scientists, Peirce, William James, and Chauncey Wright.³ The group’s discussions often centered around Charles Darwin’s *The Origin of Species*, which had just been published, as well as pragmatism, a doctrine that Peirce formulated in a paper he read to the group in November 1872.⁴ Admittedly, Peirce was a Boston Brahmin with neither expertise nor interest in law or justice, and most likely, his contributions to the discussion were largely unrelated to those subjects. At that point in his life, he had just finished a stern course in philosophy under the close instruction of his disciplinarian father, and he was just about to begin his own gravimetric experiments as a scientist at the U.S. Coastal Survey. Yet as the Peircean scholar Max Fisch carefully remarks in a footnote to an article about the origins of Oliver Wendell Holmes’s then developing theory of law, Holmes’s collectivist standard of truth “read like echoes of Peirce’s conversation.”⁵ Oliver Wendell Holmes would go on to become the most influential Supreme Court jurist in U.S. legal history, and although he

² M.H. Fisch citing William James, “Justice Holmes, The Prediction Theory of Law, and Pragmatism,” *The Journal of Philosophy* 39 no. 4 (1942): 88.

³ Fisch, “Justice Holmes, The Prediction Theory of Law, and Pragmatism,” 88.

⁴ Fisch, 92.

⁵ Fisch, 96.

never read any of Peirce's work until after he had formulated his own legal pragmatism well after the Club had disbanded,⁶ there are clear affinities between the two thinkers.

At the heart of Peirce's pragmatic philosophy was the rejection of what in "The Rules of Philosophy" he labels "Cartesianism," a worldview that begins with universal doubt, maintains that an individual can find certainty based on private inference, and that when that individual comes to things they can't understand, it is explanation enough to conclude that "God makes them so."⁷ For Peirce, we always have a moral responsibility to reason well, to "to find out, from the consideration of what we already know, something else which we do not know,"⁸ and to do our part to clear up common sense, which in its nascent form, he laments is often susceptible to having a "bad logical quality."⁹ Instead of beginning with doubt, he recommended that we begin with "all the prejudices which we actually have"¹⁰ and then proceed to adjust our beliefs in a never-ending process of collective inquiry. Peirce disliked the philosophical temperament that wants to excise everything that is vague and not fully formed and tries to reduce our reasoning to well-worn syllogisms. Instead, he appreciated all of the grey areas in the investigative process, and he was sensitive to our emotions, our dispositions, and our attitudes. In "The Fixation of Belief," he defined how belief is that which disposes us to action, in his words, it "puts us into such a condition that we shall behave in a certain way, when the occasion arises,"¹¹ and he went

⁶ Fisch, 96.

⁷ C.S. Peirce, "The Rules of Philosophy," in *Chance, Love, Logic* ed. Morris R. Cohen (New York: Harcourt, Brace, and Company, 1923), 1.

⁸ Peirce, "The Rules of Philosophy," 10-11.

⁹ C.S. Peirce, "The Fixation of Belief," in *Chance, Love, Logic* ed. Morris R. Cohen (New York: Harcourt, Brace, and Company, 1923), 14.

¹⁰ Peirce, "The Rules of Philosophy," 2.

¹¹ Peirce, "The Fixation of Belief," 15.

on to provide a general guide to what he would consider three inferior methods people use to fix their beliefs when they really start to doubt (“the weighty and noble metal itself, and no counterfeit nor paper substitute”¹²). First, there are those who reject the investigative process altogether, and “turn with contempt and hatred from anything which might disturb.”¹³ These people use what he calls “the method of tenacity,” and they “go through life systematically keeping out of view all that might cause a change.”¹⁴ Second, there are those who use the “method of authority,” which we see in what he calls the most “priest-ridden states,”¹⁵ and they learn to “regard private and unusual opinions with horror.”¹⁶ Beliefs remain fixed when people defer to authority, and it creates a situation where those who hold power proceed to “keep correct doctrines before the attention of the people, to reiterate them perpetually, and to teach them to the young, having at the same time power to prevent contrary doctrines from being taught, advocated, or expressed.”¹⁷ Ultimately, however, both of these methods fail. People will see that people “in other countries and in other ages have held to very different doctrines from those which they themselves have been brought up to believe.” Eventually, “the willful adherence to a belief, and the arbitrary forcing of it upon others, must, therefore, both be given up and a new method of settling opinions must be adopted.”¹⁸ Others turn to what they find “agreeable to reason,”¹⁹ the a priori method, which Peirce likens to the development of taste, and since “taste,

¹² C.S. Peirce, “Issues of Pragmaticism,” in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998), 353.

¹³ Peirce, “The Fixation of Belief,” 18.

¹⁴ Peirce, 19.

¹⁵ Peirce, 22.

¹⁶ Peirce, 20.

¹⁷ Peirce, 23.

¹⁸ Peirce, 23.

¹⁹ Peirce, 23.

unfortunately, is always more or less a matter of fashion,”²⁰ he goes on to recommend his experimental method as the best way of arriving at the provisional truth, which in this essay, he defines as the “settling [of] opinions” toward which belief consistently aims.²¹ This essay was the inauguration of his elaborated pragmatic method, which he then went on to describe in a series of articles for the *Popular Science Monthly* beginning in 1878, portions of which I will return to below.

Much like Peirce, Oliver Wendell Holmes also rejected the idea that there could ever be an individual standard for truth or that we should blindly submit to the authority of anyone, especially judges. Holmes based his legal theory on the rejection of the philosopher John Austin’s idea that the “law is the will of the sovereign.”²² Instead of deferring to private, internal standards, he maintained that lawmaking should be based on more objective, external standards, and that more specifically, law should evolve according to the community’s changing beliefs.²³ In principle, he reckoned that the judge was already a member of the community, and even if it were somehow possible for him to dissociate himself, he contended that “the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community.”²⁴ This was Holmes’s and Peirce’s radical inheritance from their time together in the Metaphysical Club. They set themselves apart from other 19th century thinkers by rejecting the Darwinian notion that the individual came before the rest of society.²⁵ For Peirce, truth was

²⁰ Peirce, 24.

²¹ Peirce, 23.

²² Susan Haack citing John Austin, “Pragmatism, Law, and Morality: the Lessons of Buck v. Bell,” *European Journal of Pragmatism and American Philosophy* 3 no. 2 (2011): 3.

²³ P. Holmes, “Holmes, Peirce, and Legal Pragmatism,” *The Yale Law Journal* 84 no. 5 (1975): 1129.

²⁴ P. Holmes, “Holmes, Peirce, and Legal Pragmatism,” 1135.

²⁵ P. Holmes, 1139.

based on the never-ending process of settling belief in a scientific community over the long term; for Holmes, justice was based on the idea that the law would eventually approach consistency as old precedents were swept away by changing circumstances and aligned more and more with the community's values.²⁶

In his famous speech "The Path of the Law," Holmes delivered what is considered the gospel of legal realism at the dedication of a new building at the Boston University School of Law in January 1897. Legal realism was a jurisprudential movement that emerged between 1875 and 1935 that challenged foundationalist theories of truth. Its adherents aimed to replace the conservative jurists, who were looking for a way to interpret the law such that "in its absolute purity" it would be freed from "all entangling alliances with human life,"²⁷ and defended laws that were based on developing truths instead of timeless principles, advocating for legal decisions based on facts and probabilities rather than certainties. Holmes's "prediction theory of law," which he elaborated in this speech, was the most complete articulation of legal pragmatism before Judge Richard J. Posner took up Holmes's mantle in the 1970s.²⁸ As the Peircean philosopher Susan Haack points out, for Holmes, the practice of law was the art of predicting "the incidence of the public force through the instrumentality of the courts,"²⁹ which echoed Peirce's first articulation of his pragmatic maxim: "consider what effects, might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of the effects is the whole of our conception of the object."³⁰ Its aim was to "clarify meanings

²⁶ P. Holmes, 1137.

²⁷ Marouf Hasian, Jr. citing Von Jhering, "The Domestication of Legal Argumentation: A Case Study of the Formalism of the Legal Realists," *Communication Quarterly* 46 no. 4 (1998): 433.

²⁸ Fisch, "Justice Holmes, The Prediction Theory of Law, and Pragmatism," 87.

²⁹ Haack citing Holmes, "Pragmatism, Law, and Morality," 3.

³⁰ Haack citing Peirce, "Pragmatism, Law, and Morality," 3.

with references to consequences,”³¹ and the judge was supposed to interpret legal concepts according to the “felt necessities of the time”³² rather than logical axioms, concepts that would then continue to grow over time. As Haack explains, for Holmes, legal concepts were usefully indeterminate, and much as Peirce believed that “symbols grow”³³ in use and through experience, Holmes defined the common law as a repository of concepts that develop in use over time, “growing, sporting, spreading, and developing new niches.”³⁴

With *The Law as a System of Signs*, Roberta Kevelson draws out this connection between Peirce and Holmes. She also notes their time together at the Metaphysical Club, and with them, goes on to argue that the community is a valid source of law, and that at the most elemental level, the rule of law depends on individual actors with “a purpose or goal.”³⁵ In the 1980s, Kevelson was trained as an expert in Peirce’s semiotic theory at Brown University and by the late 1990s, she was working in the Philosophy Department at Penn State before becoming the leading scholar in the Penn State Semiotic Circle. The scope of her book is impressively broad, and she draws from Peirce’s semiotic theory in addition to the philosophy of law, comparative legal history, linguistics, political science, and economic theory in order to “establish a theoretical foundation for a new approach to understanding the interrelations of law, economics, and politics against referent systems of value” and to try to explain “our social systems of law, economics, and politics – our means of interpersonal transaction as a whole...against the theoretical background of a dynamic, ‘motion-picture’ universe that is continually becoming,

³¹ Haack, 3.

³² Haack citing Holmes, 3.

³³ Haack citing Peirce, 4.

³⁴ Haack, 4.

³⁵ Roberta Kevelson, *The Law as A System of Signs* (New York: Plenum Press, 1988), 147.

that is infinitely developing and changing in response to genuinely novel elements that emerge as existents.”³⁶ Law is one sign system, she explains, as are other institutions such as “language, economics, politics, the family, and so on”³⁷ and following both Holmes and Peirce, she describes how it develops “in a process of transacting and exchanging ideas by persons who contract to accomplish a mutually agreed-upon purpose.”³⁸ Rather than a unified legal system functioning according to a fixed or eternal code, there is “actually a network of competing and conflicting legal subsystems,” she argues, and not “one type of legal discourse, but conflicting modes of legal reasoning which interact in any given period of time and are coeval in any given society.”³⁹ How does new law get integrated with old law, she asks? How can we account for the “the kind of legal discourse that involves communication between official legal actors and the general public”?⁴⁰ What is the relationship between law and justice?

Kevelson defined the rule of law as a sign system which judges then interpret by regarding legal events as semiotic events consisting of “the addresser, or the official legal actors; the addressee, or the general public however structured; the context of situation including its history and future; the channel, which in the case of the law is not restricted to the courts, to the streets, or to the official places for doing law but includes also all areas which are involved in the law, that is, the market, the government, and today even those spaces in society once outside the claim of law: the family and interpersonal relations.”⁴¹ She pointed out that the foundation of

³⁶ Roberta Kevelson, *The Law as A System of Signs*, vii.

³⁷ Kevelson, *The Law as a System of Signs*, 3.

³⁸ Kevelson, 14.

³⁹ Kevelson, 10.

⁴⁰ Kevelson, 12.

⁴¹ Kevelson, 18.

law is unstable and that there is no ultimate ground for the interpretation of a legal doctrine, and that ultimately, no one is a passive subject of the law; we can “bribe, cajole, outwit, outtalk, or in other ways use the forces of rhetoric at [our] command to bend the rules.”⁴² Nonetheless, while Kevelson seems open to thinking of legal signs against a backdrop of social (even cosmic) flux, always foregrounding the importance of language and communication in collectively determining value, instead of building her own legal model, she limits her interpretive framework by adopting Friedrich Hayek’s constitutional model in *Law, Legislation, and Liberty*, one that treats price as the measure of value. She cites the economist Gary Becker to argue for the relevance of economic analysis to a “range of nonmarket behavior [including charity and love],”⁴³ “all of that which within the discretely structured university of the twentieth century, is called ‘political science,’ and also that which, within the halls of philosophy is concerned with ethics, social and political philosophy, legal philosophy, and so on.”⁴⁴

Kevelson was an unapologetic Hayekian advocate for the then up and coming Law and Economics movement, and she took up two unfortunate aspects of Holmes’s pragmatic legacy: first, his declared position that social science, and particularly economics, is the best way to determine the collective good; and second, his rejection of ethics as a basis for lawmaking. As Haack explains in her reading of “The Path of the Law,” Holmes underscored that legal concepts and moral concepts are conceptually distinct: some legal norms are either morally indifferent or deplorable, and some morally objectionable behavior is either legally sanctioned or falls outside the scope of legal regulation.⁴⁵ He wanted to limit the judge’s role to interpreting and applying

⁴² Kevelson, 47.

⁴³ Kevelson citing Gary Becker 186.

⁴⁴ Kevelson, 182.

⁴⁵ Haack, 7.

legal standards according to the community's evolving values, not to "get as much ethics into the law as they can."⁴⁶ Yet his focus, unlike Kevelson's declared focus, was not the rhetorical practices of the community, legal or otherwise. As she herself points out, he largely ignored the role of rhetoric in lawmaking,⁴⁷ as did the Law and Economics school which would follow in his footsteps. While Law and Economics advocates typically defer to free-market economic models to decide cases, even in less traditionally economic areas of the law such as reproductive rights, criminal law, tort law, and constitutional law,⁴⁸ Kevelson is unique for making rhetorical practices the focus of her work. At the same time, however, she also diminishes the scope and importance of these practices. She states openly that legal theory and legal practice should be based on economics instead of ethics, and as a result, she ignores the promise of rhetoric, as Peirce theorized it, to inform ethical legal standards. In her model, rhetoric has a purely instrumental role. Through our rhetorical practices, we form private contracts for personal gain, and when it comes to our goals and purposes, they are all individually determined and narrowly self-interested.

As the legal scholar A.I. Ogus explains, Hayek and the Austrian School of Economics contended that value is determined subjectively, according to preference and choice in the marketplace.⁴⁹ In any society, different individuals and groups of individuals have different aims, and what is deemed 'good' or 'bad' is merely a question of which values survive the evolutionary process; cultural development involves conflicts of norms, and natural selection

⁴⁶ Haack citing Holmes, 5.

⁴⁷ Kevelson, 5.

⁴⁸ Edward M. Panetta and Marouf Hasian, Jr., "Anti-Rhetoric as Rhetoric: The Law and Economics Movement," *Communication Quarterly* 42 no. 1 (1994): 61.

⁴⁹ A.I. Ogus, "Law and Spontaneous Order: Hayek's Contribution to Legal Theory," *Journal of Law and Society* 16 no. 4 (1991): 394.

resolves them.⁵⁰ Hayek then developed this premise into a full-fledged theory of political order. He distinguished between two models of social organization: rational constructivism, which assumes that institutions can serve our purposes if they are deliberately designed, and spontaneous order, which Ogus explains, is “an unplanned process whereby individuals make use of decentralized and fragmented knowledge, limited normally to localized information about prices and costs, to advance their own interests in competition with others.”⁵¹ In other words, the spontaneous order is a “system for communicating information: individuals respond to signals, the prices which reflect people’s needs for products (demand), with profits rewarding those whose skill, perhaps luck, enables them to best adapt to those signals.”⁵² Since we have limited information about our local environments, rules governing the social order should and do emerge instinctively, Hayek contended, and inhibiting the spontaneous order from above halts progress by reducing risk and experimentation on which overall wealth depends.⁵³ The rule of law was essential to his vision because it ensured enough stability to enable the free play of the market, and the judge’s task was only to uphold what he called the “universal rules of just conduct”: first, equality before the law regardless of particular circumstance or social situation; second, principles do not determine concrete solutions to problems that arise out of many, unknowable contingencies; and third, the application of principles to particular situations is not designed to achieve particular social or economic ends but rather, reflect the practices which have evolved in the spontaneous order.⁵⁴ Implicitly, Kevelson subscribes to these universal rules of just conduct

⁵⁰ Ogus, “Law and Spontaneous Order,” 404.

⁵¹ Ogus, 395.

⁵² Ogus, 395-6.

⁵³ Ogus, 402.

⁵⁴ Ogus, 397.

when she endorses Hayek's constitutional model. She explains how his constitutional model is divided into the "the law of liberty," which protects private property, and "the law of legislation," which organizes and regulates the government⁵⁵ and with Hayek, she concludes that the law of legislation is legitimate to the degree that it upholds the law of liberty.⁵⁶

It is true that for both Hayek and Peirce, we can never really know enough to plan things out successfully, and the world is characterized as much by chance as it is by order. In fact, one of Peirce's cardinal contributions to logic was the introduction of guessing as a method of reasoning and what he calls "abductive suggestion," an "act of insight" that "comes to us like a flash,"⁵⁷ plays an important part in his pragmatic philosophy. As Kvelson points out, both Hayek and Peirce would encourage us to modify our habits, to "break the rules that have been codified," and to "reject any law or system of laws that has previously been referred to as though it were fixed and eternal."⁵⁸ For Peirce especially, freedom was the highest good, and a "code of *may be's* would supplant the code of *ought to's*,"⁵⁹ as she nicely describes. However, Hayek and Peirce defined freedom differently. According to what he called his 'synechistic' philosophy, Peirce maintained that there is no strict separation between self and other.⁶⁰ When Kvelson describes our interpersonal exchanges as "concoercive"⁶¹ transactions in a metaphorical

⁵⁵ Kvelson, 237.

⁵⁶ Kvelson, 238.

⁵⁷ C.S. Peirce, "Pragmatism as the Logic of Abduction," in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998): 227.

⁵⁸ Kvelson, 123.

⁵⁹ Kvelson, 123.

⁶⁰ C.S. Peirce, "Immortality in the Light of Synechism," in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998): 1.

⁶¹ Kvelson, 148.

marketplace, she ignores synechism, which conceives of everything, including our relationship to other beings, as on a continuum.⁶² Following Hayek and free-market economics instead of Peirce, Kvelson concludes that “mutuality, reciprocity, and cooperation between contracting parties is ideal and unsupported by evidence.”⁶³ In our interactions with others, she argues that we exchange “money or its substitute, a note, a check, a promise, a service, or something tradable”⁶⁴ to “satisfy the wants of another to impose on this other an indebtedness to respond or repay.”⁶⁵ In sum, Kvelson ends up endorsing a Darwinian evolutionary philosophy which subscribes to what Peirce would call “the metaphysics of wickedness,” the individualistic idea that “I am altogether myself, and not at all you.”⁶⁶

In “A Neglected Argument for the Reality of God” (the N.A.), Peirce defined his own “law of liberty” more expansively, according to his mathematically derived metaphysical categories of experience.⁶⁷ As he explains at the outset, there are three universes of experience: pure conjecture, “what happens in the mind of a poet or a pure mathematician”; brute fact and actuality, which encompasses the phenomenological experience of resistance; and somewhat mysteriously, the third category, “everything whose Being consists in active power to establish connections between different objects, especially between objects in different Universes.”⁶⁸ Elsewhere, he calls these “firstness, secondness, and thirdness,” the three categories which

⁶² Peirce, “Immortality in the Light of Synechism,” 2-3.

⁶³ Kvelson, 147.

⁶⁴ Kvelson, 183.

⁶⁵ Kvelson, 147.

⁶⁶ C.S. Peirce, “Immortality in the Light of Synechism,” 3.

⁶⁷ C.S. Peirce, “A Neglected Argument for the Reality of God,” in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998): 436.

⁶⁸ Peirce, “A Neglected Argument,” 435.

govern his thinking as a whole. In the N.A., he goes on to develop what he calls “Musement,” a kind of spiritual contemplation which must “be allowed to grow up spontaneously out of Pure Play.”⁶⁹ He defines pure play as the activity of spirit, and it sometimes intrudes into our well-worn habits by bringing something new to our attention. “Considering some wonder in one of the Universes or some connection between two of the three, with speculation concerning its cause,” we then begin to observe the world and to muse, which leads to a “lively give-and-take of communion between self and self.”⁷⁰ First, there is “notice of the wonderful phenomenon,” next a hypothesis, and then “the acceptance of the hypothesis... the search for pertinent circumstances and the laying hold of them, sometimes without our cognizance, the scrutiny of them, the dark laboring, the bursting out of the startling conjecture, the remarking of its smoothfitting to the anomaly, as it is turned back and forth like a key in a lock.”⁷¹ Second, we proceed by testing our hypothesis deductively, in order to explicate it and to make it distinct. In the third and final stage, we collect the consequents of our hypothesis and test it inductively, to see whether it is correct or whether it must be modified or rejected. Although this essay is famously enigmatic, it plainly demonstrates that for Peirce, the law of liberty involves much more than the free play of the market with which Kevelson mistakenly identifies it.⁷² Instead, Peirce strongly suggests that by undertaking an inquiry in whatever field we choose, we will be led to the “hypothesis of God’s Reality,” that we “will come to be stirred to the depths of [our] nature by the beauty of the idea and by its august practicality, even to the point of earnestly loving and adoring this strictly hypothetical God, and to that desiring above all things to shape

⁶⁹ Peirce, “A Neglected Argument,” 436.

⁷⁰ Peirce, “A Neglected Argument,” 436.

⁷¹ Peirce, “A Neglected Argument,” 441.

⁷² Kevelson, *The Law as a System of Signs*, 122.

the whole conduct of life and all the springs of action into conformity with that hypothesis.”⁷³
Any “living consciousness,” including “a social ‘movement,’” has this potential.⁷⁴

In the course of arguing for Hayek, Kevelson argues that Peirce dismissed love as a motivation for human action in his essay, “Evolutionary Love,” the culmination of his series of articles for *Popular Science Monthly* which began with “The Fixation of Belief.” In fact, in the first half of “Evolutionary Love,” Peirce uses his reading of the economist Simon Newcomb’s handbook on libertarian political economy to blast the very economic individualism that Kevelson endorses:

The nineteenth century is now fast sinking into the grave, and we all begin to review its doings and to think what character it is destined to bear as compared with other centuries in the minds of future historians. It will be called, I guess, the Economical Century; for political economy has more direct relations with all the branches of its activity than has any other science. Well, political economy has its formula of redemption, too. It is this: Intelligence in the service of greed ensures the justest prices, the fairest contracts, the most enlightened conduct of all the dealings between men, and leads to the *summum bonum*, food in plenty and perfect comfort. Food for whom? Why, for the greedy master of intelligence. I do not mean to say that this is one of the legitimate conclusions of political economy, the scientific character of which I fully acknowledge. But the study of doctrines, themselves true, will often temporarily encourage generalizations extremely false, as the study of physics has encouraged necessitarianism. What I say, then, is that the great attention paid to economical questions during our century has induced an exaggeration of the beneficial effects of greed and of the unfortunate results of sentiment, until

⁷³ Peirce, “A Neglected Argument,” 440.

⁷⁴ Peirce, “A Neglected Argument,” 435.

there has resulted a philosophy which comes unwittingly to this, that greed is the great agent in the elevation of the human race and in the evolution of the universe.⁷⁵

Peirce mocks the notion that “greed ensures the justest prices, the fairest contracts, the most enlightened conduct of all the dealings between men.” He acknowledges the “scientific character” of economics itself (a term of praise for him), but warns that too close a focus on economical questions “induces an exaggeration of the beneficial effects of greed and of the unfortunate results of sentiment.” In no uncertain terms, he also warns not to extend economic methods to encompass all domains of human life, lest we reach “generalizations extremely false.”

One of the first things he notices is that Newcomb’s handbook criminalizes the poor, unfairly punishes criminals, and posits a reductive conception of benefit for the individual:

It might suggest putting checks upon the fecundity of the poor and the vicious; and ‘no measure of repression would be too severe,’ in the case of criminals. The hint is broad. But unfortunately, you cannot induce legislation to take such measures, owing to the pestiferous ‘tender sentiments of man towards man.’ It thus appears, that public-spirit, or Benthamism is not strong enough to be the effective tutor of love, (I am skipping to another page), which must, therefore, be handed over to ‘the motives which animate men in the pursuit of wealth,’ in which alone we can confide, and which ‘are in the highest degree beneficent.’ Yes, in the ‘highest degree’ without exception are they beneficent to the being upon whom all their blessings are poured out, namely, the Self, whose ‘sole object,’ says the writer in accumulating wealth is his individual ‘sustenance and enjoyment.’ Plainly, the author holds the notion that some other motive might be in a higher degree beneficent even for the man’s self to be a paradox wanting in good sense. He seeks to

⁷⁵ C.S. Peirce, “Evolutionary Love,” in *Chance, Love, Logic* ed. Morris R. Cohen (New York: Harcourt, Brace, and Company, 1923), 270-1.

gloze and modify his doctrine; but he lets the perspicacious reader see what his animating principle is; and when, holding the opinions I have repeated, he at the same time acknowledges that society could not exist upon a basis of intelligent greed alone, he simply pigeon-holes himself as one of the eclectics of inharmonious opinions. He wants his mammon flavored with a *soupcou* of god.⁷⁶

Peirce then correctly predicted where the greed-philosophy would eventually lead:

The economists accuse those to whom the enunciation of their atrocious villainies communicates a thrill of horror of being sentimentalists. It may be so: I willingly confess of having some tincture of sentimentalism in me, God be thanked! Ever since the French Revolution brought this leaning of thought into ill-repute, - and not altogether undeservedly, I must admit, true, beautiful, and good as the great movement was, - it has been the tradition to picture sentimentalists as persons incapable of logical thought and unwilling to look facts in the eye...Doubtless some excuse there was for all those opinions in days gone by; and sentimentalism, when it was the fashionable amusement to spend one's evenings in a flood of tears over a woeful performance on a candle-litten stage, sometimes made itself a little ridiculous. But what after all is sentimentalism? It is an *ism*, a doctrine, namely, the doctrine that great respect should be paid to the natural judgments of the sensible heart. This is what sentimentalism precisely is; and I entreat the reader to consider whether to condemn it is not of all blasphemies the most degrading. Yet the nineteenth century has steadily condemned it, because it brought about the Reign of Terror. That it did so is true. Still, the whole question is one of how much. The Reign of Terror was very bad; but now the Gradgrind banner has been this century long flaunting in the face of heaven, with an insolence to provoke the very skies to scowl and rumble. Soon a flash and quick peal will shake economists quite out of their complacency, too late. The twentieth century, in its latter half, shall

⁷⁶ C.S. Peirce, "Evolutionary Love," 272-3.

surely see the deluge-tempest burst upon the social order, - to clear upon the world as deep in ruin as that greed-philosophy has long plunged it into guilt. No post-thermidorian high jinks then!⁷⁷

Peirce goes on to explain how the lack of “sentimentalism” contributed to the popularity of the Darwinian theory of evolution, or what he calls “tychastic” evolution, evolution by chance. Peirce does not criticize Darwin, per se, but he does note that the reason people were so eager to accept his theory in the 19th century is because “already, people’s acquaintance with suffering had dropped off very much; and as a consequence, that unlovely hardness by which our times are so contrasted with those that immediately precede them, had already set in, and inclined people to relish a ruthless theory.”⁷⁸ He contrasts tychastic evolution with “anancastic” evolution, evolution by necessity, which conceives of every change as already determined in advance. Tychastic change occurs by small departures from existing habit “in different directions indifferently, quite purposeless and quite unconstrained whether by outward circumstances or by force of logic.”⁷⁹ These departures are followed by unpredictable results, some of which become new habits. Essentially, tychastic progress is aimless and arbitrary, while anancastic progress is attributable to “causes external to the mind, such as changed circumstances of life,” and/or from causes “internal to the mind as logical developments of ideas already accepted, such as generalizations.”⁸⁰ Anancasm is basically Hegelianism, Peirce explains, and he likens it to “a vast engine...with a blind mysterious fate arriving at a lofty goal.”⁸¹ In contrast, his own agapistic theory of evolution is neither materialist nor idealist, and it

⁷⁷ C.S. Peirce, “Evolutionary Love,” 273-4.

⁷⁸ C.S. Peirce, “Evolutionary Love,” 278-9.

⁷⁹ C.S. Peirce, “Evolutionary Love,” 287.

⁸⁰ C.S. Peirce, “Evolutionary Love,” 287.

⁸¹ C.S. Peirce, “Evolutionary Love,” 292.

positions us as agents of change through “the adoption of certain mental tendencies, not altogether heedlessly, as in tychasm, nor blindly by the mere force of circumstance or of logic.”⁸²

With Peirce, Kevelson conceives of our rhetorical practices in the community as the foundation of lawmaking in conjunction with her insight that sign systems are always in the process of “infinitely developing and changing in response to genuinely novel elements that emerge.”⁸³ Rather than reaching a legal opinion deductively or even inductively, she argues that judges would arrive at opinions “abductively,” through a process of investigation that begins with incomplete information and ends with a hypothesis. She acknowledged the public’s power to impact the rule of law rhetorically and the judiciary’s power to respond and adjust, and she defined the art of judicial decision-making as that of “finding a good fit between the law and the sovereign parts,” which as she explains in “Icons of Justice/Spirit of Laws,” means that “powers must come to agreement...all powers must be in motion, must move in concert.”⁸⁴ In a pluralistic society, she explains that justice “may be interpreted as a sign of unprecedented equitable social interrelations in a new, complex, and reciprocally self-organizing human world.”⁸⁵ Since society is changing faster than law, Kevelson observes that “the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve.”⁸⁶ These are all compatible with Peirce’s agapistic theory of evolution, as well as the N.A.

⁸² C.S. Peirce, “Evolutionary Love,” 287.

⁸³ Kevelson, *The Law as a System of Signs*, vii.

⁸⁴ Roberta Kevelson, “Icons of Justice/Spirit of Laws,” *International Journal for the Semiotics of Law* 7, no. 2 (1994): 235.

⁸⁵ Kevelson, “Icons of Justice,” 228.

⁸⁶ Kevelson, *The Law as a System of Signs*, 50.

However, Kevelson's unbridled individualism is frankly incompatible with Peirce's pragmatic philosophy, as well as her own insight that as human beings, we are 'vague signs,' that we depend on other people not just to meet our goals, but to make our purposes determinate. In his terms, which she quotes, a sign is vague when "leaving its interpretations more or less indeterminate, it reserves for some other possible sign or experience the function of completing the determination."⁸⁷ "An individual person," she goes on, "as sign, requires the other who interprets to make its own meaning determinate, that is, an actor with a purpose or goal. Individuals are *relates* in Peirce's semiotics."⁸⁸ In other words, she seems to understand that the other is essential to the emergence of a self, that as the sociologist and psychoanalyst Jessica Benjamin describes, both desire and agency arise in the shared space between self and other, that we only even begin to "feel real" through a process of recognition.⁸⁹ Yet what Kevelson doesn't seem to realize, especially considering her misguided assertion that freedom is the free play of the market, is that freedom depends on how successfully we can sustain the tension between self-assertion and mutuality; it is a state in which we can "be with" as well as "distinct from."⁹⁰

In "The Doctrine of Chances," Peirce openly stated that reason requires that "our interests shall not be limited" and then went even farther by stating that they must embrace "all races of being with whom we can come into immediate or mediate intellectual relation."⁹¹ Even more emphatically, he argued that our interests "must reach, however vaguely, beyond this geological

⁸⁷ Kevelson citing Peirce, 147.

⁸⁸ Kevelson 147. [emphasis original]

⁸⁹ Jessica Benjamin, "A Desire of One's Own," in *Feminist Studies/Critical Studies* ed. Teresa De Lauretis (Bloomington: Indiana University Press, 1986), 94.

⁹⁰ Benjamin, "A Desire of One's Own," 98.

⁹¹ C.S. Peirce, "The Doctrine of Chances," in *Chance, Love, Logic* ed. Morris R. Cohen (New York: Harcourt, Brace, and Company, 1923), 73.

epoch, beyond all bounds,”⁹² and he concluded that “he who would not sacrifice his own soul to save the whole world, is, as it seems to me, illogical in all his inferences, collectively. Logic is rooted in the social principle.”⁹³ Throughout his work, Peirce maintained his focus on agapistic evolution. His pragmatism is based on the idea that we should try to evolve by cultivating the Paulinian virtues, “Charity, Faith, and Hope,”⁹⁴ as well as what the Peircean philosopher Vincent Colapietro calls the rhetorical virtues, “habits [which] enable us to craft the means of expression to serve the purposes at hand and, more fundamentally, to engage in effective deliberation regarding the purposes most worthy of our espousal and service in particular circumstances.”⁹⁵ As Colapietro explains, what makes Peirce’s theory of rhetoric (“speculative rhetoric”) unique and valuable is that he conceived of it as a generative enterprise through which our aims can evolve. Rhetoric has what he calls “a re-educative”⁹⁶ function, which can open up “fields of exploration in which possible purposes of a truly novel character...have a chance of obtaining a foothold.”⁹⁷ It includes a critique of our purposes, and because Peirce conceived of it as the third part of his philosophical system, after grammar (an account of meaning) and logic (a classification of arguments), a rhetorically persuasive argument cannot be logically fallacious.⁹⁸

In contrast, Kvelson’s conception of justice is based on instrumental rationality and reduces the world to objects of exchange, a view that is incompatible with both Peirce’s philosophical pragmatism and his theory of rhetoric. While Kvelson is right to point out that

⁹² Peirce, “The Doctrine of Chances,” 73.

⁹³ Peirce, “The Doctrine of Chances,” 73.

⁹⁴ Peirce, “The Doctrine of Chances,” 75.

⁹⁵ Vincent Colapietro, “Neglected Facets of Peirce’s ‘Speculative’ Rhetoric,” *Educational Philosophy and Theory* 45 no. 7 (2011): 17.

⁹⁶ Colapietro, “Neglected Facets of Peirce’s ‘Speculative’ Rhetoric,” 6.

⁹⁷ Colapietro, 4.

⁹⁸ Colapietro, 11.

Peirce's ethics was based on probability and not certainty, since "the certainty which is most possible is that certainty which at every moment admits to the indeterminacy of the world and yet seeks for small reassurance some measure of stability or some criterion for the time being,"⁹⁹ and that as he stated in "The First Rule of Logic," "what we know we know only in an uncertain and inexact way,"¹⁰⁰ ultimately, she fails to explain how his ethics was based on rhetorical exchanges. As a philosophical realist, Peirce maintained that there was one true definition of a general idea upon which we would all eventually converge, that "any man[sic], if he have sufficient experience and reason enough about it, will be led to the one true conclusion,"¹⁰¹ that "different minds may set out with the most antagonistic views, but the process of investigation carries them by a force outside of themselves to one and the same conclusion."¹⁰² At the same time, however, in "The Rules of Philosophy," he argued that we should investigate collectively, by proceeding from "tangible premises which can be subjected to careful scrutiny, and to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one."¹⁰³ While he maintained that "there are real things, whose characters are entirely independent of our opinions about them,"¹⁰⁴ he accounted for the fact that human development is based on rhetoric, that as Colapietro explains, as "expressive beings and social actors" we are "ineluctably caught

⁹⁹ Kelson, *The Law as a System of Signs*, 227.

¹⁰⁰ C.S. Peirce, "The First Rule of Logic," in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. the Peirce Edition Project (Bloomington: Indiana University Press, 1998), 51.

¹⁰¹ C.S. Peirce, "The Fixation of Belief," in *Chance, Love, Logic* ed. Morris R. Cohen (New York: Harcourt, Brace, and Company, 1923), 26.

¹⁰² C.S. Peirce, "How to Make Our Ideas Clear," in *Chance, Love, Logic* ed. Morris R. Cohen (New York: Harcourt, Brace, and Company, 1923), 56

¹⁰³ C.S. Peirce, "The Rules of Philosophy," in *Chance, Love, Logic* ed. Morris R. Cohen (New York: Harcourt, Brace, and Company, 1923), 3.

¹⁰⁴ Peirce, "The Fixation of Belief," 26.

up in processes of articulation in which the complex meanings of [our] feelings, actions, and patterns of thinking are time and again open to renegotiation and re-interpretation.”¹⁰⁵ A Peircean constitutional model would be fundamentally different from a Hayekian and Holmesian one because it would include rhetoric as what in “Evolutionary Love” Peirce called the ‘great agent in the elevation of the human race.’ It would challenge the idea that greed ‘leads to the *summum bonum*.’

As Ogus points out, Hayek’s universal rules of just conduct are “meta-legal principles of the rule of law” that guide human behavior in a world of unknown particulars.¹⁰⁶ They establish a political order that enables the free play of the market and sets up a system of rewards based on the marketplace.¹⁰⁷ However, as he also points out, the rules that emerge unplanned out of the spontaneous order are not necessarily morally sound: “survival is no test of moral worth and the theory can be used to justify any set of rules which develop over time.”¹⁰⁸ While this dissertation also rejects the idea that an omniscient sovereign can or should try to determine what is good, it also rejects the idea that what is good or bad is simply a question of what proves to be effective in terms of survival. There are legitimate reasons not to accept Hayek’s contention that order should be maintained by the spontaneous order in relation to the universal rules of just conduct. For one, despite Kevelson’s claims to the contrary, the market is not value neutral. Although the Law and Economics movement has made free market fundamentalism mainstream and has all but guaranteed the primacy of private property rights in legal decision-making,¹⁰⁹ its foremost

¹⁰⁵ Colapietro, “Neglected Facets of Peirce’s ‘Speculative’ Rhetoric,” 13.

¹⁰⁶ Ogus, “The Law and Spontaneous Order,” 402.

¹⁰⁷ Ogus, 403.

¹⁰⁸ Ogus, 404.

¹⁰⁹ For a critique of the Law and Economics movement from a rhetorical perspective, see for example James Arnt Aune, “On the Rhetorical Criticism of Judge Posner,” *Hastings*

thinkers have made outrageous claims, that, for example, “monogamy [is] ‘the most efficient marital form,’ children [are] commodities who are ‘presumed to have modest price elasticities because they do not have close substitutes,’ and rape [is] an unfair bypassing of ‘the market in sexual relations (marital or otherwise)...[which] therefore should be forbidden.”¹¹⁰ Despite the appeal of what Marouf Hasian, Jr. and Edward Panetta call this “anti-rhetoric” of economic discourse, a rhetoric that professes to be neutral and universally valid,¹¹¹ these examples demonstrate James Boyd White’s point that although it claims to be value-free, economic discourse is in fact “deeply resonant of value, especially in its way of imagining what a human being is, its sense of what motives drive us, its limited conception of human reason, and its image of what would constitute a fulfilled human existence.”¹¹² In his critique of Richard Posner’s pragmatism, one which attempts to ground legal practice and judicial decision-making in a world of unmediated facts, Stanley Fish also pointed out that free market economics has an essentialist conception of the human being as a narrowly motivated economic actor and argued that Posner’s pragmatic program, which aimed to subsume law under economics, actually disavows its rhetoricity by subscribing to economic concepts (“‘wealth maximization,’ efficiency, Pareto superiority, the Kaldor Hicks test”) all of which are “hostage to metaphysical

Constitutional Law Quarterly 23.3 (1996): 658-670, and Stanley Fish, “Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin,” in *Pragmatism in Law and Society*, ed. by Michael Brint and William Weaver, (Boulder: Westview Press, 1991), 47-82.

¹¹⁰ David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (New York: Routledge, 2002), 47.

¹¹¹ See generally Edward M. Panetta and Marouf Hasian, Jr., “Anti-Rhetoric as Rhetoric: The Law and Economics Movement,” *Communication Quarterly* 42, no. 1 (1994): 57-74.

¹¹² James Boyd White, *Living Speech: Resisting the Empire of Force*, (Princeton: Princeton University Press, 2006), 36. See also James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, (Chicago: University of Chicago Press, 1990).

assumptions, to controversial visions of the way the world is or should be.”¹¹³ Even Hayek admitted that when it came to labor law, landlord tenant law, and creditor debtor law, “the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice.”¹¹⁴

To the legal world, rhetoric still has a questionable reputation due in no small part to Fish himself, an at best vexing figure who engaged in a series of debates with the liberal legal philosopher Ronald Dworkin and with Richard Posner in the 1980s and 1990s. Fish contended that legal legitimacy ultimately depends on how well the legal profession can preserve itself as a distinct discipline, a community with its own special set of terms and conventions. To Dworkin’s well-known ideal judge, “Hercules,” who decides cases by drawing out latent philosophical principles in legal precedent and assessing the degree to which that principle would bring coherence and integrity to the law, Fish responded with his idea of the discourse community. While Dworkin argued for a heroic judge to bring about progressive legal change through solitary reflection, Fish maintained that the driving force behind legal change is rhetoric, language practices in the legal community. Fish pointed out that Hercules would be no more than an interpreter who would be arbitrarily persuaded out of his prior interpretations; change, in other words, would occur tyhastically. Ultimately, Fish argued that both Dworkin and Posner’s pragmatic approaches were too prescriptive. At its best, pragmatism is descriptive, he argued, it provides a way of describing what everyone, judges and lawyers included, already do: when the

¹¹³ Stanley Fish, ““Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin,” 60.

¹¹⁴ Ogus citing Hayek, “Law and Spontaneous Order,” 398.

need for decision-making and action arises, we negotiate our circumstances rhetorically; there are no transcendent truths or infallible logics. While Kevelson subscribes to Hayek's free market utopia, which is built on the idea that "a free society as a whole rests on the concept of private property and on the rights of property owners to be protected by law,"¹¹⁵ her work provides a starting point for legal theory and legal practice by providing an alternative to Fish's variant of what legal and rhetorical scholars now call the "professionalist perspective," the idea that law is a practice restricted to trained elites.¹¹⁶ With them, Kevelson argues that in a pluralistic society with an open legal system, the boundaries between law and society are fuzzy, and legal legitimacy depends on the never-ending resignification of justice.

As a Peircean, Kevelson had an unorthodox understanding of the relationship between language and the world. Currently, the most well-known linguist in the humanities is Ferdinand De Saussure, who posited a more or less arbitrary relationship between a signifier and signified. Peirce, on the other hand, posited a triadic conception of the linguistic sign which consisted of a representamen (a word, for example), an object represented, and what he calls an "interpretant," "an idea in the mind which the sign excites."¹¹⁷ As a philosophical realist, the distinguishing feature of his semiotic theory is that the object represented does not collapse into the interpretant.¹¹⁸ As Augusto Ponzio explains, the relation between the sign and its object is

¹¹⁵ Kevelson, *The Law as a System of Signs*, 237.

¹¹⁶ Marouf Hasian, Jr., Celeste Michelle Condit, and John Lucaites, "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the 'Separate but Equal' Doctrine," *The Quarterly Journal of Speech* 82 (1996), 337.

¹¹⁷ C.S. Peirce, "Of Reasoning in General," in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. the Peirce Edition Project (Bloomington: Indiana University Press, 1998), 13.

¹¹⁸ John R. Lyne, "Rhetoric and Semiotic in C.S. Peirce," *The Quarterly Journal of Speech* 66 (1980): 158.

necessarily mediated by the relation between the sign and its interpretant. “The interpretant sign is in fact constitutive of the interpreted-sign,”¹¹⁹ and this sign doesn’t belong to a closed system, but rather “evolves as re-elaboration and explicative reformulation.”¹²⁰ In her book, Kevelson defines justice as an interpretant sign, and she explains how it is rooted in the community’s sense of legitimacy.¹²¹ With the judge as a participant in “a moving process in evolving ideas and values,”¹²² the idea of justice develops over time. In addition, the idea of justice exists somewhat independently of the individual uses of the term, and as John Lyne explains, “such general ideas form a semiotic matrix *to* which humans adapt their behavior.”¹²³

When in her Hayekian vein, Kevelson describes everything as property, from knowledge itself, which is “not unlike other factory-produced goods and items”¹²⁴ to “the crop of an orchard of apple seedlings; air space over a chemical-producing factory; mineral deposits crossing below the foundation footings of an apartment building” and even what she calls “the vast, untapped, yet unexplored and moving emergent property in the depths of the sea,”¹²⁵ she subscribes to the idea that economic justice is a matter of private property rights alone. However, there are alternative ideas more in keeping with Peirce’s agapistic evolution. Peter Linebaugh the historian, in his book, *The Magna Carta Manifesto: Liberties and Commons for All*, demonstrates how the Magna Carta, the founding document of the Anglo-American legal

¹¹⁹ Augusto Ponzio, “Man as a Sign: Essays on the Philosophy of Language,” in *Approaches to Semiotics*, ed. Thomas A. Sebeok, Roland Posner, and Alain Rey, trans. Susan Petrilli (Berlin: Mouton de Gruyter, 1990), 253.

¹²⁰ Ponzio, “Man as a Sign,” 253.

¹²¹ Kevelson, *The Law as a System of Signs*, 175.

¹²² Kevelson, “Icons of Justice/Spirit of the Laws,” 237.

¹²³ John R. Lyne, “Rhetoric and Semiotic in C.S. Peirce,” *The Quarterly Journal of Speech* 66 no. 2 (1980): 166.

¹²⁴ Kevelson, *The Law as a System of Signs*, 178.

¹²⁵ Kevelson, 257.

tradition, actually has deep roots in the common ownership of resources. While Kevelson claims that the history of rights as a whole would be unintelligible without the right to private property,¹²⁶ he demonstrates how the Charter of the Forest, the long dormant and largely forgotten accompaniment to the civil and political liberties in the Magna Carta, protected a wider mix of interests, from those of the church to the feudal aristocracy to the woodland commons. The Magna Carta included provisions which in 12th and 13th century England would enable commoners to live in a world increasingly wrought by economic conflict and state despotism. As he describes, Chapter 7 protected the widows' "estover," or subsistence rights. Chapter 8 guaranteed her pension and inheritance. In addition to "housebote, hedgebote, and ploughbote,"¹²⁷ which we learn by way of the jurist Sir Edward Coke, are archaic terms that designate quotas for fuel and fencing, rights for building and equipment, and the right to nourishment, commoners also had their rights to "herbage," "agistment," and "pannage"¹²⁸ codified in the Charter of the Forest, which guaranteed common pasture, permitted livestock to roam in the forest, and allowed them to gather acorns and beech mast. They had rights to "chiminage" and "piscary,"¹²⁹ the right to travel and fish in common waters. Honey was guaranteed to every person, and those who carried wood, bark, and charcoal on their backs could use what they needed without having to pay a tax to the king. Chapter 41 ensured the right to travel by both land and water, and Charter 47 protected the forest from "disafforestation,"¹³⁰

¹²⁶ Roberta Kevelson, "Property as Rhetoric," *Cardozo Studies in Law and Literature* 4 no. 2 (1992): 200.

¹²⁷ Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (Berkeley: University of California Press, 2008), 39-40.

¹²⁸ Linebaugh, *The Magna Carta Manifesto*, 42.

¹²⁹ Linebaugh, 42.

¹³⁰ Linebaugh, 31.

being placed under the king's jurisdiction, which in turn curtailed the growth of the state and its resources to make war.¹³¹ The Charter of the Forest set a precedent for limiting state sovereignty and privatization by defining rights in relation to the commons, and even though major legal thinkers including the influential William Blackstone, author of the 18th century text *Commentaries on the Laws of England*, one of the founding documents of U.S. common law, was an early champion of private property,¹³² as was Sir Edward Coke,¹³³ even Blackstone reluctantly admitted that there are elements such as “light, air, and water, which ‘must still unavoidably remain in common.’”¹³⁴

Hardt and Negri define the commons as the “wealth of the material world – the air, the water, the fruits of the soil, and all nature’s bounty” as well as the “results of social production that are necessary for social interaction and further production, such as knowledges, languages, codes, information, [and] affects.”¹³⁵ Instead of expert decisionmakers finding the right balance between the law of liberty and the law of legislation, under this model, decisions would be made locally, and individuals would cooperatively coordinate their actions to manage resources from what the sociologists Maria Mies and Veronika Bennholdt-Thomsen call the “subsistence perspective,” a social orientation wherein people value autonomy, interdependence, and the “creation, recreation, and maintenance of life” over the “permanent expansion of goods, services, and money.”¹³⁶ As the political scientist Elinor Ostrom observes in *Governing the Commons*:

¹³¹ Linebaugh, 34.

¹³² Linebaugh, 112.

¹³³ Linebaugh, 79.

¹³⁴ Linebaugh quoting Blackstone, 112.

¹³⁵ Michael Hardt and Antonio Negri, *Commonwealth* (Cambridge: Harvard University Press, 2009), viii.

¹³⁶ Maria Mies and Veronika Bennholdt-Thomsen, *The Subsistence Perspective: Beyond the Globalised Economy* (London: Zed Books, 1997), 3, 19.

the Evolution of Institutions for Collective Action, her award-winning study of commons governance around the world, state and market centered policy-making models reproduce the philosopher Garrett Hardin's Hobbesian assumptions about human nature. Hardin famously posited his "tragedy of the commons" metaphor in a 1968 article in *Science* magazine, where he depicted hypothetical cattle herdsman who held a pasture in common and eventually destroyed that pasture by greedily adding more cattle to their herds. Arguing that much like these herdsmen the human race needed a leviathan for its own good, Hardin and many of the policymaking models which followed from his work discounted or ignored both adaptability and communicative competence.¹³⁷ What Ostrom recommends is less a policy prescription (she argues that "many solutions exist to cope with many different problems"¹³⁸) than an approach which takes communicative competence seriously as the starting point for making complex institutional arrangements to successfully maintain shared resources over the long term. Her examples range from almost entirely self-governing commons to ones that partner with the state.

Even though the woodland commons in England probably wasn't, in the former World Bank economist turned commons activist Raj Patel's words, "some protodemocratic Eden where everyone got a fair and equal say,"¹³⁹ Linebaugh describes how before the 12th century, women had at least enjoyed relatively equal status as the men in open commons where they gleaned,¹⁴⁰ acquired fuel, grazed cows, and kept livestock,¹⁴¹ before greed and the pursuit of power led to

¹³⁷ Elinor Ostrom, *Governing the Commons: the Evolution of Institutions for Collective Action*, (Cambridge: Cambridge University Press, 1990), 2-8.

¹³⁸ Ostrom, *Governing the Commons*, 14.

¹³⁹ Raj Patel, *The Value of Nothing: How to Reshape Market Society and Redefine Democracy* (New York: Picador, 2009), 99.

¹⁴⁰ Gleaning was the practice of gathering grain after the harvest. Linebaugh, 76.

¹⁴¹ Linebaugh, 125.

expulsion from common lands, mass pauperization, the growth of towns, and the rise of commercial relations.¹⁴² In the early 1200s, King John of England levied a heavy tax on the royal barons, stole the forest, took children for ransom, sold women (including his own wife), and then set out on a crusade to take the holy lands away from Muslims. He also crushed movements from below that wanted to share all things in common.¹⁴³ By the 16th century, what used to be a system of agriculture that was maintained by custom and tradition was rapidly privatized.¹⁴⁴ By the 18th century, British slavers obtained licenses to trade African slaves throughout the Americas, expelled indigenous peoples from their lands, and made African labor power available for exploitation in tobacco and sugar fields and wool and cotton factories.¹⁴⁵ While the commons was based on mutual aid and enabled a way of life characterized by “neighborliness, fellowship, and family with their obligations of trust and expectations of security,”¹⁴⁶ with rampant privatization, urbanization, poverty, dependence, and slavery became the existential condition of the world’s majority.¹⁴⁷

Steven A. Reisler, the former chair of the National Lawyers Guild (NLG)’s Seattle branch observes that in the United States, even individual rights and liberties had to be added to the Constitution “years after commercial and property rights, including slavery, had been enshrined.”¹⁴⁸ To make matters worse, not only is the federal judiciary politically appointed, state bar associations, which are made up of attorneys who have strong interests in maintaining

¹⁴² Linebaugh, 25.

¹⁴³ Linebaugh, 27.

¹⁴⁴ Linebaugh, 50-52.

¹⁴⁵ Linebaugh, 95.

¹⁴⁶ Linebaugh, 59.

¹⁴⁷ See generally, Linebaugh, *The Magna Carta Manifesto*.

¹⁴⁸ Steven A. Reisler, “Teaching the Commons,” *Guild Practitioner* 65, no. 1 (2008): 19.

the status quo, screen and select individuals for judicial office based on their willingness to conform to the mainstream.¹⁴⁹ He points out that property and commercial interests currently employ the majority of lawyers who appear in court, and since judges rely on lawyers to inform them about the facts and issues (with the exception of tax and administrative law judges, who are more specialized), “the reality of the judges’ ‘education’ about property rights versus the rights of the commons is that their education lies in the hands of those who own the most and who would least want to consider the concept of the commons.”¹⁵⁰ “Judging from what is presented to lawyers (and judges) at most law-and-technology seminars oriented toward members of the bar,” he remarks, “one would have to assume that there simply are no viable alternatives to the status quo and that the proprietary rights of acquisition and ownership are the *sine qua non* of all human intercourse.”¹⁵¹

Generally speaking, the legal system is usually seen as a site for individual dispute resolution, where a detached and neutral arbiter administers rules to private parties in order to resolve individualized grievances. Especially during the 1960s and 1970s, however, the legal scholar and President of the Center for Constitutional Rights (CCR) Jules Lobel explains that social justice advocates began to conceive of the courtroom under the ‘institutional reform model,’ wherein a multitude of parties would aim to restructure institutions by filing lawsuits before an activist judge who would then address a policy concern. The main limitation of both the individualized grievance and the institutional reform models is how they position the judge as the main agent of change, and that they focus exclusively on winning the legal battle. Under

¹⁴⁹ Reisler, “Teaching the Commons,” 20.

¹⁵⁰ Reisler, 20.

¹⁵¹ Reisler, 19.

Lobel's alternative, which he calls the 'courts as forums for protest' model, lawsuits which are unlikely to achieve their aims through litigation alone can still benefit from the courtroom as a space to articulate the stakes of a dispute and mobilize the public. While Lobel proposes this model to encourage courts to hear challenging cases and to call for a more engaged standard of advocacy among lawyers, his argument also opens up alliances between activists, litigators and rhetorical critics. While social movements might eventually win in court, they often lose in the short run, especially when human rights and commons rights are pitted against private property. As he points out, however, legal losses don't necessarily result in political losses. Activists, lawyers and rhetorical critics can still educate the public through forums opened up by the litigation, thereby transforming political consciousness. Exploring the limitations and possibilities of legal judgments opens up fertile ground for us to form alliances with educators and advocates by using the shared vocabulary of the law. In legal pleadings and statements to the press, lawyers could contribute to the community's ongoing discourse about a social issue that "convey[s] the full story of the oppression and injustice."¹⁵² Lobel's "bottom-up, decentralized"¹⁵³ approach, in contradistinction to Hayek's, shifts the focal point of social change away from the market and the judge to legal events.

Lobel's argument partially aligns with Marouf Hasian, Jr., Celeste Condit, and John Lucaites's landmark article, "The Rhetorical Boundaries of the Law." With this article, they established Critical Legal Rhetoric as a counterpoint to the Critical Legal Studies (CLS) school by arguing that instead of critiquing the law, it would be more useful to reconceptualize the rule of law as what they call "the hegemonic product of rhetorical culture," the "allusions, aphorisms,

¹⁵² Jules Lobel, "Courts as Forums for Protest," *UCLA Law Review* 52 (2004), 550.

¹⁵³ Lobel, "Courts as Forums for Protest," 489.

analogies, characterizations, ideographs, images, myths, narratives, and commonplace argumentative forms that demarcate the symbolic boundaries within which public advocates find themselves flexibly constrained to operate."¹⁵⁴ CLS was founded at a conference by that name at the University of Wisconsin in 1977, and scholars affiliated with the movement aimed to expose how the rule of law is actually not as neutral as it professes to be. They pointed out that judges are not detached arbiters who follow the rules and regulations by putting their own biases aside, and they also argued that the rule of law is one of the main ways we perpetuate systemic inequality, exposing the inconsistencies and contradictions in judicial opinions. Critical Legal Rhetoric is an emerging school which contends that public discourse establishes norms, and the public vocabularies from which these norms emerge then inform the terms for legal practice and judicial interpretation. They maintain that the law can still be a site of progressive possibility through public interventions and judicial response. They take unofficial legal actors as seriously as lawyers, judges and policymakers, and they are generally optimistic about the prospects for change through official channels.

In practice, especially when it comes to the prospect of displacing the primacy of private property rights, the degree to which the legal structure reliably permits reinterpretation of statutes and the Constitution is of course debatable. Lobel characterizes his own intellectual stance as aligned with “critical theory’s emphasis on exposing the contradictions and limitations of law, and the litigators’ focus on presenting arguments to the judge based on precedent,”¹⁵⁵ and he identifies two contrasting positions on the effectiveness of articulating transformational

¹⁵⁴ Celeste Michelle Condit, Marouf Hasian, Jr., and John Lucaites, “The Rhetorical Boundaries of ‘the Law’: A Consideration of the Rhetorical Culture of Legal Practice and the ‘Separate but Equal’ Doctrine,” *The Quarterly Journal of Speech* 82 no. 4 (1996): 336-7.

¹⁵⁵ Lobel, “Courts as Forums for Protest,” 554.

arguments in the courts through an example that emerged in the context of steel plant closings in Youngstown, Ohio in the late 1970s. U.S. Steel had made a promise to their workers that they would keep the steel plant where they worked operational if it continued to be profitable, and in return, the workers “had agreed to a variety of concessions, worked hard, and relied on that promise to their detriment.”¹⁵⁶ When U.S. Steel broke its promise, Lynd made a legal argument supported by existing contract law to have the court make the promise legally enforceable, while the district court judge raised the more radical possibility that the Youngstown community may have acquired property rights in U.S. Steel based on their long-established relationship. Lynd refused to argue the case on those terms, since as Lobel explains, part of his struggle as a socialist lawyer was to “help explain, educate, and expose the nature of capitalist law.”¹⁵⁷ He articulated the workers’ position to the court on terms that were already legally actionable while working to develop another strategy to fight the injustice alongside the workers.¹⁵⁸ Arthur Kinoy, who represents an alternative to Lynd, filed an amicus brief on behalf of the Center for Constitutional Rights (CCR) making the novel property rights argument. For Kinoy, who as Lobel points out had with some success articulated radical interpretations of the Thirteenth and Fourteenth Amendments during the civil rights struggles of the 1960s, the law is usefully indeterminate; through political struggle, the courts can be persuaded to reinterpret them, even when it comes to economic and social rights.¹⁵⁹ In this case, his argument lost in court.

Since the 1970s, CLS has aimed to challenge Law and Economics by pointing out the ways in which rights language is ideologically based and determined by the arbitrary reasoning

¹⁵⁶ Lobel, 552.

¹⁵⁷ Lobel, 553.

¹⁵⁸ Lobel, 553.

¹⁵⁹ Lobel 553-4.

of majoritarian judges. In a widely circulated critique of liberal rights, the CLS scholar Mark Tushnet persuasively argued that “people need food and shelter right now, and demanding that those needs be satisfied – whether or not satisfying them can today persuasively be characterized as enforcing a right – strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.”¹⁶⁰ He pointed out that for many, “conditions of life are so near the floor”¹⁶¹ and rights are too indeterminate to effectively protect them; inevitably, those with more resources will be more successful mobilizing rights claims in their favor.¹⁶² Tushnet cited the First Amendment cases that led all the way up to the *Citizens United* decision, beginning with *Virginia Pharmacy Board*, which was the Court’s first time ruling that commercial “speech” (in this case, pharmacy advertising) was protected under the First Amendment, before moving to *San Antonio School District v. Rodriguez*, a case in which the justices upheld unequal financing of public schools because to not do so would be to “perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes,”¹⁶³ this despite the fact that these very policies could disproportionately (and unconstitutionally) affect people of different races. Tushnet highlights how in its decision in *Rodriguez*, the Court effectively dismissed the rights of children “left functionally illiterate or ill-informed about public matters” as the result of a radically unequal educational system.¹⁶⁴ As he pointed out, “right-holders [must] have the material and psychological resources that will allow them to

¹⁶⁰ Mark Tushnet, “An Essay on Rights,” *Texas Law Review* 62 (1984), 1394.

¹⁶¹ Tushnet, “An Essay on Rights,” 1402.

¹⁶² Tushnet, 1363-4.

¹⁶³ Tushnet citing *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973), at 1379.

¹⁶⁴ Tushnet, 1380.

exercise their rights.”¹⁶⁵ Accordingly, Tushnet recommends “preserving real experiences rather than abstracting general rights from those experiences.”¹⁶⁶ “When I march to oppose United States intervention in Central America,” he argued, “I am ‘exercising a right’ to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling along in a crowd, and so on.”¹⁶⁷ Tushnet raises a valid critique of the Anglo-American legal tradition by refusing to be the sovereign individual that is the subject of liberal rights. Instead, he points out the limits of those rights and advocates for a political culture based on community and solidarity.

Yet as Lynd argues, asserting a right is not necessarily the same as belief in the efficacy of the legal and political system, and as the Charter of the Forest demonstrates, codifying and enforcing rights is not incompatible with commons governance. In theory, rights can be derived from the five core principles of the Charter of the Forest, subsistence, neighborhood, reparations, anti-enclosure, and travel. As Linebaugh points out, while there are overlaps between human rights and commons rights, especially the positive rights codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR), whose core provisions ensure the right to work, social security, family, an adequate standard of living, health, education, and participation in cultural life, commons rights differ from human rights because they are grounded in labor processes embedded in particular ecologies and because they are independent of the state.¹⁶⁸ Even if they are not legally actionable, asserting a commons right can establish a matrix for

¹⁶⁵ Tushnet, 1380.

¹⁶⁶ Tushnet, 1382.

¹⁶⁷ Tushnet, 1382.

¹⁶⁸ In the 13th century English context, commons rights inhered in “a particular praxis of field, upland, forest, marsh, and coast.” Linebaugh, 45.

action. From Peirce's rhetorical perspective, as Lyne explains, "words implicate a system of relationships. They are not just tools of expression but thought patterns which collect about them a force of habit."¹⁶⁹ As rhetorical constructs, rights can function as what Peirce would call "thirds," forces in shaping events which can induce movement in the form of tendencies, laws, and habits,¹⁷⁰ and as thirds, rights can bring about regularity and order.¹⁷¹ As Kevelson argues in the context of advocating for private property rights, the commons is a "way of defining a space,"¹⁷² and as a "unit in thought,"¹⁷³ it can grow, develop and evolve.

Before I elaborate what this theoretical perspective enables, it might help to compare it with deconstruction, an equally abstract theoretical perspective that validates the CLS position. As the legal philosopher Jack Balkin explained to a mystified legal audience in the early 1990s, deconstruction is based on De Saussure's theory of the sign, from which follows the conclusion that 'language is a system of difference without positive signs.'¹⁷⁴ In other words, a sign doesn't correspond to a world of objects "out there," but is constitutive of it. Since meanings are not self-evident, he explained that legal doctrine, which is based on a set of foundational concepts like "fault," "intent," or "causation," are linguistically and ideologically determined.¹⁷⁵ This approach demonstrated that there is no ultimate ground for the interpretation of a legal doctrine

¹⁶⁹ Lyne, "Rhetoric and Semiotic in C.S. Peirce," 166.

¹⁷⁰ Lyne, 161-2.

¹⁷¹ Lyne, 162, 166.

¹⁷² Kevelson, "Property as Rhetoric," 192.

¹⁷³ Kevelson, 193.

¹⁷⁴ J.M. Balkin, "Deconstructive Practice and Legal Theory," *The Yale Law Journal* 96 no. 4 (1987): 750.

¹⁷⁵ J.M. Balkin, "Deconstructive Practice and Legal Theory," 754.

or for the adjudication of rights. The rule of law is “the free play of text”¹⁷⁶ and its history is iteration; legal materials are subject to different interpretations in different contexts ad infinitum.

The rhetorical approach which follows from Peirce’s semiotic theory would also hold that the rule of law is subject to different interpretations in different contexts ad infinitum, and it would reject the view that signs have a one to one relationship with the world. However, his rhetorical approach is both enabling and constructive. First, as the Peircean film theorist Teresa De Lauretis points out, our goals and purposes make the rule of law not quite ‘the free play of text,’ but a deliberately formed construction.¹⁷⁷ Second, since the sign’s relationship to what is being signified is mediated by the interpretant, which as I pointed out above, is not determined arbitrarily, then theoretically speaking, a judge’s interpretation is not determined arbitrarily either, but through the mediating agency of the three different kinds of interpretant: immediate, dynamic, and final. According to Peirce’s semiotic theory, an immediate interpretant is our feeling, the dynamic, our reaction, and final, our interpretation. As the semiotic process continues over time, so the final interpretant continues to evolve. In her book, Kevelson begins to point out what the interpretant can enable. She focuses on law as a sign system, and she wants to explain how judges can look at the law from an evolutionary perspective by focusing on the body of judicial precedent. Keeping in mind that as she points out, from a Peircean perspective, “signs interpret signs,” the case at hand would constitute the “immediate interpretant,” the body of precedent, the “dynamic interpretant,” and the judge’s decision in the case is the “final

¹⁷⁶ J.M. Balkin citing Derrida, 777.

¹⁷⁷ Teresa De Lauretis, “Semiotics and Experience,” in *Alice Doesn’t: Feminism, Semiotics, Cinema* (Bloomington: Indiana University Press, 1984), 173.

interpretant.” In a different case, the final interpretant would be the immediate interpretant, and so on ad infinitum.

John Lyne explains that a third is “not simply the aggregate of many tiny efficient causes, but a mediating agency that asserts connections in different times and places.”¹⁷⁸ A conventional sign is what Peirce would call a “symbol,” a sign which according to his semiotic theory, differs in kind from “icons” and “indices.” An icon is a sign that resembles what it represents, a photograph or map, for example; an index is a sign that has a physical connection to what it represents, for example, a weathervane; while a symbol is a purely conventional sign, for example, a legal right. Even a symbol, however, does not have a purely arbitrary connection to the world. When we perceive things in the world, what we discern is not purely in our minds, but to differing degrees, correspond to what Lyne calls “general relations that hold among certain sorts of qualities and facts.”¹⁷⁹ Therefore, signs, under which everything is subsumed, exercise a regulative force. As Lyne explains, they call out habits of interpretation, and as such, they have the capacity for “making things happen.”¹⁸⁰ It follows then, that as symbols, rights not only make things happen, but they also accumulate in value as the semiotic process unfolds, as our interpretations of what we perceive and discern become more accurate over time.

What is enabling about Peirce’s theory is that it explains how to assert rights that can establish a relationship between an individual, the commons, and the state; for example, the “right to the city,” a right originally coined by the radical sociologist Henri Lefebvre, which gives urban inhabitants the right to collectively manage wealth instead of delegating that power

¹⁷⁸ Lyne, “Rhetoric and Semiotic in C.S. Peirce,” 162.

¹⁷⁹ Lyne, 162.

¹⁸⁰ Lyne, 162.

to governing bodies which have relationships with capital.¹⁸¹ Whether or not a judge deigns to recognize or protect a right, if we assert a right establishing a relationship that really exists, if we name, in other words, a “general relation that holds among certain sort of qualities and facts,” then it should (and will eventually) “bring conformity to a norm,” as Lyne explains that all thirds do.¹⁸² As symbols, the interpretation of whether and how the rights apply can evolve over time, accumulating in value. This is a very different approach to law than the deconstructive approach associated with the CLS school in that it gives the judiciary the option of participating in the evolutionary process as part of the community of inquiry.

According to Peirce, the art of rhetoric is “the general secret of rendering signs effective,”¹⁸³ and while laws may be proclaimed by those who have the power to proclaim them, justice still depends on what the audience comes to believe is legitimate in the very long run. As the Peircean philosopher John Michael Krois explains, from a Peircean point of view, audience exists in three interdependent modes: the real audience, the ideal audience, and the audience that mediates between the real and the ideal. He bases his model on the idea of Chaim Perelman’s universal audience, an audience of all people that extends into the infinite future. In Peircean terms, the universal audience is the audience in its “first” mode. In its “second mode,” the audience brings every possible critique of a law to bear on a law that is proclaimed. This is the aspect of the audience that resists, the “brute actuality” that would confront lawmakers. The

¹⁸¹ Much of this is yet to be worked out at the practical level. For an overview, see David Harvey, “The Right to the City,” *New Left Review* 53 (2008): 1-18. For a thorough exposition of research on this topic and its relationship to producing urban space, see Mark Purcell’s “Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant,” *GeoJournal* 58. no. 2/3 (2002): 99-108.

¹⁸² Lyne, “Rhetoric and Semiotic in C.S. Peirce,” 162.

¹⁸³ Lyne quoting Peirce, 163.

“third” mode, which is a postulate of Peirce’s theory of rhetoric, is the audience as it mediates between the first and second, the real and ideal audience.¹⁸⁴ Ultimately, justice is a movement, a constant mediation between what is and what should be. This is a fundamentally unstable standard, but nevertheless, one that is purposeful. Accordingly, in the following chapters, I will look at how movements for economic justice have asserted their rights and with what levels of success, pointing out ways that we can productively challenge and recirculate their arguments.

Even though the commons is at best still an underground concept in legal practice,¹⁸⁵ Reisler points out that the courts still present a “reasonable opportunity to press rational arguments on behalf of community interests rather than just arguments of political or economic expediency on behalf of the privileged few.”¹⁸⁶ Even Lynd, who admits that “rights in capitalist society inevitably are treated as a kind of individual property,” a zero-sum game where my rights are pitted against yours, argues that even some liberal rights can still be given a “positive-sum” character through collective struggle. These “communal rights” include the right to free speech and the right to organize labor which can act as points of convergence around which movements can coalesce.¹⁸⁷ Despite the bleak outlook for reform through official legal channels, this dissertation takes existing legal rights as a starting point for a transition to commons governance. In Peircean terms, rights are signs, and as Kevelson points out, “every interpretation of a sign results in a new, more complex sign, which carries its reference along cumulatively, thereby adding something at each stage of interpretation to the reference which did not previously or

¹⁸⁴ John Michael Krois, “Peirce’s Speculative Rhetoric and the Problem of Natural Law,” *Philosophy and Rhetoric* 14, no. 1 (1981): 26-27.

¹⁸⁵ Reisler, “Teaching the Commons,” 20.

¹⁸⁶ Reisler, 20.

¹⁸⁷ Staughton Lynd, “Communal Rights,” *Texas Law Review* 62 no. 8 (1984), 1419.

initially exist.”¹⁸⁸ Other than critiquing the law and trying to implement the implausible strategy of ‘stacking the decks’ of the judicial hierarchy with judges more favorable to progressive values, CLS has so far left us without a way to construct a viable alternative to the spontaneous order, and Lynd is right to warn that to discount rights “extends the same invitation to others, hostile to our utopias, who have much more power than we do.”¹⁸⁹ In addition to our habits, goals, and purposes, all of which, in Peircean terms, occur in the domain of thirds, asserting a right is a power that we can still usefully exercise.

In Chapter Two, I will look at the right to free speech in the context of litigation that came out of the Occupy Wall Street movement, easily this decade’s most emphatic movement for the commons. Although Occupy lost in court and activists were rapidly evicted from their encampments, the First Amendment still functioned as a communal right around which they could mobilize to realize their collectivist vision. I focus my analyses on two cases: *BNY Mellon v. Occupy Pittsburgh*, a case which out of all the many cases that came out of the Occupy Wall Street movement, epitomized the battle between the commons and private property rights by pitting one of the investment banks responsible for the 2008 financial crisis against the social movement that took shape to address it; and *People of the State of New York v. Nunez*, a criminal case brought against an Occupier who refused to leave Zuccotti Park after the property owner illegally ignored regulations which were already in place to protect the people’s ability to use spaces like Zuccotti Park, ‘privately owned public spaces,’ where the public’s right to free speech is increasingly compromised. In both of my analyses, I demonstrate Reisler’s point that the commons is not yet legible to the legal system, and that alongside efforts to reimagine

¹⁸⁸ Kevelson, *The Law as a System of Signs*, 9.

¹⁸⁹ Lynd, *Communal Rights*,” 1419.

politics outside the nation-state frame, raising awareness of the commons as a historical concept rooted in the Anglo-American legal tradition might lead to a set of new legal outcomes and more importantly, to a more communitarian set of social values. In Chapter Three, I discuss the environmental non-profit organization Our Children's Trust's recent litigation against the U.S. government for failing to adequately address climate change. By asserting a novel commons 'right to a stable climate and healthy atmosphere,' this litigation radically decenters the sovereign individual as the subject of rights and forces the court to adapt to the changing times or risk losing public legitimacy. While their first case, *Alec L. v. McCarthy*, was cavalierly dismissed by a DC Appeals Court in 2012, its sister case, *Juliana v. United States*, recently won an order permitting the case to go to trial, but on more humanistic terms. Judge Ann Aiken issued an opinion ordering the case to go forward based on the 'right to a climate capable of sustaining human life.' Nevertheless, in what reads as a judicial call to arms, Aiken, who approvingly calls *Juliana* 'no ordinary lawsuit,' demonstrates how legal rhetoric can still define positive possibilities for the future by partnering with the commons.

In Chapter Four, I turn to reparations, an ancient claim for economic justice with a long history in the U.S. legal system. First, I discuss *In-Re African-American Slave Descendants*, the latest case to come out of the movement for slavery reparations. In 2002, African-Americans filed a lawsuit against the banks and corporations that financed slavery. Even though they lost the legal battle, this case crystallizes two opposing sides of the economic justice debate, one in favor of human rights, the other private property rights. The District and Appeals Court decisions demonstrate how the higher up this case travelled, the more it faced arguments to preserve the reigning, libertarian legal decision-making model as well as the status quo. Although Bernie Sanders and others on the left have claimed that reparations is a "divisive"

issue, I argue that depending on how it is framed, reparations can be a communal claim, one that begins with reparations for African-Americans and then extends all the way to working people more broadly. Finally, in Chapter Five, I will look at the right to organize labor codified in Section 7 of the National Labor Relations Act (NLRA), which gives workers the right to organize, bargain collectively, strike, and picket for purposes of mutual aid. While the labor law framework is rightly criticized for domesticating labor discontent and channeling it into the courtroom, the right to organize still enables broad-based solidarity among all workers by invoking the evolutionary principle of mutual aid and by empowering workers to leverage unions as an organizing space to cultivate commons-based values. As I will demonstrate, depending on the way union campaigns are framed, the right to organize under the NLRA could set the stage for a new labor movement to take shape. I will demonstrate how two cases which were set to be rapidly overturned by Donald Trump's newly appointed chairman Philip J. Miscimarra each involve a segment of the workforce that has historically been ignored by unions, and how addressing their concerns even from within the labor law framework can begin to restructure the economy.

Although the quest to reclaim the commons from private interests may seem quixotic, most Americans are overwhelmingly in support of regulatory enforcement against corporations¹⁹⁰ and younger Americans, whose politics have been shaped by an era of economic meltdown and environmental catastrophe, are especially attuned to the need for systemic

¹⁹⁰ “Corporate Impunity: ‘Tough on Crime’ Trump is Weak on Crime and Corporate Wrongdoing.” *Public Citizen Corporate Research Project*. Rick Claypool, Taylor Lincoln, Michael Tanglis, Alan Zibel. Washington D.C.: (July 2018), 4.

change.¹⁹¹ In this chapter, I have tried to demonstrate that although Peirce was not an activist, an advocate, or a jurist, he did leave us with an evolutionary philosophy, a pragmatic framework, and a radically enabling theory of rhetoric to get us started. As Oliver Wendell Holmes began to recognize in the 1860s, we can all learn something from his faith that the community of inquiry will succeed in discovering the truth in the very long run, and that an unstable standard for justice is no reason to despair. Justice, like truth, is a living concept, one that as Kevelson reminds us, is grounded in a “process of becoming” in which we can actively participate.¹⁹²

¹⁹¹ See for example, Sarah Leonard, “Why are So Many Young Voters Falling for Old Socialists,” *The New York Times*, June 16, 2017, <http://www.nytimes.com/2017/06/16/opinion/sunday/sanders-corbyn-socialists.html>; Sean Vazquez, “This is Why Millennials Favor Socialism,” *Huffington Post*, April 11, 2017, https://www.huffingtonpost.com/entry/this-is-why-millennials-favor-socialism_us_58ed0feae4b0145a227cb8d3; Chris McGreal, “The ‘S-word’: How Young Americans Fell in Love With Socialism,” *The Guardian*, September 2, 2017, <https://www.theguardian.com/us-news/2017/sep/02/socialism-young-americans-bernie-sanders>.

¹⁹² Kevelson, *The Law as a System of Signs*, 174-5.

2.0 Judicial Misrecognition of the Commons in *BNY Mellon v. Occupy Pittsburgh* and *People of the State of New York v. Nunez*

After decades of rapid economic meltdown, on September 17, 2011, in conjunction with a wave of democratic activity in Tahrir Square, Cairo; Pearl Square, Manama; Syntagma Square, Athens; and Plaça de Catalunya, Barcelona; Occupy Wall Street set up a camp in New York City's Zuccotti Park. The Occupy Movement had begun a few weeks earlier as a small protest by a few lone anarchists on Wall Street, and just went it looked like it would soon be forgotten, the American public responded. First in Zuccotti Park and then all over the United States, abandoned urban spaces turned into "the living, exuberant expression of the Commons."¹⁹³ At long last, "solidarity, mutual aid, and free association"¹⁹⁴ – the very best of anarchist ideals – were beginning to materialize, and in a delightful paradox, anarchists, people whose self-definition depends on their opposition to leadership,¹⁹⁵ soon found themselves at the forefront of a movement for economic justice. Culturally, this was a period of instability, and as Condit, Hasian, and Lucaites point out, in times like this, the courts must choose whether to align themselves with "special interests or to predict, to articulate, or to lead the development of new hegemonic alliances."¹⁹⁶ This chapter begins by providing a rhetorical analysis of *People of the*

¹⁹³ Alicia Williamson, "The Space of Occupation," *Critical Quarterly* 54 no.2 (2012): 70.

¹⁹⁴ Mark Bray, *Translating Anarchy: the Anarchism of Occupy Wall Street* (Washington: Zero Books, 2013), 45.

¹⁹⁵ Leonard Williams, "Hakim Bey and Ontological Anarchism," *Journal for the Study of Radicalism* 4 no. 2 (2010): 109.

¹⁹⁶ Marouf Hasian, Jr., Celeste Michelle Condit, and John Lucaites, "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the 'Separate but Equal' Doctrine," *The Quarterly Journal of Speech* 82 (1996): 336.

State of New York v. Nunez and *BNY Mellon v. Occupy Pittsburgh*, two cases that came out of the Occupy Wall Street movement which exemplified the defining battle of the neoliberal era: the commons v. private property.¹⁹⁷

During the Occupy Wall Street movement, the police had tried to clear Zuccotti Park twice before the final eviction on November 15: first on September 24, when they surrounded Zuccotti Park and didn't leave until the media arrived, and second on October 14, when faith, labor, and health care activists arrived to camp in solidarity with the occupation. All three eviction attempts were characterized by violence that was 'high in spectacle.'¹⁹⁸ Especially in New York City, police mistreatment of Occupiers was actually fairly routine. In one protest, they "leapt from scooters, tackled a man to the ground, and placed him in handcuffs" and left a legal observer for the National Lawyers Guild "pinned under a police motorcycle" as they pursued other protestors.¹⁹⁹ In another, the *New York Times* reported that a protestor taken into police custody had a "gash on his forehead and blood running down his face."²⁰⁰ The NYPD made scores of these arrests. Peaceful protestors were pepper sprayed and boxed in with orange nets during a march on Wall Street, and over one thousand people were arrested in a march across Brooklyn Bridge.²⁰¹ Then, after receiving counterterrorism training on November 15th, hundreds

¹⁹⁷ Michael Hardt, "The Common in Communism," *Rethinking Marxism* 22 no. 3 (2010): 350.

¹⁹⁸ As opposed to what the literary critic Rob Nixon calls "slow violence," which he says is "low in spectacle." See generally Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard: Harvard University Press, 2011).

¹⁹⁹ Colin Moynihan and Cara Buckley, "Cleanup of Zuccotti Park is Postponed," *The New York Times*, October, 14, 2011, http://cityroom.blogs.nytimes.com/2011/10/14/cleanup-of-zuccotti-park-cancelled/?_r=0.

²⁰⁰ Moynihan and Buckley, "Cleanup of Zuccotti Park is Postponed."

²⁰¹ For a first-hand account of the raids on Zuccotti Park by police, see Benjamin Shepard, "Occupy Wall Street, Social Movements, and Contested Public Space," in *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space*, ed. Ron Shiffman, Rick Bell, Lance Jay Brown, and Lynne Elizabeth (Oakland: New Village Press, 2012), 21-33; See also Al Baker

of NYPD officers wearing full riot gear ordered the protestors to leave or face arrest. In the meantime, they also confiscated the library of over 1,100 books and four laptops and threw them in the trash.²⁰² In their comprehensive study of rights violations during the Occupy Wall Street movement, the law schools at Harvard, Stanford, New York University, and Fordham provide a detailed report of police violence, which includes videos of police throwing protestors to the ground, and numerous reports of them dragging, punching, kicking, and choking demonstrators as well as members of the media.²⁰³

As the constitutional law scholar Tabatha Abu El Haj points out, we accept a far higher level of restrictions on our right to assemble today than at any time in our history²⁰⁴ and this comes at the very high cost of disabling “face to face experiences of citizenship,” which have been proven to motivate political engagement.²⁰⁵ She observes that only in very rare cases did First Amendment protections for free speech and assembly actually protect Occupiers and their encampments. Most judges decided that the First Amendment did not apply to occupied spaces,

and Joseph Goldstein, “After Earlier Mis-Step, a Minutely Planned Raid,” *The New York Times*, November 15, 2011, <http://www.nytimes.com/2011/11/16/nyregion/police-clear-zuccotti-park-with-show-of-force-bright-lights-and-loudspeakers.html> and Joseph Goldstein and Colin Moynihan, “Videos Show Police Using Pepper Spray at Protest on the Financial System,” *The New York Times*, September 26, 2011, <http://www.nytimes.com/2011/09/26/nyregion/videos-show-police-using-pepper-spray-at-protest.html>.

²⁰² William Scott, “Introduction,” *Critical Quarterly* 54 no. 2 (2012): iii-vi. For an interview with Scott about the library’s destruction see <http://peopleslibrary.wordpress.com/tag/bill-scott/>. The Occupiers have since won a Federal Court case against the City of New York and Brookfield Properties. See Colin Moynihan, “Suit Settled with Occupy Wall St. Over Seizure of Library at a Park,” *The New York Times*, April 9, 2013, <http://www.nytimes.com/2013/04/10/nyregion/occupy-wall-street-wins-suit-over-seizure-of-library.html>.

²⁰³ “Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street.” Protest and Assembly Rights Project, (Jan. 2012), particularly pages 142-178.

²⁰⁴ Tabatha Abu El Haj, “All Assemble: Order and Disorder in Law, Politics, and Culture,” *Journal of Constitutional Law* 16 no. 4 (2014): 953.

²⁰⁵ El Haj, “All Assemble,” 952.

and that camping was not really considered speech even though legally, the state or property owner isn't allowed to limit the First Amendment rights of the public when the property is "held in trust for the use of the public."²⁰⁶ There are reports that the then-mayor Bloomberg and the private owner of the public Zuccotti Park, Brookfield Properties, spoke on a daily basis,²⁰⁷ and many of the raids and arrests were made at his behest, while he was working closely with Brookfield to monitor and regulate activities in the park. Occupiers could never do enough to comply with their demands: when the Mayor claimed the plaza was dirty, protestors cleaned it; when nearby residents objected to drumming, Occupiers made a curfew on noise; when the fire department seized gas generators, they used pedal powered ones instead.²⁰⁸ Then, on the morning of the 15th, the NYPD completely disregarded New York Supreme Court Justice Billings' restraining order on the grounds that Bloomberg's lawyers had found it "confusing,"²⁰⁹ and went ahead and evicted the encampment.

Since 1968, when the New York City Planning Commission gave Brookfield Properties a special permit in exchange for development rights, Zuccotti Park was a privately owned public space (POPS). In New York City, over 500 public spaces were privately owned at that time,

²⁰⁶ Arthur Eisenberg citing *Burton v. Wilmington Parking Authority* 365 U.S. 715, 721 (1961), "Some Unresolved Constitutional Questions," in *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space*, ed. Ron Shiffman, Rick Bell, Lance Jay Brown, and Lynne Elizabeth (Oakland: New Village Press, 2012), 75.

²⁰⁷ Colin Moynihan and Cara Buckley, "Cleanup of Zuccotti Park is Postponed," *The New York Times*, October, 14, 2011, http://cityroom.blogs.nytimes.com/2011/10/14/cleanup-of-zuccotti-park-cancelled/?_r=0; Eisenberg, "Some Unresolved Constitutional Questions," 78.

²⁰⁸ Gregory Smithsimon, "'A Stiff Clarifying Test Is in Order': Occupy and Negotiating Rights in Public Space," in *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space*, ed. Ron Shiffman, Rick Bell, Lance Jay Brown, and Lynne Elizabeth (Oakland: New Village Press, 2012), 42.

²⁰⁹ Janos D. Marton, "Representing an Idea: How Occupy Wall Street's Attorneys Overcame the Challenges of Representing Non-Hierarchical Movements," *Fordham Urban Law Journal* 39 (2012): 1114.

which amounted to over 20 million square feet of public space.²¹⁰ Private owners are legally prohibited from treating POPS like private property and are required to keep them open and accessible to the public at all times. Not incidentally, POPS are also heavily subsidized by taxpayers. Brookfield had received \$460,000 in subsidies for the Park, while their tenants (which included high end stores like Saks Fifth Avenue) received \$20.1 million.²¹¹ Despite clear rules and regulations prohibiting private owners from treating these spaces as their own, half of all POPS in New York were either closed or privatized illegally by the time Occupy began.²¹²

In the years prior to Occupy, New York's City Planning Commission (CPC) had conducted a three-year study of POPS and enacted a comprehensive rezoning plan. This plan was meant to ensure that zoning law would protect the public's ability to access these spaces by placing procedural and substantive restrictions on private owners, including the requirement that the private owner must obtain CPC authorization to close the park. The CPC can only justify closing a POPS if the private owner provides evidence that there are significant safety issues that necessitate closing the space. Even then, the CPC can allow closure of POPS only after a public hearing for which the public was supposed to be given adequate notice.²¹³ Despite these procedural safeguards which were already in place to ensure that the public's First Amendment rights would be respected in spaces that comprise a major part of New York City's urban

²¹⁰ "Suppressing Protest," 7; Jerold S. Kayden, "Meet Me at the Plaza," *The New York Times*, October 19, 2011. <http://www.nytimes.com/2011/10/20/opinion/zuccotti-park-and-the-private-plaza-problem.html>.

²¹¹ Theresa Agovino, "Zuccotti Park's Landlord is Richly Subsidized," *Crain's New York Business*, October 31, 2011, http://www.crainsnewyork.com/article/20111031/REAL_ESTATE/111039989.

²¹² Kayden, "Meet Me at the Plaza"; *The People of the State of New York v. Nunez*, Memorandum of Law of Amicus Curiae New York Civil Liberties Union, Docket No. 2011 NY 08291, 4.

²¹³ Kayden, "Meet Me at the Plaza."

landscape, Brookfield Properties posted its own rules and restrictions and decided to close the Park anyway. It even ignored the Borough President Stringer's demand for a dialogue with Occupiers to respect the Occupier's First Amendment rights.²¹⁴

On the night of the eviction, 142 people were arrested, including Ronnie Nunez, a 24-year old, Dominican born Harlem resident and teacher's aide for students with special needs. He was charged with trespass, disorderly conduct, and obstructing governmental administration. In his defense, he argued that the City had no authority to evict him because Brookfield's actions violated the zoning code, yet Judge Matthew A. Sciarrino, Jr. of the Criminal Court of the City of New York issued a ruling on April 6, 2012 denying Nunez's motion to dismiss the criminal charges against him, even though Brookfield hadn't consulted the CPC in order to exclude the public and there had been no public hearing.

In his opinion, Sciarrino described Zuccotti as a "typical" POPS which was intended to be used for "passive recreation, rather than for active recreation or sports activities"²¹⁵ and he decided that Brookfield had every right to regulate the space by promulgating "reasonable" rules to avoid liability, so long as they would not interfere with the "intended use of the POPS by the general public."²¹⁶ Throughout the opinion, he foregrounded Brookfield's right to private

²¹⁴ Manhattan Borough President Stringer issued the following statement on Oct. 21, 2011: "Last week, we called on Brookfield to delay its cleanup of the park to allow for dialogue and ultimately, a long-term solution that works for the community and protects the First Amendment rights of OWS." Statement on Community Board Occupy Wall Street Resolution by Senator Squadron, Congressman Nadler, & Borough President Stringer, <http://nadler.house.gov/press-release/statement-community-board-occupy-wall-street-resolution-senator-squadron-congressman>. Brookfield rejected this offer. See Memorandum of Law of Amicus Curiae New York Civil Liberties Union, 10.

²¹⁵ *The People of the State of New York v. Nunez*, Decision and Order, Docket No. 2011 NY 082981, 3.

²¹⁶ *The People of the State of New York v. Nunez*, 7.

property, arguing that the rules Brookfield implemented were reasonable to avoid liability and that forcing them to “grant unregulated access to this space” (which was not really at issue here) would be “inconsistent with the concept of private ownership.”²¹⁷ In an abrupt, four page decision, Sciarrino kept repeating Brookfield’s potential liability: “the actions of Brookfield were narrowly tailored to protect both itself from liability and those at risk”²¹⁸; “the posted rules were designed to ensure that the park would be used for its intended purpose and to prevent the existence of lawful conditions that might expose Brookfield Properties to liability”²¹⁹; “the rules appeared to be reasonable to forestall liability”²²⁰; and “the actions of Brookfield were narrowly tailored to both protect itself from liability and those at risk because of the unsafe conditions in Zuccotti Park.”²²¹ In the second footnote to the decision, he even said that “it is not for this court to state what the message of the OWS movement is or is not” but only a few pages later, he blatantly contradicted himself when he concluded that the Occupation did not merit First Amendment protection because “there is no reason to conclude that camping in Zuccotti Park conveyed any particular message.”²²²

Sciarrino’s failure to apply the First Amendment is particularly glaring given how he began the decision. He describes the Occupation in terms that would convey the very message he had just denied. There, he cited two articles, one from *Wired* magazine and one from the *New York Times*, both of which described the camp as a site of commons governance. He had even excerpted a description of the encampment which the authors had described as “a little city

²¹⁷ *The People of the State of New York v. Nunez*, 6.

²¹⁸ *The People of the State of New York v. Nunez*, 4.

²¹⁹ *The People of the State of New York v. Nunez*, 7.

²²⁰ *The People of the State of New York v. Nunez*, 8.

²²¹ *The People of the State of New York v. Nunez*, 10.

²²² *The People of the State of New York v. Nunez*, 9.

within the Big City, with its own library, medical center...information center, a common kitchen...People filled the walkways and sidewalks surrounding the occupation day and night. They ate, chatted, held spontaneous teach-ins.”²²³ Other courts across the country, including the Court of Common Pleas in Pittsburgh, had at the very least recognized that the encampment was expressive conduct of some kind. Judge Frances A. McIntyre in Boston found that the camps conveyed a message that was broadly understood by the public: “There is considerable media attention devoted to Occupy sites, and most articles, per journalistic custom, restate the Occupy position. The media has clearly understood the plaintiffs' contribution to the national conversation.”²²⁴ In Augusta, Judge Nancy Terresen found that “those who view the tent cities erected by the Occupy movement in general and by Occupy Augusta in particular are likely to understand that these tent cities in parks and squares near centers of government and finance symbolize a message about the unequal distribution of wealth and power in this country.”²²⁵ Federal courts in Minneapolis, Fort Myers, and Columbia found the same, that camping was expressive conduct.²²⁶

In the two months following Occupy Wall Street’s arrival at Zuccotti Park, Brookfield Properties never petitioned the CPC once to restrict the public’s access to the space or for evicting the Occupiers,²²⁷ while on and after November 15, the public had been subjected to heinous police restrictions. According to a letter written to the City Commissioner by the

²²³ Sciarrino quoting Quinn Norton, “Scenes from the Occupation: Before and After the Wall Street Eviction,” *Wired*, November 16, 2011, 4.

²²⁴ Udi Ofer quoting Judge Francis A. McIntyre, “Occupy the Parks: Restoring the Right to Overnight Protests in Public Parks,” *Fordham Urban Law Journal* 39 (2012): 1165.

²²⁵ Udi Ofer quoting Judge Nancy Terresen, “Occupy the Parks: Restoring the Right to Overnight Protests in Public Parks,” *Fordham Urban Law Journal* 39, 1155-1181, 1165.

²²⁶ Ofer, “Occupy the Park,” 1165-6.

²²⁷ Memorandum of Law of Amicus Curiae New York Civil Liberties Union, 14.

ACLU, Center for Constitutional Rights (CCR), and the NLG, people in and entering the park after November 15 were subjected to police searches that relied on “ad hoc, arbitrary, and inconsistent rules and regulations.”²²⁸ As the letter to the commissioner describes, the public had to follow rules specifying what they could or could not bring into the Park that changed on a daily basis, all of which restricted the public’s use of the Park. On one day, they were told that they could bring “signs, bags, containers, food, [and] musical instruments” while on another day, they were told they could not. As the letter puts it, the rules would “vary by the day, the type of activity in the park at the time, the attire of the person attempting to enter, and the caprice of security personnel.”²²⁹ The letter also described how since the eviction, the Park had been surrounded by metal barricades in direct violation of the city’s zoning laws. This letter was part of the record before the court and had received no mention in Sciarrino’s decision. Instead, Sciarrino chose to conclude by stating that though “movements are laudable, that does not arguably excuse one’s obligations to work within the lawful processes allowed in our democratic society” and that “if the 99% wishes to make itself heard, it must do so in a legal, organized manner,”²³⁰ this despite the Court’s failure to acknowledge the importance of the hearing that would have granted Occupiers a chance to lawfully contest the rules promulgated by Brookfield. For him it was adequate that the police read “a written announcement describing what was taking place” over a bullhorn, and that they announced that they were clearing the Park before they did so.²³¹ What he didn’t realize is that spaces like the Occupy encampments can “fulfill the

²²⁸ Letter to Commissioner Robert LiMandri by the New York Civil Liberties Union, the Center for Constitutional Rights, and the National Lawyers Guild New York Chapter, “Violations at 1 Liberty Plaza,” (Jan. 9, 2012), 1.

²²⁹ Letter to Commissioner Robert LiMandri, 3.

²³⁰ *The People of the State of New York v. Nunez*, 12-13.

²³¹ *The People of the State of New York v. Nunez*, 10.

functions of the traditional agora, places where people can confront issues of common concern and facilitate their resolution.”²³² Law and Urban Planning Professor Peter Marcuse points out that not only were New York City officials not obligated to force Occupy Wall Street out of Zuccotti Park, they could have provided Occupiers with facilities like sound systems, fire extinguishers, safe connections, and sources of heat in the very same way that they provide facilities for commercial and recreational events.²³³

As David Harvey’s research on urbanization reveals, the judiciary’s unwillingness to recognize the Occupiers’ First Amendment rights actually has deep historical roots in a model of economic growth which dates all the way back to 1851, when the Republican bourgeoisie violently repressed the French Revolution and Napoleon Bonaparte enlisted the urban designer Georges-Eugene Haussman to try to solve France’s economic problems.²³⁴ Relying on new financial and credit instruments, Haussman then designed and implemented an urban redevelopment plan on an unprecedented scale.²³⁵ He annexed the suburbs, designed entirely new neighborhoods like Les Halles, and gradually inaugurated a whole new way of life. Paris, which was formerly the site of a great revolution, became “the city of light,” and people flocked there in large numbers, to the newly constructed cafes, department stores, and grand expositions in a rising tide of rampant consumerism.²³⁶ Inevitably, the financial credit structures upholding the system collapsed, and by 1868, the Paris Commune rose up to take back the city on behalf of

²³² Peter Marcuse, “Occupy and the Provision of Public Space: The City’s Responsibilities,” in *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space*, ed. Ron Shiffman, Rick Bell, Lance Jay Brown, and Lynne Elizabeth (Oakland: New Village Press, 2012), 269.

²³³ Marcuse, “Occupy and the Provision of Public Space,” 267.

²³⁴ David Harvey, “The Right to the City,” *New Left Review* 53 (2008): 25.

²³⁵ Harvey, “The Right to the City,” 25.

²³⁶ Harvey, 26.

the poor, who had been dispossessed in the name of “civic improvement and renovation.”²³⁷

In the 1940s, the urban designer Robert Moses got it into his head to set out and remake New York City just as Haussman had remade Paris.²³⁸ As Harvey recounts, Moses eventually reengineered the whole metropolitan region, transforming the infrastructure, building highways and developing suburbs, which just as it had in 1840s France, resulted in the great transformation of everyday life.²³⁹ Not only were there new products to be bought, “from housing to refrigerators and air conditioners, as well as two cars in the driveway and an enormous increase in the consumption of oil,” but rather than community action, subsidized home-ownership (which, as Harvey points out, was a form of prosperity to which minorities were denied access) resulted in the repression of women and “the defense of property values and individualized identities.”²⁴⁰ In 1968, discontented white middle-class students went into revolt, formed alliances with marginalized groups demanding civil rights, and protested American wars for oil abroad.²⁴¹

Urbanization over the last forty years has been similar in principle and even more massive in scale. After the high-tech crash of the late 1990s, the housing sector fueled the economy in the United States and abroad, in the UK, Spain, and China.²⁴² Once again, investment banks innovated credit instruments to back urbanization and property markets – but this time, all over the world. They funded massive construction projects in Johannesburg, Taipei,

²³⁷ Harvey, 26, 23.

²³⁸ Harvey, 27.

²³⁹ Harvey, 27.

²⁴⁰ Harvey, 27.

²⁴¹ Harvey, 28.

²⁴² Harvey, 29.

Moscow, London, Los Angeles, Dubai, and Abu Dhabi, and as Harvey points out, they did so often in “the most conspicuous, socially unjust and environmentally wasteful ways possible.”²⁴³

Back in the United States, they were busy building the housing bubble on a foundation of sub-prime mortgages, risky home loans with sky-high interest rates that borrowers would never be able to repay.²⁴⁴ The ACLU reports how lenders systematically targeted communities of color for sub-prime mortgages, even when they were eligible for more traditional, affordable home loans.²⁴⁵ All through the late 1990s and early 2000s, Wall Street packaged and sold these sub-prime mortgages on the securities market, amassing immense fortunes for the 1%. Backed by local state governments in league with investment banks and corporations, developers had shaped the city to serve themselves. As Harvey explains, cities were bastions of consumerism where “shopping malls, multiplexes and box stores proliferate, as do fast-food and artisanal market-places” and a new urbanism movement fulfilled the dream of urban life, “a world in which the neoliberal ethic of intense possessive individualism, and its cognate of political withdrawal from collective forms of action, becomes the template for human socialization,”²⁴⁶ all while the poor, underprivileged, and marginalized were once again, systematically dispossessed.²⁴⁷

Inevitably, the housing bubble did burst in 2008. Homeowners weren’t able to make their home loan payments, and the investment banks that had bought and sold these loans finally

²⁴³ Harvey, 29-30.

²⁴⁴ Larry Schwartztol, “Predatory Lending: Wall Street Profited: Minority Families Paid the Price,” *ACLU*, September 16, 2011, <http://www.aclu.org/blog/racial-justice/race-and-economic-justice/predatory-lending-wall-street-profited-minority>.

²⁴⁵ Schwartztol, “Predatory Lending: Wall Street Profited.”

²⁴⁶ Harvey, 32.

²⁴⁷ Harvey, 33.

started to fail.²⁴⁸ According to the Pew Research Center, Hispanic and African-American families suffered the most, with recent reports demonstrating that the median wealth of white households has grown to 20 times that of black and Hispanic households since the 2008 financial crisis started, exacerbating racial wealth inequality.²⁴⁹ Rather than turn to a different economic model or underscore the need for increasing the regulation of investment banks, the federal government bailed them out instead. They were just ‘too big to fail.’

Yet as I pointed out in Chapter One, society is changing faster than the law, and the public has the power to impact the rule of law rhetorically. Inspired by the occupation in Zuccotti, which had emerged to challenge the government’s position that there is no alternative to an unchecked market economy, Occupy Pittsburgh set up its camp in a park located at the intersection of Grant and Sixth Street adjacent to Bank of New York (BNY) Mellon, one of the largest financial institutions in the world.²⁵⁰ In their pleadings to the Court, Occupy Pittsburgh explicitly stated that it had done this to bring attention to “the disparities in political and economic power in our society in general” and specified that it was “the role of Bank of New York Mellon in particular” which had “attracted this scrutiny due to lawsuits by states Attorney

²⁴⁸ Steve Fiorillo, “What Was the Subprime Mortgage Crisis and How Did it Happen?” *The Street*, September 7, 2018, <http://www.thestreet.com/personal-finance/mortgages/subprime-mortgage-crisis-14704400>.

²⁴⁹ Schwartztol, “Predatory Lending: Wall Street Profited.”

²⁵⁰ Occupy Pittsburgh started with a three-thousand person march that began at Freedom Corner in the historically black neighborhood called the Hill District. During the civil rights movement, activists from the Hill District met here to protest “urban renewal,” policies that displaced low-income African American residents from their neighborhoods and had a devastating effect on social and cultural life in the area. For more on the history of Freedom Corner and its significance as a gathering point for Occupy Pittsburgh, see Mindy J. Fullilove and Terri Baltimore, “Freedom Corner: Reflections on a Public Space for Dissent in a Fractured City,” in *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space*, ed. Ron Shiffman, Rick Bell, Lance Jay Brown, and Lynne Elizabeth (Oakland: New Village Press, 2012), 105.

General, speculative currency trading, transactions with Bernie Madoff, and dealings in toxic mortgages.”²⁵¹ Even despite decades of financial deregulation, when Occupy Wall Street began, the Justice Department, several states, and its own clients were in the process of suing BNY Mellon for several federal law violations. Mellon was accused of cheating pensioners, including teachers and police officers, out of \$2 billion dollars by charging them rates higher than market costs, overcharging bank clients over \$1.5 billion in foreign transaction fees, and promising its customers the best rates on their investments before defrauding them out of \$2 billion.²⁵² It had misled investors into buying subprime mortgage backed securities.²⁵³ It had also raised Bernie Madoff’s credit by \$300 million based on falsified documents and was facing a lawsuit alleging that it had illegally funneled billions of dollars into his Ponzi scheme, reaping millions in profits.²⁵⁴ Since Occupy Pittsburgh had fairly broad appeal, it came as no surprise when early on in the movement, BNY Mellon’s spokesperson Ron Gruendl said that the Bank would respect the occupation as long it was peaceful and respectful of the Bank’s property.

When Occupy was still active, roughly between October 2011 and June of the next year, it had protested BNY Mellon along with another investment bank, PNC, and it had protested

²⁵¹ Defendant’s Answer and New Matter, 2.

²⁵² Eric Dash and Peter Lattman, “U.S. and N.Y. Sue Bank of New York Mellon Over Foreign Exchange Fees,” *The New York Times*, October 4, 2011, <http://www.nytimes.com/2011/10/05/business/new-york-state-says-bank-of-new-york-mellon-cheated-pension-funds.html?r=0>.

²⁵³ Chris Fleisher, “BNY Mellon Being Sued by Lender Commerzbank AG Over Housing Crisis-Related Activities,” *TribLive*, December 28, 2015, <http://triblive.com/business/headlines/9703309-74/mellon-bny-bank> and Jonathan Stempel, “Bank of NY Mellon Must Face Lawsuit Over \$1.2 Billion Mortgage Loss,” *Reuters*, March 3, 2016, <http://www.reuters.com/article/us-bony-mellon-lawsuit-idUSKCN0W52CJ>.

²⁵⁴ Erik Larson, “BNY Mellon Raised Madoff’s Credit by \$225 Million in 2006,” *Bloomberg News*, November 14, 2013, <http://www.bloomberg.com/news/articles/2013-11-14/bny-mellon-raised-madoff-s-credit-by-225-million-in-2006>.

Target Corporation, UPMC, and Bakery Square in East Liberty, an urban development that is part of the growing wave of gentrification in Pittsburgh. They had also protested then Governor Tom Corbett's massive cuts to the public infrastructure, including education and transit, all while he gave 1.7 billion in tax dollars to Shell Oil for a fracking plant and to corporations like Verizon, who then exploited tax loopholes to avoid paying millions in state taxes. Yet in her decision for the Court of Common Pleas of Allegheny County, Judge Christine Ward declined to engage with these details or with Occupy Pittsburgh's systemic critique. In the opening of her decision, Ward provides a brief description of Occupy Pittsburgh's message as a critique of "wealth disparity and corporate greed" which they sought to convey "through the expressive technique of encampment at selected locations,"²⁵⁵ but she conspicuously avoids discussing Mellon's role in creating that disparity. She discusses Occupy Wall Street's critique of the political and economic system in only the vaguest of terms, as the "message of the 99%"²⁵⁶ or as "certain messages"²⁵⁷ which Occupiers were able to "impress...on passersby."²⁵⁸ As the legal answer explicitly stated, however, Occupiers had taken over Mellon Green in order "to spur discussion, mobilization, and education of the public"²⁵⁹ and to convey "the paramount message behind Defendant Occupy Pittsburgh and the larger Occupy movement "an unequivocal criticism of the extreme disparities of wealth and political power, created and facilitated by financial institutions centered on Wall Street."²⁶⁰

²⁵⁵ Defendant's Answer and New Matter, 1.

²⁵⁶ *BNY Mellon v. Occupy Pittsburgh*, Pa. Dist. & Cnty. Dec. (2012), 27.

²⁵⁷ *BNY Mellon v. Occupy Pittsburgh*, 27.

²⁵⁸ *BNY Mellon v. Occupy Pittsburgh*, 27.

²⁵⁹ Defendant's Answer and New Matter, 2.

²⁶⁰ Defendant's Answer and New Matter, 23.

As the opinion progresses, Ward’s reasoning comes across as embarrassingly dated. At most, Ward saw the encampment not as a site of commons governance but as a makeshift recreational campsite, and she stated that “the nature of the Green itself as a small green space in the heart of Downtown should make it apparent to all that it is not a space appropriate for camping, such as a state park could be” and that it is therefore “implicitly clear that it would not be permissible to put a sign expressing a message on the side of a car or an RV and drive it onto the Green and park.”²⁶¹ At one point, she even patronizes the Occupiers by recognizing how hard it is to camp in winter: “The court acknowledges the testimonies in support of the Occupy encampment...It is understandable that these groups would admire and support the pluck and resiliency of this hardy band of souls willing to freeze their tails off to demonstrate the plight of the disadvantaged.”²⁶²

During the course of the lawsuit, Occupy Pittsburgh had presented the court with documents proving that the Pittsburgh Urban Redevelopment Authority (the “URA”) had financed the construction of Mellon Green with \$15,000,000 in public money in the form of a grant and government bonds in order to subsidize the construction of its office building and to further a “major redevelopment effort to strengthen the Fifth and Forbes corridor of the City’s central business district” which was “expected to leverage more than \$400 million of private investment and...an additional 650,000 square feet of retail and entertainment to the district,” including “a multi-screen movie theatre” and “possibly a new department store” to complement the existing Kaufmann’s, Lazarus, Saks Fifth Avenue, and Lord & Taylor. The documents presented to the court show that \$7,000,000 of the \$15,000,000 sum Mellon was granted was to

²⁶¹ *BNY Mellon v. Occupy Pittsburgh*, 36.

²⁶² *BNY Mellon v. Occupy Pittsburgh*, 2.

be spent on preparing the site and for “other project related activities,” while \$8,000,000 was in the form of bonds, and was to go to improving sidewalks, the intersection, and transit access as well as “a public plaza adjacent to the Mellon facilities.”²⁶³ Both the URA document that Occupy had included as part of its answer and the documents that BNY Mellon had submitted to the court had even stated that the land at 6th and Grant Street was supposed to be “public plaza.”²⁶⁴

In their complaint, BNY Mellon had claimed that the space at 6th and Grant Street was “Accessory Open Space Reserved for Future Development,” a “Temporary Open Space” and, significant for legal purposes, not “Urban Open Space.”²⁶⁵ According to the 1988 Zoning Code, Urban Open Space is subject to more requirements than either other kind of Open Space. During business hours, Urban Open Space must be open to the public for: “1) facilitating pedestrian circulation; 2) providing space for ‘relaxation, sitting, informal recreation or activities such as entertainment, exhibits, eating, and drinking’; 3) improving access to public transportation; and 4) providing connections to other urban or public space open network.”²⁶⁶ Open Space, however, is for the private property owners’ use and the owner is not required to open it up to the public. In their legal answer, the Occupiers made a solid legal argument claiming that the land was Urban Open Space. They cited the 1988 Zoning Code, which requires that Urban Open Space “be maintained for use by the general public” and that it be open without restriction “at least during all business hours common to the area of the district in which it is located.”²⁶⁷ Since the

²⁶³ Defendant’s Answer and New Matter, Exhibit B-2, 10-11.

²⁶⁴ Defendant’s Answer and New Matter, Exhibit B-2, 18.

²⁶⁵ Plaintiffs Verified Complaint for Injunctive Relief, 2.

²⁶⁶ Plaintiffs Verified Complaint for Injunctive Relief, 6-7.

²⁶⁷ Defendant’s Answer & New Matter, 22.

businesses that operate in the vicinity of People’s Park maintained regular business hours during the winter, they argued that the Bank was legally required to keep the Park open to the general public during those months as well.²⁶⁸

Well before Occupy Wall Street, the City of Pittsburgh – Allegheny County Task Force for People with Disabilities had held a meeting about the public’s concerns that public spaces were being eroded, and in their amicus brief on behalf of Occupy, they point out how Mellon’s brief to the court obscures the fact that the City’s Planning Commission had required them to set aside land as Urban Open Space in Paragraph 5 of their November 10, 1988 Zoning Report, which stated that there must be a “rolling lawn that is crossed by two paths that provide handicapped access between Ross Street and Grant Street.”²⁶⁹ Why, the Task Force asks, would the Planning Commission “see any relevance in ‘handicapped access’ being important for their consideration if this was unencumbered Mellon property which could later be developed, removing the access provided by these paths?”²⁷⁰ They also pointed out that the “sidewalk” the Bank provided to qualify as required accessible Urban Open Space was in fact a stairway with 24 steps. They concluded that the only other Urban Space remaining must have been the path through the center of Mellon Green, the only other space that wasn’t the “sidewalk,” and that therefore closing the green during winter months would violate Title II of the ADA, which requires that any privately owned space of public accommodation be in usable condition. Although Ward responded to the amici, she never acknowledged the privatization of public

²⁶⁸ Defendant’s Answer & New Matter, 22.

²⁶⁹ Amicus Brief in Opposition to Preliminary Injunction, 8.

²⁷⁰ Amicus Brief in Opposition to Preliminary Injunction, 9.

spaces as an issue, and quickly concluded that the Green had always been Open Space according to “the history of the project,” even if there was a zoning code violation.²⁷¹

Ward reasoned that although the park could be considered a public forum in the non-winter months, in the winter, it was “simply private property.”²⁷² She recognized the Occupiers’ camp as “constitutionally protected symbolic expression,”²⁷³ but she also defended Mellon’s restrictions on winter use of the space as “reasonable.”²⁷⁴ Given that it was winter and the people could slip and fall on icy sidewalks, she reasoned that the Bank closed the Park to protect the public’s safety and avoid liability. Given the precedents, the history of how the Green has been used, and its “nature”²⁷⁵, she concluded it would be unlikely that even in the non-winter months, Mellon Green could be considered a public forum (“thus far” it hasn’t been held out as a space for public discussion and debate, she concludes).²⁷⁶ However, Ward conspicuously left out a justification for ruling that Mellon Green may have already been zoned for the very kinds of public use that take place in public forums, even in winter.

Ward’s conclusion that what she calls “tax increment financing,” a form of public financing for development schemes that gives large banks and corporations public money in return for the nebulous promise that they will bring jobs and tax revenue to an area, “does not somehow strip BNY Mellon of its exclusive ownership of the property it purchased” is unpersuasive if not legally unsound, especially in light of the fact that none of the URA’s development plans had proven sustainable. Her opinion highlights the need for the judiciary to

²⁷¹ *BNY Mellon v. Occupy Pittsburgh*, 17.

²⁷² *BNY Mellon v. Occupy Pittsburgh*, 2.

²⁷³ *BNY Mellon v. Occupy Pittsburgh*, 34.

²⁷⁴ *BNY Mellon v. Occupy Pittsburgh*, 37.

²⁷⁵ *BNY Mellon v. Occupy Pittsburgh*, 36.

²⁷⁶ *BNY Mellon v. Occupy Pittsburgh*, 34.

recognize the subsistence perspective, forms of value that cannot be reduced to the expansion of goods, services, and money. It is troubling that if we follow the court, we should think about economic justice as a matter of private property rights alone. Ward invites us to remember the rules protecting private property interests, of Mellon and of private citizens: “there is no zoning, constitutional, statutory, or common law ground to take over someone else’s property as Defendants have taken over BNY Mellon’s property here”²⁷⁷; “the Occupiers’ conduct here greatly interferes with BNY Mellon’s exclusive right to its property”²⁷⁸; “the Occupiers do not have a right to be on BNY Mellon’s private property.”²⁷⁹ What Ward leaves out is any discussion of BNY Mellon’s role in the economic system, its criminal activity, and how its “property rights,” contribute to a system of power relations that produces inequality and compromises the health, safety, and welfare of people on, near, and away from Mellon Green. She called the occupation an “invasion of BNY Mellon’s private property”²⁸⁰ that is “clearly unreasonable”²⁸¹ and she granted the injunction in part because the Occupiers would not be able to compensate BNY Mellon for the \$24,400 a week it was spending on security forces that it had hired since the Occupation began, the necessity for which she never questioned.²⁸²

While she all but criminalized the occupiers rhetorically, she described the criminal bank as basically respectable, praising its “efforts to resolve this ongoing trespass without confrontation by asking Defendants to leave” and its “reasonable business decision” to close the

²⁷⁷ *BNY Mellon v. Occupy Pittsburgh*, 3.

²⁷⁸ *BNY Mellon v. Occupy Pittsburgh*, 7.

²⁷⁹ *BNY Mellon v. Occupy Pittsburgh*, 15.

²⁸⁰ *BNY Mellon v. Occupy Pittsburgh*, 21.

²⁸¹ *BNY Mellon v. Occupy Pittsburgh*, 21.

²⁸² *BNY Mellon v. Occupy Pittsburgh*, 12.

park in the winter.²⁸³ She even claims that the occupiers posed a threat to the public, drawing an analogy between this case and *White v. Foley*, in which the Court had granted a preliminary injunction to plaintiffs whose neighbors had placed playground equipment on their land. “As serious as the risks were in *White v. Foley*,” she concludes that here, because of the icy sidewalks, “the risks caused by the Occupation, to the Occupiers, to BNY Mellon employees and to the public at large, including non adults, is even greater.”²⁸⁴ She then concluded that “no property owner should be forced to wait until some liability producing event or other harm happens on its property to obtain injunctive relief.”²⁸⁵ Even if the legal precedent in *White* may have determined the outcome in this case, Ward does little to counteract the implication that Mellon had to protect the Occupiers from themselves. Her opinion thus deemphasizes the public’s power as potential lawmakers in their own right, and she invalidates the Peircean idea that legal legitimacy resides in the community’s rhetorical practices.

Perhaps worst of all, she barely paused to define the public interest as separate from the interests of BNY Mellon, conflating the two in statements such as “the harm to people or property or a risk of liability to BNY Mellon” and the “property interests in land as well as threats to health and safety.”²⁸⁶ For her, “any public use of BNY Mellon Green is up to the discretion of BNY Mellon”²⁸⁷ and the property rights of BNY Mellon and the public interest are often barely distinguishable, as when she declares that “the public interest here is in protecting BNY Mellon’s rights as a property owner and in protecting the health, safety, and welfare of

²⁸³ *BNY Mellon v. Occupy Pittsburgh*, 9.

²⁸⁴ *BNY Mellon v. Occupy Pittsburgh*, 9.

²⁸⁵ *BNY Mellon v. Occupy Pittsburgh*, 11.

²⁸⁶ *BNY Mellon v. Occupy Pittsburgh*, 10.

²⁸⁷ *BNY Mellon v. Occupy Pittsburgh*, 28.

people on or near BNY Mellon Green.”²⁸⁸ Like Kevelson, she even projects into the future to protect private property by citing an excerpt from *Stuart v. Gimbel*, and points out that legally, damage to property can be “repeated and continuing, or occasion damages which are estimable by conjecture and not by any accurate standard.”²⁸⁹

Ward’s legal analysis conceals the central problem of neoliberalism, which the human geographer Mark Purcell identifies as “the growing disenfranchisement of democratic citizens” and its end result, authoritarianism.²⁹⁰ As he explains, since the 1970s, global restructuring (which following Michael Hardt, I define as “strategies of deregulation, privatization, and the reduction of welfare structures”²⁹¹) has resulted in three specific changes to the way cities are governed: 1) what he calls ‘rescaling’; 2) policies that prioritize competition over redistribution; and 3) the transfer of state functions to non-state and quasi-state governing bodies.²⁹² As he explains, local governments and institutions at supranational scales (like the WTO) are becoming more powerful than the nation-state and local governments are now more like “flexible firms” designed first and foremost to attract investment; they are institutions that have evolved to “eschew democratic deliberation as inefficient and inappropriate for present economic circumstances.”²⁹³ Decisions about where and how to allocate resources are made by these almost entirely democratically unaccountable, corporatized governing bodies which are explicitly tasked with prioritizing private property rights.²⁹⁴ In Pittsburgh, for example, city

²⁸⁸ *BNY Mellon v. Occupy Pittsburgh*, 37.

²⁸⁹ *BNY Mellon v. Occupy Pittsburgh*, 6.

²⁹⁰ Mark Purcell, “Excavating Lefebvre: The Right to the City and the Urban Politics of the Inhabitant,” *Geojournal* 58 no. 2/3 (2002): 100.

²⁹¹ Hardt, “The Common in Communism,” 346.

²⁹² Purcell, “Excavating Lefebvre,” 100.

²⁹³ Purcell, 101.

²⁹⁴ Purcell, 103.

officials working with redevelopment authorities and developers routinely displace low-income residents from their neighborhoods, often African-American ones, in order to build high-end stores and developments. LG Realty Advisors, a real estate company run by the multi-millionaire Gumberg family, recently evicted residents from the below market rate Penn Plaza residences in the East Liberty neighborhood, successfully petitioning the city to rezone the space from residential to mixed-use commercial development, all without a community planning process.²⁹⁵

As Nancy Fraser points out, political movements need to look beyond the nation-state frame form to challenge currency speculators, multinational corporations, and investment banks,²⁹⁶ which in tandem with the supranational governance structures of the global economy, now set the terms for exploitation.²⁹⁷ Occupy Wall Street was an indictment of the global economic system, and as an expression of the commons, it demonstrated that there are alternatives to neoliberalism. However, as David Harvey points out in *Rebel Cities*, the Occupy encampments and even Elinor Ostrom's research on the commons involve a few hundred people at most, and neither adequately addresses commons problems in the metropolis; for example,

²⁹⁵ Tim Schooley, "Penn Plaza Agreement Comes Under Heavy Criticism," *Pittsburgh Business Times*, October 28, 2015.
<http://www.bizjournals.com/pittsburgh/news/2015/10/28/penn-plaza-agreement-comes-under-heavy-criticism.html>; Ryan Deto, "Pittsburgh Planning Commission Approves Zoning Change for Penn Plaza, Residents Say Public Input Should Have Happened First," *Pittsburgh City Paper*, October 28, 2015.

<http://www.pghcitypaper.com/Blog/archives/2015/10/28/pittsburgh-planning-commission-approves-zoning-change-for-penn-plaza-residents-say-public-input-should-have-happened-first>.

²⁹⁶ Nancy Fraser, *Fortunes of Feminism: From State Managed Capitalism to Neoliberal Crisis* (New York: Verso Books, 2013), 191.

²⁹⁷ Purcell, 100.

how commoners who develop distinctive cultures in local neighborhoods can stop those neighborhoods from being taken over by real estate developers and upper class consumers.²⁹⁸

In *People of the State of New York v. Nunez* and *BNY Mellon v. Occupy Pittsburgh*, the judiciary failed to develop and change the law in response to the idea of the commons, which Occupiers successfully brought back into the mainstream by coalescing around the right to free speech and assembly under the First Amendment. Yet as I have tried to demonstrate, the legal outcomes were far from inevitable; the judiciary chose not to adapt to the community's evolving beliefs. They declined to find a good fit between the law and the felt necessities of the time, and tenaciously upheld the primacy of private property rights instead. As a unit in thought, however, the commons can still grow in use and through experience, sporting, spreading, and developing new niches. The social order imagined by Haussman and others has proven unsustainable in the long run, and from a commoner's perspective, these cases could be the beginning a movement for a new globalism to take shape under LeFebvre's right to the city. Although the right to the city currently resides with corporate governing bodies like corporations, banks, and development authorities, as LeFebvre imagined it, asserting the right to the city meant asserting the right to prioritize human needs over corporate profits. In Peircean terms, it can establish a matrix for action by empowering urban inhabitants to call for the state to manage resources from the subsistence perspective.

²⁹⁸ David Harvey, *Rebel Cities: From the Right to the City to Urban Revolution* (Verso: New York, 2012), 78-88.

3.0 Redefining Sovereign Legitimacy: Alec L. v. McCarthy, Juliana v. United States, and the Right to a Stable Climate and Healthy Atmosphere

At a recent gathering of Western Buddhists in the Highland Park neighborhood of Pittsburgh, Pennsylvania, Adam Lobel, a Harvard Divinity School graduate, meditation teacher, and environmental activist opened the daylong retreat, *Silent Transformations: Ecological Destruction as Spiritual Practice*, with a modified version of the opening parable from Charles Eisenstein's *Climate: A New Story*. "Imagine," he asked us, "a man lost in a maze. Frantically he races around seeking the way out. Left, right, left, right, up and down, around in circles he runs, hitting dead ends and turning back, finding himself again and again back at his starting point. He begins to despair – after all that effort he has gotten nowhere. A committee of voices in his head offers him advice: how to run faster, how to choose smarter. He heeds one, then another, yet no matter how different the advice, the result is always the same. Then, amid the cacophony, he hears another voice as well, a quieter voice telling him, 'Stop.' He collapses in a heap. He hears a beautiful, musical sound. He has a chance to ponder his wanderings, and he remembers glimpsing secret doors that he was too much in a hurry to investigate. He begins to understand the structure of the territory he has been racing in. He explores the small, dark passageways that he'd dismissed before. He enters the hidden doorways that take time to unlock. Sometimes these new doors and passages lead to dead ends too, but at least now there is hope. Sometimes when he follows the music it seems to take him the wrong way, but eventually,

following the music, he emerges into the sunlit realm he always knew must exist. And there he finds the source of the music, his beloved, who has been singing to him all this time.”²⁹⁹

For centuries now, we have been losing our forests, grassland, minerals, oil, copyright patents, the Internet, broadcast airwaves, and government research to private interests as the result of an antiquated and corrupt regulatory maze.³⁰⁰ Under the 1872 Mining Act, for example, a law which has remained largely unchanged for the past 130 years, mining companies are allowed to extract gold, silver, copper, and other minerals that are publicly owned without paying royalty fees to the federal government. Depending on the type of minerals they discover, they can also take title to the land for much less than it is worth. One speculator in Keystone, Colorado was able to sell land he bought from the government for \$2.50 per acre to a developer for \$11,000 per acre. Since 1872, the federal government has given away more than \$245 billion of mineral reserves, while the environmental effects, including acid, cyanide, and other toxic runoff from mines routinely kill vegetation, wildlife, and streams and the people who live near the mines suffer health risks resulting from unsafe drinking water, soil contamination, and lead poisoning. In the Coeur d’Alene River basin in Silver Valley, Idaho, for example, approximately 26% of two-year-olds have been found with dangerous levels of lead in their blood.³⁰¹ Since the 1960s, the nation’s leading oil companies have also been allowed to evade billions of dollars in royalty payments for extracting hundreds of millions of gallons of oil from public lands while reaping the benefits from an array of special tax breaks.³⁰² Since the 1950s, the U.S. Forest

²⁹⁹ For the unmodified parable, see Charles Eisentein, *Climate: A New Story* (Berkeley: North Atlantic Books, 2018), 1-4.

³⁰⁰ David Bollier, *Silent Theft: the Private Plunder of Our Common Wealth* (New York: Routledge, 2002), 1-4.

³⁰¹ Bollier, 86-90.

³⁰² Bollier, 89.

Service has steadily increased what it considers a sustainable timber yield, authorized aggressive new tree harvesting methods such as clear-cutting, and constructed a costly 360,000 mile system of logging roads to facilitate commercial logging, all of which has resulted in massive soil erosion, degradation of streams and rivers, the loss of wildlife habitat, and irreversible harm to the ecological function of forest lands.³⁰³ When the former head of the EPA, Scott Pruitt, recently dismissed over half the members of a scientific review board to clear the way for appointees from industry, and when soon after, Donald Trump announced a new plan to drill in federal waters off the Alaska coast for the first time, many of us were lost, especially since his official authorization immediately followed the UN's Intergovernmental Panel on Climate Change's (IPCC) announcement, which called for governments worldwide to take "rapid, far-reaching and unprecedented changes in all aspects of society" to prevent extreme drought, wildfires, floods, and food shortages on a mass scale.³⁰⁴

As a way to prevent us from becoming practitioners of neoliberal mindfulness, which co-opts beneficial aspects of the wisdom traditions and puts them in the service of ego-driven goals, Adam and his co-organizers, Michelle King and Fitzhugh Shaw, organized the retreat to respond to the following question: following Donna Haraway, what would it mean to "stay with the trouble" of global warming and ecological destruction instead of dissociating from our own complicity with a rapidly globalizing economic system that is destroying our collective habitat? After the day's activities drew to a close, I reflected on my own habits in the context of neoliberalism, a set of global political and economic policies which abolishes protections, rules,

³⁰³ Bollier, 91-93.

³⁰⁴ Brandon Miller and Jay Croft, "Planet Has Only Until 2030 to Stem Catastrophic Climate Change, Experts Warn," *CNN*, October 8, 2018, <https://www.cnn.com/2018/10/07/world/climate-change-new-ipcc-report-wxc/index.html>.

tariffs, and regulations in order to readily enable the free flow of goods, services, and capital from nation to nation. After the breakdown of socialism in Eastern Europe, these policies took hold worldwide, notably with Pinochet's coup in Chile in 1973.³⁰⁵ In the United Kingdom and here in the United States, Margaret Thatcher and Ronald Reagan universalized these policies with global treaties backed by the World Bank and International Monetary Fund.³⁰⁶ As factories relocated from old industrial centers to cheap labor countries and the logic of privatization reached new areas of the globe, companies and scientists emerged as patent holders who commercialized and monopolized the common biological and cultural heritage.³⁰⁷ Transnational corporations and investment banks came to dominate the world scene, and half of the world's trade is now carried out between financially interrelated transnational corporations, ninety percent of which are located in the global north.³⁰⁸ Since these systems of power are so deeply entrenched, it will require unprecedented changes at every level of scale to effect meaningful change.

As important as it is to mindfully evolve our personal habits in a more sustainable direction, as the environmental law scholar Mary Wood points out, any proposed climate-change solution that remains at the local or even the state level simply won't work in time. She points out that for the most part, the American public is regrettably disengaged, and she warns that "time consuming educational and democratic initiatives may not propel the citizenry to force

³⁰⁵ Maria Mies and Veronika Bennholdt-Thomsen, *The Subsistence Perspective: Beyond the Globalised Economy* (London: Zed Books, 1997), 27.

³⁰⁶ Mies and Bennholdt-Thomsen, 28.

³⁰⁷ Mies and Bennholdt-Thomsen, 38.

³⁰⁸ Mies and Bennholdt-Thomsen, 27-28.

government action in the narrow window of time remaining.”³⁰⁹ According to climate science, we are rapidly approaching climate tipping points that necessitate regulatory interventions. “For any legal framework of carbon responsibility to work,” she concludes, “it must respond to this macro level of necessary carbon reduction by imposing across the board obligations on the local level.”³¹⁰

As I mentioned in Chapter One, five months before Occupy Wall Street began, a team of lawyers backed by the Eugene non-profit organization Our Children’s Trust filed lawsuits against all fifty states and the federal government for failing to address climate change based on Wood’s innovative legal theory. In an early article introducing the legal framework for judicial intervention, she identifies the United States as the biggest contributor of greenhouse gas emissions in the world, and she points out that to date, it has taken no steps to put laws in place that would assign liability for greenhouse gas pollution. Thirty years ago, Congress passed a series of environmental statutes including the Clean Air Act, Clean Water Act, and Endangered Species Act along with several other state and local statutes in order to establish a framework through which individual litigants could bring claims. As time went on, however, the limitations of the regulatory structure started to become clear. For one, the law has been interpreted, applied, and enforced by administrative bodies which despite their professed neutrality, are actually “subject to intense political pressure by developers, industrialists, private property owners, and politicians,”³¹¹ and as she points out, since nearly all environmental and land use statutes give federal agencies authority to issue permits, “ironically...the law itself has become a

³⁰⁹ Mary Christina Wood, “Atmospheric Trust Litigation,” in *Climate Change Reader* eds. W.H. Rodgers, Jr. and M. Robinson-Dorn (Durham: Carolina Academic Press, 2011), 39.

³¹⁰ Wood, “Atmospheric Trust Litigation,” 29.

³¹¹ Wood, 13.

major engine of environmental destruction.”³¹² Wood observes that often, agencies use their discretion to issue permits to allow irreversible damage, and the EPA, which she points out actually has the resources necessary to protect the environment, routinely makes decisions that favor the fossil fuel industry and their government allies.

Concluding that administrative law is both dysfunctional and corrupt, Wood devised her theory based on the Public Trust Doctrine, a rarely invoked legal principle which requires the government to act as a steward of natural resources upon which society, the economy, and government depend.³¹³ According to the Public Trust Doctrine, which Wood dates back to “res communes,” a Roman Law principle which classified air, water, wildlife, and the sea as things held in common by the public, the government is a trustee, and it has an affirmative duty to manage shared resources for its trust beneficiaries, both the current and future generations.³¹⁴ Despite the fact that courts have defined the scope of the Public Trust Doctrine narrowly, usually restricting it to apply only to water, Wood sees no reason why they can’t extend the doctrine to apply to the atmosphere as well, and she argues that the obligations that come with being a trustee set a limit on sovereignty. *Alec L. v. McCarthy*, the first lawsuit against the federal government, is part of a global legal movement called Atmospheric Trust Litigation, which uses the Public Trust Doctrine as a basis for bringing two causes of action: first, actions by citizens against their government to enforce trust obligations owed to them; and second, actions by

³¹² Wood, 12.

³¹³ Douglas Quirke, “The Public Trust Doctrine: A Primer,” A White Paper of the University of Oregon School of Law Environmental and Natural Resources Center, Eugene (2016), 1.

³¹⁴ Quirke, “The Public Trust Doctrine,” 2.

children against their government for breach of trust obligations that compromise the atmosphere and other natural resources necessary for survival and prosperity now and in the future.³¹⁵

Although their website stands in need of more careful curation (as just one example, every one of the legal documents is posted without the explanations necessary to make them legible to a reading public pressed for time), Our Children’s Trust still usefully aims to leverage the courts as a forum for protest against the government’s collusion with industry. While the lawsuits advance a top-down approach to change by radically redefining the idea of sovereign power, the organization also attempts to mobilize the wider public at a grassroots level, albeit by restricting political engagement to channels that are all-too-familiar, for example, by purchasing “#youthgov gear, donating money, or spreading the word via an online petition.”³¹⁶ Regrettably, however, many of the legal pleadings that they make available to the public still advance politically regressive arguments at odds with commons governance.

Wood’s theory calls for a new relationship between “law, morality, economics, and politics,”³¹⁷ and she acknowledges that the problem with current environmental law statutes is that “in trying to control some of the ill-effects of the industrial pollution economy, the environmental statutes nevertheless sanction that same economy.”³¹⁸ While she laments that this has resulted in political inertia, and that “rarely do system-changing economic alternatives emerge from environmental statutory litigation,” the first complaint in *Alec L.* takes a more conservative approach.³¹⁹ Unfortunately, the lawyers’ ethical appeals sustain what Hardt and

³¹⁵ Wood, “Atmospheric Trust Litigation,” 47.

³¹⁶ See <https://www.ourchildrenstrust.org/>.

³¹⁷ Wood, “Atmospheric Trust Litigation,” 44.

³¹⁸ Wood, 43.

³¹⁹ Wood, 43.

Negri identify as the three most corrupt forms of the common: the corporation, nation-state, and family, the latter of which, as Hardt and Negri warn, often succumbs to the logic of narcissistic extension, “a kind of projected individualism via one’s progeny and betrays an extraordinary incapacity to conceive the future in broader social terms.”³²⁰ The lawsuit hardly initiates large scale transformation when it declares the need to protect the climate of “our Nation”³²¹ and the rights of “our children and our children’s children”³²² by making sure that their future includes the right “to be free from imminent property damage,”³²³ or when it tries to establish ethos by citing a Navy admiral who states that climate change is a national security threat and that “our federal government must not ignore our military leader’s concerns.”³²⁴ When the complaint makes coded references to climate change as a national security threat which “could lead to failed states, instability, and potentially, radicalization”³²⁵ (i.e. Middle East people are dangerous and must be quarantined) or when it describes how one of the named plaintiffs, Madeleine L., started a nonprofit called “Superheroes Needed” to sell homemade necklaces for building wells in “Africa because water issues there are so urgent,”³²⁶ a characterization which positions Americans as those superheroes and foreign people as their objects of charity at the same time that it celebrates how student groups actively cultivate entrepreneurial values, one wonders whether this litigation is even worth pursuing. Even the faith group amici submitted a brief that was overtly nationalist. As just one example, in the context of their appeal to consider the case

³²⁰ Michael Hardt and Antonio Negri, *Commonwealth* (Harvard: Harvard University Press, 2009), 161.

³²¹ *Alec L. v. McCarthy*, First Amended Complaint, 1.

³²² First Amended Complaint, 2.

³²³ First Amended Complaint, 2.

³²⁴ First Amended Complaint, 4.

³²⁵ First Amended Complaint, 4.

³²⁶ First Amended Complaint, 10.

from a human rights perspective, they claim that the “United States has played a critical leadership role in developing international law and promoting human rights”³²⁷ and they proudly quote a legal scholar who declared that the rights codified in the International Covenant on Civil and Political Rights “are in their essence American constitutional rights projected around the world.”³²⁸ This remark dangerously echoes what David Graeber identifies as the imperialist “dream that the United States, through its economic, political, and military power can not only defeat enemies but also create new political and social orders, reshaping nations, regions, and ultimately the global environment.”³²⁹

Nevertheless, the legal documents still advance narratives that are widely compelling. In the initial complaint, the lawyers describe how a few years before the lawsuit began, Alec L., an asthmatic sixteen-year old who used to enjoy “hiking and walking in forests” over ninety percent of which no longer exist, went on a hiking trip to a glacier in Iceland, one of the world’s biggest, and witnessed firsthand how it is melting at a rate of up to 3,000 feet per year.³³⁰ It also describes how Garrett and Grant S., two of the five other named plaintiffs, had moved from a community near the Los Padres National Forest, where extreme weather patterns resulted in wild fires and draught, to Timberville, Virginia near a house on the Shenandoah River hoping to be “able to play, swim, and fish in the river.”³³¹ As the lawyers describe, however, they soon discovered it had become unsafe for swimming as a result of runoff pollution from a nearby

³²⁷ Brief of Faith Groups as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 12.

³²⁸ Brief of Faith Groups as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, quoting Richard B. Lillich, 12.

³²⁹ David Graeber, “Wall Street, War Street, Debt Machine,” *Tidal: Occupy Theory/Occupy Strategy* no. 4 (2012): 19.

³³⁰ First Amended Complaint, 9.

³³¹ First Amended Complaint, 11.

factory, and that the trout, sunfish, and bass were dying off in large numbers.³³² Although other narratives aimed at gaining the judges’ sympathy are less effective (for example, Garrett and Grant apparently “take personal responsibility” for keeping the environment clean by “picking up trash”³³³), the complaint’s declared exigence, “an atmospheric climate emergency” which will “result in unimaginable consequences if our government does little or nothing,”³³⁴ usefully prescribes an emphatic response. As the lawyers explain, climate change is “unequivocally human-induced, occurring now, and will continue to occur unless drastic measures are taken to curtail it,” and the opening brief and complaint provide clear scientific evidence demonstrating the rapid extinction of species, erasure of livable habitats due to warming oceans, changing precipitation patterns, rising sea levels, as well as melting glaciers, ice sheets, and sea ice.³³⁵ The plaintiffs then took the unprecedented step of asking the court to issue an injunction ordering the federal government to reduce carbon dioxide emissions by 6% per year, make a yearly inventory of greenhouse gas emissions and a carbon reduction budget, and prepare a climate reduction plan within 120 days of the order.³³⁶

When the Trump Administration filed for an extraordinary legal writ to evade trial *Alec L.*’s sister case, *Juliana v. United States*, earlier this spring, calling it “an ill-conceived suit,”³³⁷ it was clearly seeking to avoid the kind of transformative publicity which public interest suits of this kind make possible. Even the *Alec L.* pleadings, which are even less comprehensive and in

³³² First Amended Complaint, 11.

³³³ First Amended Complaint, 11.

³³⁴ First Amended Complaint, 27.

³³⁵ First Amended Complaint, 19.

³³⁶ First Amended Complaint, 7.

³³⁷ *Juliana v. United States*, Petition for a Writ of Mandamus and Emergency Motion for a Stay of Discovery and Trial Under Circuit Rule 27-3, 4.

some ways more circumspect than *Juliana*'s, unambiguously characterize every named federal agency as a dismal failure: the EPA failed to regulate carbon dioxide emissions,³³⁸ the Department of the Interior (DOI) has recklessly permitted logging, livestock grazing, off-road vehicles, extraction of coal, coal-bed methane, oil, oil shale and natural gas, and oil, coal, and electric infrastructure and transmission facilities on public land,³³⁹ the USDA has permitted large scale logging in national forests and has failed to protect the atmosphere from unsustainable agricultural practices,³⁴⁰ the Department of Commerce has failed to protect the environment in its efforts to make American industry competitive,³⁴¹ the Department of Energy (DOE) has failed to advance the replacement of fossil fuels as a source of energy,³⁴² the Department of Defense (DOD) has failed to address climate change and has made the U.S. even more open to animosity by the rest of the world.³⁴³

Both the complaint and the amicus brief submitted in *Alec L. and Juliana* by Dr. James Hansen, director of the NASA Goddard Institute and Professor of Earth Sciences at Columbia University, present the facts of climate change, which Wood warns can often be too complex and technical for a public audience, clearly and efficiently. During the Holocene period (the last 10,000 years), Hansen explains that the earth's climate was relatively constant, while especially in the past few decades, due largely to the burning of fossil fuels, the atmospheric concentration of carbon dioxide has risen sharply from 316 ppm in 1959 to 390 ppm in 2010, with U.S.

³³⁸ *Alec L. v. McCarthy*, First Amended Complaint, 14.

³³⁹ First Amended Complaint, 15.

³⁴⁰ First Amended Complaint, 15.

³⁴¹ First Amended Complaint, 15.

³⁴² First Amended Complaint, 16.

³⁴³ First Amended Complaint, 16.

emissions in particular doubling from 2.83 to 5.67 billion metric tons.³⁴⁴ The unprecedented concentrations of carbon dioxide have resulted in global warming measuring 0.8 degrees Celsius, with another 2 degrees Celsius imminent.³⁴⁵ Simulations already show observable effects from this warming, including losses of coastal wetlands, coastal flooding, storm surges, melting glaciers and ice sheets, and destruction of coral reefs. Premature death due to the increasing prevalence of infectious disease in subtropical climates, more intense droughts, summer heat waves, and devastating wildfires are also pending.³⁴⁶ The thrust of Hansen’s brief is not only that climate change will cause future calamity, but that these changes have already started. Although he mentions “industry pressure at virtually every turn,”³⁴⁷ his brief maintains its focus on the science and the need for judicial intervention, concluding that “failure to act with deliberate speed in the face of the clear scientific evidence of the danger functionally becomes a decision to eliminate the option of preserving a habitable climate system” and he urges to the court not to delay in ordering sharp emissions reductions.³⁴⁸

While it remains necessary to critique the parties and many of the amici for making regressive arguments, the plaintiffs still usefully root sovereign legitimacy in the idea of responsible commons management and they do so in subtle and gradual ways, which as Kenneth Burke pointed out in the progressive 1930s, is a rhetorical strategy more likely to appeal to the mainstream public than revolutionary antithesis. As he recommended, the lawyers present “a familiar and pragmatic solution, a slight but significant shift in policy which might eventually

³⁴⁴ Brief for Amicus Curiae Dr. James Hansen, 6.

³⁴⁵ Brief for Amicus Curiae Dr. James Hansen, 6-7.

³⁴⁶ Brief for Amicus Curiae Dr. James Hansen, 9.

³⁴⁷ Brief for Amicus Curiae Dr. James Hansen, 14.

³⁴⁸ Brief for Amicus Curiae Dr. James Hansen, 7.

develop into something radical.”³⁴⁹ This subtle shift in how we conceive of government – from sovereign to sovereign trustee – would effectively disrupt a longstanding collusion between the state and the market. As a sovereign trustee, the state would effectively partner with the commons to limit privatization and enshrine principles, latent in statements such as the following, that private ownership is not an ultimate good: “to allow carbon emissions to clog the atmosphere and destabilize the climate is the equivalent of allowing the transfer of the atmospheric resource into private ownership, a resource to which only the public has a just claim.”³⁵⁰

It is frustrating that even despite its sometimes compromising rhetoric of synthesis, however, the plaintiffs lost the first case in the D.C. Circuit to the government backed by industry. The pretrial motions all highlight the unfortunate reality that public interest lawsuits are a war of attrition, and it raises the perennial question of whether or not progressive energy would be better spent elsewhere, particularly when the filings were met with such a cavalier dismissal by the District and Appeals Court. At the same time, however, cases like this one still enable us to “think constitutionally again,”³⁵¹ as Linebaugh urges us to do, and it enshrines principles of common ownership that could lead to a new order.

Given that the stakes of this case were no less than the survival of life on earth, the first DC Circuit decision was a resounding disappointment. Offering only the briefest readings of the key cases at issue, the judge decided that the Public Trust Doctrine is a matter of state and not

³⁴⁹ Ann George and Jack Selzer, *Kenneth Burke in the 1930s* (Columbia: University of South Carolina Press, 2007), 78.

³⁵⁰ *Juliana v. United States* (quoting *United States v. Causby* 328 U.S. 256, 261 (1946)) , Motion to Dismiss Denied, 41.

³⁵¹ Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (Berkeley: University of California Press, 2008), 20.

federal law and he dismissed the case based on a technical decision that the court lacked proper jurisdiction. What is striking about this opinion is not so much the holding as how it fails to deliver what Bitzer would call a “fitting” response to the rhetorical situation; the purpose, theme, matter, and style are out of sync with the exigence.³⁵² Much like Ward and Sciarrino, Judge Robert L. Wilkins chose not to include any of the context which gave rise to the legal claims, for example, how according to “the best available science, reductions in emissions of carbon dioxide are warranted immediately” and how “all of Earth’s climate systems (the atmosphere, land, and ocean) are unequivocally warming as a result of greenhouse gas emissions (GHGs) from burning fossil fuels and land use changes like deforestation and industrial agriculture.”³⁵³ Instead, he brushes these facts aside, addresses the case on the narrowest possible legal terms, and dismisses the cornerstone of the plaintiffs’ legal argument, based on the precedent set by the Supreme Court in *Illinois Central*, that the federal government must protect “property of a special character” “in which the whole people are interested.”³⁵⁴ While the plaintiffs persuasively argued that the atmosphere, like the land under the navigable waterways at issue in *Illinois Central*, is not “subject to private ownership,”³⁵⁵ the judge avoided mentioning the idea of common ownership entirely by stating that “traditionally the doctrine has functioned as a restraint on the states’ ability to alienate submerged lands in favor of public access to and enjoyment of waters above those lands” and that the plaintiffs “have cited no cases, and the Court is aware of none, that have expanded the doctrine to protect the atmosphere.”³⁵⁶

³⁵² Lloyd Bitzer, “The Rhetorical Situation,” *Philosophy and Rhetoric* 1 (1968): 10.

³⁵³ *Alec L. v. McCarthy*, Plaintiff’s Motion for Preliminary Injunction, 25.

³⁵⁴ *Alec L. v. McCarthy*, First Amended Complaint (quoting *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 at 454 (1892)), 15.

³⁵⁵ First Amended Complaint, 16.

³⁵⁶ *Alec L. v. Jackson*, 863 F. Supp. 2d (D.D.C. 2012), 3.

Yet even in a decision that is almost completely null and void, Wilkins may have unwittingly invited the public to take direct action. He concludes that even though “a sweeping court-imposed remedy is not the appropriate medicine for every intractable problem,” this does not mean that “the parties involved in this litigation – the plaintiffs, the Defendant federal agencies, and the Defendant-Intervenors – have to stop talking to each other once the Order hits the docket. All of the parties seem to agree that protecting and preserving the environment is more than a laudable goal, and the Court urges everyone involved to seek (and perhaps even seize) as much common ground as courage, goodwill, and wisdom might allow to be discovered.”³⁵⁷ On one level, it is easy to read Wilkins’s closing remarks as a disingenuous call to civility. Absent the court as a forum, it encourages dialogue between two groups, one motivated by subsistence, the other profit, who have incompatible goals, not to mention that it understates the need to address climate change as “laudable” rather than “urgent.”³⁵⁸ Assuming that conversation between the corporate defendants and the plaintiffs would even be possible, as Raj Patel points out, from a corporation’s perspective, this and similar litigation is a zero-sum game. “Quite rationally and without malice,” he explains, “they try to increase their profits by any means, legally and occasionally illegally...corporations that don’t follow this cardinal law of the jungle will go out of business, which means that whatever else a corporation makes, it’ll invariably produce externalities,”³⁵⁹ i.e. the environmental and social costs. Patel wisely observes that this is not to say that “the people who work in these organizations are vicious or

³⁵⁷ *Alec L. v. Jackson*, 11.

³⁵⁸ *Alec L. v. Jackson*, 11.

³⁵⁹ Raj Patel, *The Value of Nothing: How to Reshape Market Society and Redefine Democracy* (New York: Picador, 2009), 48.

cruel or callous.”³⁶⁰ He recounts how Unilever’s director of sustainable agriculture, Jan Kees Vis, is “by all accounts a decent, committed, thoughtful, and caring man, trying to do right by the planet. He oversees many initiatives that benefit both the planet and his company – saving water, using less fossil fuels and so on. But as he admitted, the minute that he adopts a policy that benefits the environment but harms the company is the minute he will lose his job.”³⁶¹

Pending a decision in this case, James Hansen, along with a group of progressive senior citizens including the Seattle Raging Grannies, have recently begun shutting down oil pipelines in several states, and other activists have also been blockading train tracks used by oil companies.³⁶² Although they would much rather achieve their aims by legal means (Annette Klapstein even lamented her own criminal acquittal because a trial “would have made real waves in the judicial system and within the public eye”), they see no other option besides committing what the state considers criminal offenses.³⁶³ Remarkably, courts are beginning to step in to address the executive and legislative failure to address climate change by recognizing the necessity defense and keeping these and future activists out of jail. They acknowledge that at the present time, there is no legal alternative to nonviolent direct action to address climate impacts, and as the group of eleven scientists responded in their amicus brief to the Appeals Court, “the time for mere talk has passed.”³⁶⁴ One can speculate as to whether the conclusion to Wilkins’ 2012 opinion was simply clueless or a deliberate nod in that direction.

³⁶⁰ Patel, 48.

³⁶¹ Patel, 48.

³⁶² Wood, “Atmospheric Trust Litigation,” 63.

³⁶³ For an interview with Klapstein, see https://www.democracynow.org/2018/10/11/tar_sands_value_turners_dr_james.

³⁶⁴ Brief of Amici Curiae Scientists, 22.

Before the Court denied the appeal in *Alec L.*, the parties on both sides amplified their arguments by bringing in a brief by twenty six prominent law professors, including Erwin Chemerinsky, whose book on constitutional law is required reading in law schools across the country, Joseph Sax, who has made innovations in property law using the Public Trust Doctrine, as well as Mary Wood. Alongside their legal arguments, the law professors convincingly stated that the public trust principles justifying recognition of a right to a stable climate and healthy atmosphere are “almost axiomatic” in Western jurisprudence, that they are so basic that “courts and commentators have rarely specified the specific constitutional texts that support application of the principles.”³⁶⁵ They explicitly cited the Charter of the Forest provisions codified in Chapters 33, 47, and 48 of the Magna Carta³⁶⁶ as well as “res communes,” and warned the court that the management of natural resources cannot justifiably be privatized or squandered for short term gains to “politically unaccountable agents.”³⁶⁷ Responding to Wilkins’s characterization of the case as ultimately about “the nature of our government and our constitutional system,”³⁶⁸ the law professors argued that “the basic expectation, central to the purpose of organized government [is] that natural resources essential to survival remain abundant, justly distributed, and bequeathed to future generations.”³⁶⁹

However axiomatic, however, the law professors were still asking for a radical shift in judicial perspective. By trying to persuade the court that the Public Trust Doctrine should be

³⁶⁵ Corrected Brief of Law Professor in Support of Plaintiffs-Appellants Seeking Reversal, 16.

³⁶⁶ Corrected Brief of Law Professor in Support of Plaintiffs-Appellants Seeking Reversal, 29.

³⁶⁷ *Alec L. v. McCarthy*, Corrected Brief of Law Professor in Support of Plaintiffs-Appellants Seeking Reversal, 25.

³⁶⁸ *Alec L. v. Jackson*, 10.

³⁶⁹ *Alec L. v. McCarthy*, Corrected Brief of Law Professor in Support of Plaintiffs-Appellants Seeking Reversal, 2.

expanded under federal law to include the atmosphere, they were asking the judiciary to play the role of guardian rather than neutral arbiter. The defendants in this case argued forcefully against change, calling the plaintiff’s legal theory “a novel proposition”³⁷⁰ that is fundamentally at odds with the province of federal courts to decide the rights of individuals, an argument which industry echoed by calling the lawsuit “extraordinary”³⁷¹ “unprecedented”³⁷² and by accusing the plaintiffs of making a “bold assertion”³⁷³ for judicial intervention. The government warned the court that the plaintiffs were asking for “a highly generalized array of federal agency actions and inactions”³⁷⁴ and that greenhouse gas emissions are for the Congress and the Executive to regulate. Anything else would be contrary to “well settled legal principles,”³⁷⁵ industry argued, and in a favorite argument for status quo apologists, would show “a lack of respect”³⁷⁶ for the legislative branches. The industry brief was also quite explicit that they were arguing against economic restructuring, here referred to as a move to preserve “economic development” and prevent “a sweeping new regulatory agenda.”³⁷⁷ The conservative Tort Reform Association filed a brief which crystallized the conservative position. Accusing the plaintiffs of “hijacking” the political process,³⁷⁸ they argued that regulation would have a “broad impact” on industrialized

³⁷⁰ Response Brief of Appellees Gina McCarthy, et. al., 13.

³⁷¹ Opening Brief for Intervenor-Appellees, 1.

³⁷² Opening Brief for Intervenor-Appellees, 1.

³⁷³ Opening Brief for Intervenor-Appellees, 16.

³⁷⁴ Response Brief of Appellees Gina McCarthy, et. al., 14.

³⁷⁵ Opening Brief for Intervenor-Appellees, 7.

³⁷⁶ Opening Brief for Intervenor-Appellees, 23.

³⁷⁷ Opening Brief for Intervenor-Appellees, 7.

³⁷⁸ Amicus Curiae Brief of the American Tort Reform Association in Support of Appellees, 2.

economies and that businesses would bear the burden of the “unforgiving” reduction in GHG emissions.³⁷⁹

Despite amicus briefs filed by faith groups, government leaders, national security experts, Native American nations, scientists, and social justice organizations, the judges still refused to recognize the newly asserted right. The faith groups urged the court to consider the case from an international law and human rights perspective, framing climate change as a moral issue that affects vulnerable populations and particularly the poor. They made references to international standards codified in the Conventions on the Rights of the Child and the International Covenant on Economic, Social, and Cultural Rights and once again highlighted the need for the judiciary to adapt to the changing times: “our institutions and infrastructure have been designed for the relatively stable climate of the past, rather than the human-caused disrupted climate of today and tomorrow.”³⁸⁰ The Texas state representative Lon Burnam, Montgomery Councilman Marc Elrich, Missoula Mayor John Engen, and Eugene Mayor Kitty Percy, who identified themselves as representatives of “city, county, and state government officials who are concerned about climate change,”³⁸¹ argued for federal emissions standards which other industrialized nations have already set in place and “have proven that it is possible for national governments to cut emissions while maintaining economic prosperity,”³⁸² while Native American Nations argued

³⁷⁹ Amicus Curiae Brief of the American Tort Reform Association in Support of Appellees, 12-13.

³⁸⁰ Brief of Faith Groups as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 8.

³⁸¹ Brief of Government Leaders as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 1.

³⁸² Brief of Government Leaders as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 14.

that given their unique relationship to the land, their “subsistence lifestyle”³⁸³ should be preserved. The plaintiffs even submitted another brief by military experts who warned that climate disaster could bring about events like the “Arab Spring upheaval.”³⁸⁴ Yet the Appeals Court still declined to recognize the right. In a one page opinion that relied on the District Court’s ruling, it unceremoniously dismissed the case, and simply declined to extend the application of the Public Trust Doctrine to the atmosphere.

To no avail, the law professors had argued that the District Court simply had not been “asked to consider the application of public trust principles to natural resources of critical interest to the federal government,”³⁸⁵ and that the public trust is “inherent in sovereignty,”³⁸⁶ is in fact part of the sovereign compact between the government and its citizens as incorporated into the Vesting Clauses, the Equal Protection Clause, and the Due Process Clause of the Constitution, both of which must, they emphasized, “be interpreted in light of the Constitution’s Preamble, which explicitly manifests intergenerational concern by stating the intention to ‘secure the Blessings of Liberty to ourselves and our Posterity.’”³⁸⁷ They underscored that in the other key public trust case, *Illinois Central*, the Supreme Court had made it clear that natural resources cannot be fully privatized because doing so would violate the reserved powers doctrine. Quoting the justices, they contended that the Public Trust Doctrine applies to the atmosphere as much as

³⁸³ Brief of National Congress of American Indians, et. al. as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 2.

³⁸⁴ Brief of National Security Experts as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 20.

³⁸⁵ Corrected Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 13.

³⁸⁶ Corrected Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 16.

³⁸⁷ Corrected Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, 17.

the land and waterways at issue in *Illinois Central*: “the state can no more abdicate its trust over property in which the whole people are interested, like navigable waterways and soils under them, so as to leave them entirely under the use and control of private parties...than it can abdicate its police powers in the administration of government and the preservation of the peace.”³⁸⁸ In rejecting this argument, the Court had simply concluded that “the plaintiffs point to no case...standing for the proposition that the public trust doctrine – or claims based upon violations of that doctrine – arise under the Constitution or the laws of the United States.”³⁸⁹

Five years later, in a historic order allowing *Juliana v. United States* to go to trial, Judge Ann Aiken for the District of Oregon issued an order that finally superseded the DC Circuit. Signed just two days after the election of Donald Trump, Aiken’s remarkable fifty-four page opinion breaks new legal ground in what implicitly reads as a judicial call to arms. Unlike the DC District Court, which only two sentences after introducing the plaintiffs quickly added that “plaintiffs’ one-count complaint does not allege that defendants violated any specific federal law or constitutional provision,”³⁹⁰ Aiken began her decision by boldly asserting that “this is no ordinary lawsuit.”³⁹¹ With an audience of future judges in mind, she even concedes that the lawsuit “challenges decisions defendants have made across a vast set of topics.”³⁹² Significantly, however, she then goes on to consolidate what these decisions were for a public audience: “whether and to what extent to regulate CO2 emissions from power plants and vehicles, whether to permit fossil fuel extraction and development to take place on federal lands, how much to

³⁸⁸ Corrected Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, (quoting *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 at 453-55 (1892), 11.

³⁸⁹ *Alec L. v. McCarthy*, 561 F. App’x 7 (D.C. Cir. 2014), 1.

³⁹⁰ *Alec L. v. McCarthy*, 561 F. App’x 7 (D.C. Cir. 2014), 1.

³⁹¹ *Juliana v. United States*, 3.

³⁹² *Juliana v. United States*, 3.

charge for use of those lands, whether to give tax breaks to the fossil fuel industry, whether to subsidize or directly fund that industry, whether to fund the construction of fossil fuel infrastructure such as natural gas pipelines at home and abroad, whether to permit the export and import of fossil fuels from and to the United States, and whether to authorize new marine coal terminal projects.”³⁹³ Having set the tone by quietly asserting the stakes, Aiken then narrows the judicial task to determining simply whether defendants “are responsible for some of the harm caused by climate change,”³⁹⁴ whether they can challenge the policy in court, and whether a court can legitimately order a change in that policy without violating the separation of powers.

The Obama Administration had raised the same objections here as they did in *Alec L.*: the plaintiffs lacked standing to sue, the case did not raise a question of federal law over which the court has jurisdiction, that climate change is a political question better left for the legislature to decide, and that the claims were displaced by other legislative acts, including the Clean Air Act. As Aiken systematically addressed each of the legal questions in careful order, the distinguishing rhetorical feature of her analysis was its insistence that the courts must engage with difficulty. As just one example, determining whether a case presents a legally barred “political question” is based on a legal standard that is notoriously ambiguous. However, Aiken warns that “the scope of the political doctrine should not be overstated,” and pressing on, she urges other courts to do the same: “a court cannot simply err on the side of declining to exercise jurisdiction when it fears a political question may exist, it must instead diligently map the precise limits of jurisdiction.”³⁹⁵ She herself demonstrates how to undertake what she calls a “rigorous analysis” by going through

³⁹³ *Juliana v. United States*, 3-4.

³⁹⁴ *Juliana v. United States*, 4.

³⁹⁵ *Juliana v. United States*, 7.

each and every one of the six factors in *Baker v. Carr*, the key political questions case, an analysis which neither the District Court nor the Appeals Court had bothered to provide in *Alec L.*³⁹⁶ “There is no need to step outside the core role of the judiciary to decide this case,” she concludes, and furthermore, “speculation about the difficulty of crafting a remedy could not support dismissal at this early stage.”³⁹⁷

The “rigorous analysis” Aiken provides also allows her to strategically consolidate some of the most compelling facts in *Juliana*. For example, the lead plaintiff Kelsey Juliana had found algae in her drinking water and drought has killed off the wild salmon she eats. Xiuhtezcatl Roske-Martinez faces increased wildfires where he lives. Alexander L. faces record-setting temperatures harming the health of the hazelnut orchard on his family farm. Jacob L.’s family has had to install an irrigation system on their farm. Zealand B. has been unable to ski during the winter, and Sahara V.’s asthma is exacerbated by ever more prevalent forest fires. Not only does Aiken list these harms, but she then goes on to describe the most recent plaintiff Jayden F.’s supplemental declaration in a narrative in fairly robust detail, allowing her imagined audience, which at this point extends beyond the judiciary to the public, to easily imagine the effects of climate change. The thirteen-year-old resident of Rayne, Louisiana, Aiken reports, awoke abruptly at five o’clock on the morning of August 13, 2016 to find that his home had been almost totally submerged: “floodwaters were pouring into our home through every possible opening. We tried to stop it...the water was flowing down the hallway, into my Mom’s room and my sister’s room.”³⁹⁸ Aiken then proceeds to quote the full excerpt describing the damage before

³⁹⁶ *Juliana v. United States*, 8.

³⁹⁷ *Juliana v. United States*, 17.

³⁹⁸ *Juliana v. United States*, 19.

following it up by beginning the very next paragraph with the statement that “the government contends these injuries are not particular to plaintiffs because they are caused by climate change, which broadly affects the entire planet (and all people on it) in some way.”³⁹⁹

By the end of her opinion, Aiken had recognized the plaintiff’s legal theory under the Public Trust Doctrine as well as a modified version of the right, which she restated more narrowly as “the right to a climate system capable of sustaining human life,” a move that would increase its chance of recognition in later courts.⁴⁰⁰ In its initial brief, the government had urged the Court not to recognize a new right based on a negative rights argument which the public would likely find unacceptable: that the youth have no “right to be free of CO2 emissions,” and not only has no court ever recognized that right, but “more generally, no court has ever recognized the right to a natural environment free of pollutants.”⁴⁰¹ When the government argues that what they call “the right to be free of CO2 emissions” is not a “fundamental right deeply rooted in the Nation’s history,”⁴⁰² they follow it up with technical legal claims, like, for example, “there is a ripeness issue.” They also argued that the plaintiffs couldn’t bring claims because they don’t have legal standing and after all, they stand to “eventually become political decision makers.”⁴⁰³ Even less persuasively, as Aiken points out, they claim that suing in a court of law is dependent on “personal interest, as standing to sue may not be predicated on an interest

³⁹⁹ *Juliana v. United States*, 20.

⁴⁰⁰ *Juliana v. United States*, 32.

⁴⁰¹ *Juliana v. United States*, Federal Defendants’ Memorandum of Points and Authorities in Support of their Motion to Dismiss, 19.

⁴⁰² Federal Defendants’ Memorandum of Points and Authorities in Support of their Motion to Dismiss, 25.

⁴⁰³ Federal Defendants’ Memorandum of Points and Authorities in Support of their Motion to Dismiss, 25.

which is held in common by all members of the public.”⁴⁰⁴ Aiken herself rejected these arguments by basing her legal analysis on the judgment in *Oberegfell v. Hodges*, concluding that “just as marriage is the ‘foundation of the family,’ a stable climate system is quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’”⁴⁰⁵ As Wood points out, Aiken had the option of recognizing the new right on different terms, for example, by pointing to the right to privacy, the right to vote, or the right to travel, but by trying to ground her example on the material basis of all rights, albeit in exclusionary terms, she still initiates judicial recognition for the commons.

Aiken is at her most convincing when she explicitly distances herself from what she identifies as the “judicial conservatism” exemplified by liberal courts like the DC Circuit when they refuse to update the law and automatically side with industry.⁴⁰⁶ Citing the Oregon Supreme Court’s Justice Goodwin, who in 1969 ruled against a private property owner’s claim to challenge an Oregon state law requiring public access to all dry sand beaches, she also pointed explicitly to custom as a legitimate source of law. “Finding echoes” of the property owner’s argument in the government and industry’s position, she stated that she was not “persuaded by the reasoning of the *Alec L. Courts*, specifically its position on the precedent set in *PPL Montana*, which “says nothing about the viability of federal public trust claims.”⁴⁰⁷ As Aiken notes, “a deep resistance to change runs through defendants’ and intervenors’ arguments for dismissal,” and instead of using this resistance as a reason to set the case aside, she frames the

⁴⁰⁴ Federal Defendants’ Memorandum of Points and Authorities in Support of their Motion to Dismiss, 8.

⁴⁰⁵ *Juliana v. United States*, 32.

⁴⁰⁶ *Juliana v. United States*, 53.

⁴⁰⁷ *Juliana v. United States*, 44.

difficulty as an imperative for the court to reject the libertarian standard and reason “carefully and correctly.”⁴⁰⁸

Of course, Aiken’s order would have been more emphatic if she had not only mentioned the government’s resistance to change, but also its complicity with private interests. The *Juliana* complaint reported that the United States has supported the fossil fuel industry through \$5.1 billion in subsidies to support fossil-fuel exploration, and according to the IMF, it still continues to subsidize the industry up to \$502 billion per year. Through the Office of the President, it has also provided over \$14.8 billion in commitments to the petroleum sector worldwide, including new coal and gas power plants. Under Obama, for example, the government erected an additional 100,000 miles to the already existing 2.5 million miles of oil and gas pipelines.

While both “the right to a climate system capable of sustaining human life” and *Alec L.’s* original formulation, “the right to a stable climate and healthy atmosphere,” are what Lynd would call communal rights, quite possibly, two of the most communal rights ever to be declared in American legal history, the former is a narrower articulation that puts the human being right at the center of the world. While this move may make the right more likely to win in a court of law, it may not have the most desirable consequences in the very long run. As I explained in Chapter One, Peirce developed his philosophy of history, agapistic evolution, as an alternative to Hegel’s dialectic and Darwin’s theory of natural selection. A variety of Lamarckian evolution, Peirce’s agapism identifies creative love as an evolutionary force. Whereas for Darwin we are merely “agent[s] of reproduction,”⁴⁰⁹ for Peirce, we each have a role to play in “the drama of

⁴⁰⁸ *Juliana v. United States*, 52.

⁴⁰⁹ C.S. Peirce, “Pearson’s *Grammar of Science*,” in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998), 58.

creation,”⁴¹⁰ and so he recommended that we all get acquainted with “the character of cosmical truth” and bring ourselves into accord with “its fuller revelation.”⁴¹¹ When it comes to climate change, this will necessitate that we subject our habits as well as our laws to closer scrutiny and begin to evolve them in a more sustainable direction, a process which lower level courts such as the District Court in Oregon are beginning to initiate.

⁴¹⁰ C.S. Peirce, “Immortality in the Light of Synechism,” in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998), 3.

⁴¹¹ C.S. Peirce, “Pearson’s *Grammar of Science*,” 59.

4.0 Race and Reparations: The Market as Racist Meta-Law in In Re African-American Slave Descendants and an Overview of the Japanese-American Movement for Redress

A recent debate between Ta-Nehisi Coates and the political scientist Cedric Johnson brings up an enduring conflict, even something of a battle line, among social justice advocates upon which the success of social movements often depends – whether remaking the political economy should take priority over the politics of recognition. In a widely read 2014 *Atlantic Monthly* article, “The Case for Reparations,” Ta-Nehisi Coates called to address the effects of 250 years of slavery, making a compelling moral case for reparations by describing the destructive intergenerational impact of racist redlining practices on African-American families.⁴¹² Although he publicly endorsed Bernie Sanders’s socialist politics, for Coates, the “class-first” approach represented by Sanders and some Marxists doesn’t adequately address racial oppression⁴¹³; while for Johnson, reparations represents an at best ineffective form of moralism that detracts from class struggle, which is more fundamental.⁴¹⁴

From a legal perspective, African-Americans’ arguments for the violation of individual rights and liberties usually founder on the statute of limitations defense, the difficulty of proving harm to an individual in the present day, the absence of individual perpetrators to accuse, the lack of direct causation for present day harm, and the difficulty of determining an effective

⁴¹² Ta-Nehisi Coates, “The Case for Reparations,” *The Atlantic*, June 2014,

<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>.

⁴¹³ Ta-Nehisi Coates, “Why Precisely is Bernie Sanders Against Reparations?” *The Atlantic*, January 2016, <https://www.theatlantic.com/politics/archive/2016/01/bernie-sanders-reparations/424602>.

⁴¹⁴ Cedric Johnson, “Reparations isn’t a Political Demand,” *Jacobin*, March 2016, <https://www.jacobinmag.com/2016/03/cedric-johnson-brian-jones-ta-nehisi-coates-reparations>.

compensation scheme.⁴¹⁵ Reparations can encompass a range of legal and political strategies including but not limited to official apologies, municipal services such as the creation of new educational programs, cash payments, and land transfers. In the early 1970s, the federal government settled land claims by Native Alaskans, Native American tribes received monetary awards for the government's violation of treaties, and Native Hawaiians negotiated with the State of Hawaii to settle a billion-dollar damages claim based on the state's misappropriation of Hawaiian land trust funds.⁴¹⁶ In the 1980s, the Japanese American Citizens League (JACL) and the National Council for Japanese American Redress (NCJAR) spearheaded the movement for reparations, which included *William Hohri v. United States*, the first and only case to demand a monetary award from the government for psychological and emotional damages resulting from their internment during WWII as well as the taking of property. Although it lost in the court system, it put pressure on the government to avoid the prospect of having to pay the \$27 billion in damages that the plaintiffs were asking for, and to seriously consider passing the much less costly, \$1.27 billion reparations bill through the legislature instead. In 1988, Ronald Reagan signed the Civil Liberties Act, the bill that finally granted \$20,000 in reparations to each Japanese-American interned during WWII. Yet when African-Americans have filed damage claims in federal court against the federal government under the Thirteenth Amendment, Reconstruction-era civil rights statutes, and the Federal Tort Claims Act, all of these claims have

⁴¹⁵ Chon et. al., *Race, Rights, and Reparation*, 421 [citing Eric K. Yamamoto, "Racial Reparations: Japanese-American Redress and African American Claims," *Boston College Law Review* 40 (1999): 477, 490-491].

⁴¹⁶ Margaret Chon, Jerry Kang, Carol I. Izumi, Frank H. Wu, Eric K. Yamamoto, *Race, Rights, and Reparation: Law and the Japanese American Internment* (New York: Aspen Publishers, 2001): 420.

been quickly dismissed.⁴¹⁷ In 1989, the Congressman John Conyers introduced H.R. 40, a bill calling for the federal government to study slavery and its effects and to investigate possible remedies, which major civil rights organizations including the NAACP, the Southern Christian Leadership Conference, the Rainbow PUSH coalition, and the Leadership Conference for Civil Rights have already endorsed. Despite reintroducing a revised version of the bill in 2017, the legislature has still taken no action.

Much as the federal government declared the banks ‘too big to fail’ after the 2008 financial crisis, Kaimipono David Wenger observes that slavery may just be “too big to remedy.”⁴¹⁸ Wenger explains that courts generally avoid finding liability wherever there is systemic failure that includes a broad potential universe of plaintiffs, as they did in *Waters v. New York City Housing Authority*, when the judge denied recovery damages against a negligent landlord to a woman who was forced into an unlocked area of a building and raped because she was not a tenant, concluding that this would have “opened the floodgates of potential liability”⁴¹⁹ to other landowners; or in *Hamilton v. Beretta U.S.A. Corp.*, when the judge reasoned that gun manufacturers were not liable for third party harms since the universe of claims would be “potentially limitless.”⁴²⁰ As I explained in Chapter One, the relationship between slavery and dis-commoning goes to the very foundations of the Anglo-American legal tradition,⁴²¹ when a

⁴¹⁷ Chon et. al., *Race, Rights, and Reparation*, 420.

⁴¹⁸ Kaimipono David Wenger, “Too Big to Remedy – Rethinking Mass Restitution for Slavery and Jim Crow,” *Loyola of Los Angeles Law Review* no. 44 (2010): 178.

⁴¹⁹ Wenger, “Too Big to Remedy,” 210 [quoting *Waters v. New York City Housing Authority* 505 N.E. 2d 922 (N.Y. 1987)].

⁴²⁰ Wenger, “Too Big to Remedy,” 210 [quoting *Hamilton v. Beretta U.S.A. Corp.* 750 N.E.2d 1055 (N.Y. 2001)].

⁴²¹ Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (Berkeley: University of California Press, 2008), 94-5.

way of life which was based on mutual aid and the common ownership of resources gave way to rampant privatization and mass poverty and found its justification in the primacy of private property rights.

While workers of all races and ethnicities all live within the same economic system, the effect on African-Americans and all people of color is undeniably disparate. Nancy Fraser defines misrecognition as being denied the status of “a *full partner* in social interaction and prevented from participating as a peer in social life – not as a consequence of a distributive inequity...but rather as a consequence of *institutionalized* patterns of interpretation and evaluation that constitute one as comparatively unworthy of respect or esteem.”⁴²² The sociologist John Torpey and the legal scholar Maxine Burkett outline how in the aftermath of slavery, centuries of discriminatory laws, policies, and social practices, which defined African-Americans “as a pariah group, as lacking standing in a courtroom, and as disenfranchised politically”⁴²³ also resulted in maldistribution. For example, in addition to segregationist laws in the Jim Crow South, New Deal reforms and post WWII government measures excluded African-Americans as beneficiaries.⁴²⁴ The Fair Labor Standards Act of 1938 established a minimum wage for all but farmworkers and domestic servants, the two categories of employment most common for African-Americans at that time, and the GI Bill granted whites education and housing opportunities that were not made available to African-Americans. Restrictive covenants often prevented African-Americans from owning homes, and when they did, redlining rated

⁴²² Nancy Fraser, *Fortunes of Feminism: From State Managed Capitalism to Neoliberal Crisis* (New York: Verso Books, 2013), 177.

⁴²³ John Torpey and Maxine Burkett, “The Debate Over African-American Reparations,” *The Annual Review of Law and Social Science* no. 6 (2010): 451.

⁴²⁴ Torpey and Burkett, “The Debate Over African-American Reparations,” 452.

black neighborhoods lower than white neighborhoods, lowering their value. Currently, most black people live in segregated neighborhoods with high concentrations of poverty where access to jobs is difficult; black men make up over half the prison population despite comprising only 13% of the general population; and black rates of unemployment are twice that of whites.⁴²⁵ Rates of mental illness, psychosomatic disease, and substance abuse are far higher than average for all people of color living in the United States.⁴²⁶ At the same time, however, the most recent case to come out of the slavery reparations movement demonstrates how the struggle for economic and racial equality can find common ground.

For the first time, in 2002, Deadria Farmer-Paellman, an independent researcher, lawyer, and activist, filed a complaint on behalf of the descendants of slaves not against the federal government, but against CSX Transportation, Aetna, FleetBoston and 100 anonymous corporations for financing, insuring, and providing transportation services to slave owners between 1619 and 1865. Nine lawsuits were filed across the country, and in 2004, the Multidistrict Litigation Panel consolidated these cases into *In Re African-American Slave Descendants*. After it was transferred to federal court in the Northern District of Illinois, the District Court Judge Charles R. Norgle ordered the plaintiffs to amend their complaint twice before he was willing to hear their claims, and the final version of the complaint consisted of broadly three sets of allegations: first, that enslaved people were denied property rights in their own labor and that their descendants had been denied wealth they would have otherwise inherited; second, that the descendants of slaves suffered intentional and negligent infliction of emotional distress; and third, that the corporations had fraudulently concealed their involvement

⁴²⁵ Torpey and Burkett, “The Debate Over African-American Reparations,” 452-3.

⁴²⁶ Torpey and Burkett, “The Debate Over African-American Reparations,” 453.

in slavery. On October 5, 2005, Judge Norgle issued a 55-page opinion dismissing the case, once again, by ruling that the link between the defendants' actions and harms to the plaintiffs was too tenuous, the statute of limitations had already passed, and slavery reparations was a non-justiciable political question. Once the case was dismissed at the trial court level, the plaintiffs appealed to the Circuit Court Judge Richard J. Posner. Posner reversed the District Court Judge Charles R. Norgle's decision to dismiss the lawsuit, but only after fundamentally altering what the lawsuit was for – reparations against private entities for their involvement in slavery. Both judges minimized the injustice of slavery and its aftereffects, but in a qualified legal victory for slave descendants, Posner remanded the case back to the District Court to decide whether or not the consumer rights of the descendants of slaves had been violated. If the defendants had concealed their involvement in slavery or misrepresented the nature of their business in contravention of the applicable consumer fraud statutes, then, and only then, should they be held liable.

When *In Re Slave Descendants* was first filed, the Harvard Law Professor Charles J. Ogletree, Jr., a member of the Reparations Coordinating Committee's (RCC), which along with the National Coalition for Blacks in America (N'COBRA) is one of the two major national reparations organizations, wrote an article in the *New York Times* distancing the RCC from the lawsuit. Although he endorsed the lead plaintiff Deadria Farmer-Paellmann's efforts to bring corporate involvement in the slave trade to public attention,⁴²⁷ Ogletree argued that the litigation strategy for what he anticipated would be a high-profile lawsuit should also implicate the U.S. government, additional corporate defendants, and private institutions such as Brown, Yale, and

⁴²⁷ James Cox, "Farmer-Paellmann Not Afraid of Huge Corporations," *USA Today*, February 21, 2002, <http://usatoday30.usatoday.com/money/general/2002/02/21/slave-activist.htm>.

Harvard Law School, whose grants and endowments can all be traced back to slavery.⁴²⁸

Ogletree feared that litigating the issue without naming these additional defendants would fail to illuminate the full scope of slavery and how for centuries, major institutions have been built on the exploitation of African-Americans. The result turned out to be even worse than Ogletree had anticipated. Not only did the judges fail to indict the banks, corporations, insurance companies, the government, and universities for their involvement in slavery, but they issued opinions which taken together, dehumanized and marginalized African-Americans, erased the history of social movements which led to ratifying the Thirteenth and Fourteenth Amendments, and turned every citizen into a consumer, thwarting the reparations movement and the broader movement to reclaim the commons from privatization.

Norgle characterized *In Re Slave Descendants* as a case for reparations rooted in the “historic injustices and the immorality of the institution of slavery,”⁴²⁹ and at the very least, he attempted to recognize the historic injustice by turning to the historical record. Yet, as Norgle selected and deselected facts to include in his account, he ended up attending very little to African-Americans and their relationship to the accused corporations, deliberately obscuring the corporations’ role in maintaining and profiting from slavery. First, he began his opinion by constructing a deeply problematic narrative describing the history and origins of slavery, one which notably included the accusation that African tribal leaders were in large part responsible for the slave trade. Then, Norgle established the Civil War as the focal point for this case, shifting attention away from its causes to the events leading up to and following the Civil War.

⁴²⁸ Charles J. Ogletree, Jr., “Litigating the Legacy of Slavery,” *The New York Times*, March 31, 2002, https://www.nytimes.com/2017/03/05/arts/confronting-academias-ties-to-slavery.html?_r=0.

⁴²⁹ *In Re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721 (N.D. Ill. 2005), 1.

What he produces is a story of heroic self-sacrifice on the part of the union soldiers, and he implies that it is the soldiers and not the slaves who are entitled to reparations:

It is beyond debate that slavery has caused tremendous suffering throughout our Nation's history. No reasonable person can fail to recognize the malignant impact, in body and spirit, on the millions of human beings held as slaves in the United States. Neither can any human being fail to appreciate the massive, comprehensive, and dedicated undertaking of the free to liberate the enslaved and preserve the Union. Millions fought in our Civil War. Approximately six hundred and twenty thousand died. Three hundred and sixty thousand of these individuals were Union troops. Union soldiers, sailors, and marines gave their lives on bloody battlefields and the sea to maintain one sovereign nation in which slavery would be eradicated. The impact of this struggle on the families of the wounded and the dead is immeasurable and lasting. The victorious and the vanquished together shared the cup of suffering. Death deprived the youthful warriors of the opportunities that the survivors of the War would enjoy.⁴³⁰

Norgle then conspicuously goes on to list the number of deaths, recount the sequence of events that led up to the Battle at Fort Sumter, and ends his account emphatically with General Ulysses S. Grant's last words.⁴³¹ As the legal scholar Lolita Buckner Innis points out in her critical rhetorical reading of the case, Norgle's treatment of slavery is comparatively detached, and he consistently refers to it in general terms, as an "institution," which he describes neutrally as "legally sanctioned... more than simply a social and economic institution. It was also an established legal institution."⁴³² He even fails to include any information from the plaintiff's

⁴³⁰ *In Re African-American Slave Descendants Litigation*, 54.

⁴³¹ *In Re African-American Slave Descendants Litigation*, 5.

⁴³² *In Re African-American Slave Descendants Litigation*, 3; Lolita Bucker Innis, "A Critical Legal Rhetoric Approach to *In Re African-American Slave Descendants Litigation*" *St. John's Journal of Legal Commentary* no. 24 (2010): 674.

brief, which he dismissively calls a “pastiche of generally acknowledged horrors,” nothing like the vivid and specific descriptions that he provides of the Civil War, which he makes sure to mention, was America’s “bloodiest.”⁴³³

A few pages into the opinion, he also forecloses any inquiry into how the corporations benefitted from slavery by summing up the allegations against them as follows: “Plaintiffs seek to hold Defendants liable for an entire era of history simply because their alleged predecessors were purportedly doing business in nineteenth century America.”⁴³⁴ On the one hand, Norgle’s legal reasoning is unremarkable, since obviously “plaintiffs” can’t hold “defendants” liable if their actions are legal, yet by referring to the institutions that financed, facilitated, and perpetuated slavery at such a high level of generality, Norgle all but absolves them from blame. When Norgle then goes on to argue that the nation’s leaders enacted lasting change out of their own “initiative,” that “it was the President and Congress who prosecuted the military and political aspects of the Civil War,” that “it again was the President and Congress who chose to amend the Constitution and enact civil rights legislation,”⁴³⁵ and when he approvingly points out that “when the issue of reparations has arisen in regard to other minority groups, Congress has dealt with the issue,”⁴³⁶ he delegitimizes the plaintiffs’ claims. People may have been enslaved but the legacy of slavery is long gone, and even though he reproduces statistics from the plaintiffs’ complaint demonstrating that white and black Americans are unevenly situated when it comes to safety, education, income level, education and life expectancy,⁴³⁷ he declines to

⁴³³ *In Re African-American Slave Descendants Litigation*, 39.

⁴³⁴ *In Re African-American Slave Descendants Litigation*, 42.

⁴³⁵ *In Re African-American Slave Descendants Litigation*, 37.

⁴³⁶ *In Re African-American Slave Descendants Litigation*, 40.

⁴³⁷ *In Re African-American Slave Descendants Litigation*, 15.

integrate this information into an overarching narrative that would not only legitimize their claims for reparations, but would also reveal the history of activism behind the reparations movement which led to civil rights reforms. Throughout, Norgle deflects critical attention away from the corporate defendants by venerating the achievements of official decisionmakers, and he even concludes by accusing the plaintiffs of demonstrating a “lack of respect for the Representative Branches.”⁴³⁸

However inclusive he purports to be, Norgle frequently positions the descendants of slaves as cultural outsiders whose allegations show “a lack of respect” for the legislature, and “fly in the face of numerous well-settled legal principles and history.”⁴³⁹ Whereas Norgle reasoned through the political question and standing requirements in the neutrality that legal language enables, his analysis is less careful than it is didactic in tone: “the political question doctrine is a justiciability limitation with its prudential roots dating back to the 18th century”⁴⁴⁰; “standing, this central principle of United States jurisprudence has deep historical roots. This requirement that a litigant demonstrate standing...to bring a matter before a court for adjudication has been a bedrock principle in our system of law, as well as the common law system from which our system of law developed”; and the statute of limitations has “been well-established in the law for centuries.”⁴⁴¹

This is why initially, Posner’s clinically detached account of the case and implied promise to do away with any unnecessary contextual detours comes as a relief.

Characteristically, Posner focuses his opinion as narrowly as possible, defining political

⁴³⁸ *In Re African-American Slave Descendants Litigation*, 39.

⁴³⁹ *In Re African-American Slave Descendants Litigation*, 53.

⁴⁴⁰ *In Re African-American Slave Descendants Litigation*, 29.

⁴⁴¹ *In Re African-American Slave Descendants Litigation*, 44.

questions as simply “disputes that the Constitution has been interpreted to entrust to other branches of the federal government” and then provides a single example before quickly overruling Norgle’s judgment that *In Re Slave Descendants* presented a political question.⁴⁴² In these early stages, Posner attempts to establish his ethos by conspicuously distancing himself from Norgle and by pointing out that Norgle made an obvious legal error by dismissing the case with prejudice: “If the judge was correct that there is no jurisdiction, he should have dismissed the suit without prejudice and thus not decided their merits.”⁴⁴³ Right from the start, he delineates the statutory basis for his authority to decide the case pursuant to the two federal statutes governing jurisdiction for multidistrict panel litigation, making it known that unlike Norgle, he wasn’t interested in exceeding his proper authority by considering any extraneous information. However, by immediately characterizing this case as a case for “conventional legal relief”⁴⁴⁴ rather than reparations for slavery, he begins to undermine the potential of using the court as a forum for protest.

During the oral arguments, plaintiffs’ attorney John Wareham underscored that slavery was recently declared a crime against humanity by the United Nations, 400 African-American NGOs, and 168 African nations, a fact which both judges strategically omitted. Wareham also argued that Norgle’s account of history ignores lynchings, Jim Crow, sharecropping, and the KKK, as well as the fact that neither slaves nor descendants of slaves could have reasonably been expected to know which banks and insurance companies in far off Northern states had made slavery possible, let alone bring lawsuits against them. As with *Alec L.*, at this stage in the

⁴⁴² *In Re African-American Slave Descendants Litigation II*, 471 F.3d. 754 (7th Cir. 2006), 6.

⁴⁴³ *In Re African-American Slave Descendants Litigation II*, 5.

⁴⁴⁴ *In Re African-American Slave Descendants Litigation II*, 6.

lawsuit, the plaintiffs were simply asking for Posner to toll the statute of limitations and allow the case to go forward. The law and literature scholar Honni Van Rijswijk points out that the Eastern District Court of New York had tolled the statute of limitations in *Bodner v. Paribas*, a case which Holocaust survivors brought against the banks and insurance companies that had collaborated with Nazis during the Holocaust.⁴⁴⁵ According to that judge, equitable tolling is used when it “would have been impossible for a reasonably prudent person to learn or discover critical facts underlying their claim.”⁴⁴⁶ Yet Posner was unwilling to toll the statute of limitations in this case, tersely concluding that “even in the South, descendants of slaves have had decades of effective access to the courts to seek redress for the wrongs of which they complain” and “it’s not as if it had been a deep mystery that corporations were involved in the operation of the slave system.”⁴⁴⁷

One of the defining features of Posner’s reasoning is the strict separation he maintains between law as it is and law as it should be. He even declines to state the shared moral standard that slavery is wrong, even at this critical juncture, where he sets the stage for remanding the case back to the District Court:

It is true that under no consumer protection law known to us, whether a special statute or a doctrine of the common law of contracts or torts, has a seller a general duty to disclose every discreditable fact about himself that might if disclosed deflect a buyer. To fulfill such a duty he

⁴⁴⁵ Honni Van Rijswijk, “The Poetics and Politics of Past Injuries: Claiming in Reparations Law and in Toni Morrison’s *Beloved*,” *Law and Society Association Australia and New Zealand (LSAANZ) Conference, “W(h)ither Human Rights*,” Sydney: Dec. 10-12, University of Sydney, 2008, 4.

⁴⁴⁶ *Bodner v. Paribas*, 114 F.Supp. 2d. 122 (E.D.N.Y. 2000), 135.

⁴⁴⁷ *In Re African-American Slave Descendants Litigation II*, 14.

would have to know much more about his consumers than he possibly could. But the plaintiffs are charging the defendants with misrepresenting their activities in relation to slavery.⁴⁴⁸

Legally, all Posner is stating here is that a seller does not have to disclose every discreditable fact that may deflect a potential buyer because in order to do this he would have to know more about the potential buyers than he could be reasonably expected to know. Unless there is a special statute on the books, or unless he is in direct violation of a common law of contract or tort, he can defer to common sense. Implicitly, however, Posner is communicating that it is common sense that only the descendants of slaves could consider slavery “discreditable.”

Posner refuses to define victimization in anything but narrowly defined legal terms, and he is consistently careful to absolve the corporations of blame by describing them as neutral, profit-making entities: “if the insurance business was competitive back then (and the plaintiffs do not argue that it was not), Aetna did not profit in an economic sense from the transactions of which it complains (its ‘profit’ would be just its cost of equity capital), and in any event it would have distributed any profits from the transactions to its shareholders long ago.”⁴⁴⁹ Posner abstracts away from the quality of these “transactions” by using the language of costs and benefits, neutralizing the nature of the defendants’ financial investments. Once again indicating the radical potential of the plaintiff’s claims should they have attracted public attention, Posner appeals to the need to preserve the integrity of the legal system: “a person whose ancestor had been wronged a thousand years ago could sue on the grounds that it was a continuing wrong and he is one of the victims.”⁴⁵⁰

⁴⁴⁸ *In Re African-American Slave Descendants Litigation II*, 15.

⁴⁴⁹ *In Re African-American Slave Descendants Litigation II*, 8.

⁴⁵⁰ *In Re African-American Slave Descendants Litigation II*, 8.

Posner is right that it would have been difficult, and maybe even impossible, for the individual plaintiffs to prove through litigation that the activities of a specific corporation during slavery ended up causing specific individuals a “calculatable” amount of monetary harm. As Rijswijk points out, however, by ignoring the continuing effects of slavery, Posner “denies the materiality and specificity of experience, and the operations of power arising out of race, class, and gender.”⁴⁵¹ The critical race theorist Kimberle Crenshaw argues that white race consciousness “reinforces whites’ sense that American society is really meritocratic and thus helps prevent them from questioning the basic legitimacy of the free market...equal opportunity *is* the rule, and the market is an impartial judge; if Blacks are on the bottom it must reflect their relative inferiority.”⁴⁵² Posner is careful to mention that economists study intergenerational class mobility and cites two articles that have looked at the negative aggregate effects of slavery on African-American wealth, but he also compares this case to a hypothetical “suit by a descendant of a Union soldier, killed in battle, against a Civil War era gun manufacturer still in business that sold guns to the Confederacy,”⁴⁵³ echoing Norgle’s implicit claim that if anyone deserves reputations, it is the union soldiers. The descendants of slaves are not legally permitted to sue because they are not authorized representatives of their ancestors’ estates, he explains, but in order to make this point, he uses a colorblind analogy that makes the social position of slave descendants equivalent to white descendants of white Civil War soldiers: “it is possible that had the ancestor not died when he did he would have become a wealthy person and left bequests so immense that that his remote descendant, the plaintiff, would have inherited more money from

⁴⁵¹ Van Rijswijk, “The Poetics and Politics of Past Injuries,” 4-5.

⁴⁵² Kimberle Williams Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law,” *Harvard Law Review* 101 no. 7 (1988): 1380.

⁴⁵³ *In Re African-American Slave Descendants Litigation II*, 11.

his parents or grandparents than he actually did.” However, he concludes, this hypothetical inquiry and the plaintiffs’ allegations are “too speculative” to succeed in a court of law.⁴⁵⁴

Unforgivably, Posner refuses to explicitly repudiate the strategies of dehumanization on which both slavery and war rely, and instead of acknowledging the need to correct past wrongs, suggests that slaveholders, and by extension, any profit-seeking entity, would have found a way to maximize profits, the law notwithstanding. Here, despite his social conservatism, he adheres to the neoliberal idea that the market is a meta-law which ensures freedom by protecting free choice in the marketplace as he upholds the rules and regulations protecting private enterprise. Although he is careful to limit his remarks to “slaveholders” and not all people, Posner doesn’t explicitly characterize the slaveholder as different from any reasonable person, as the following hypothetical suggests:

Suppose a class member could prove that he was descended from one of the slaves insured by Aetna or transported by the Union Pacific Railroad (another defendant) or bought with money lent to the buyer by the predecessor of the JP Morgan Chase Bank (still another defendant), and that these transactions were illegal and that the descendants of slaves are among the people whom the laws were intended to protect. Had he not been insured or transported or bought with a bank loan, how would the financial welfare of his remote descendant be affected? Would this ancestor have been freed? Or perhaps never enslaved in the first place? As the plaintiffs stress, slavery was profitable; is it conceivable that slaveholders would have been unable to insure, transport, and finance the purchase of slaves if northern companies had been excluded from the provision of these services or had refused to violate the states’ laws that sought to keep them from providing services?⁴⁵⁵

⁴⁵⁴ *In Re African-American Slave Descendants Litigation II*, 11.

⁴⁵⁵ *In Re African-American Slave Descendants Litigation II*, 9.

During the oral arguments, Posner concludes that if “J.P. Morgan [and by implication, the other defendants in this case] hadn’t financed slavery, other corporations would have.”⁴⁵⁶ This same argument also precluded one of the investment banks responsible for the most recent financial crisis to evade public accountability. In 2008, the former CEO of AIG, Maurice Greenberg, sued the federal government for \$40 billion on behalf of its shareholders for the terms of the bailout. At \$180 billion, it was the largest loan taxpayers had ever made, and it prevented the company from sure collapse. Yet instead of holding the bank accountable, in June 2015, Judge Thomas C. Wheeler of the United States Court of Federal Claims handed down a 75-page decision ruling that the government had overstepped its authority by taking a stake in the company. He positioned AIG as the victim of both the public and the government, and although he declined to award AIG any damages because the company would have otherwise ceased to exist, Wheeler emphatically came down against the “draconian requirements” and “punitive terms” of the bailout.⁴⁵⁷ In no uncertain terms, he declared that “the government should return to AIG’s shareholders the revenue it received,” but lamentably, “case law construing ‘just compensation’ under the Fifth Amendment holds that the Court must look to the property owner’s loss,” which he had to admit, would literally have amounted to nothing.⁴⁵⁸ Much as Posner excused the banks, corporations, and insurance companies for financing slavery since, he reasoned, other private entities would have done the same, Wheeler accused the government of unfairly singling out AIG for lying to bank customers and engaging in predatory lending. While Posner distinguishes himself from Wheeler by demonstrating that he can reason

⁴⁵⁶ *Slave Reparations Case Oral Arguments*, CSPAN, September 27, 2006, <https://www.c-span.org/video/?194842-1/slave-reparations-case-oral-arguments>, 24:21.

⁴⁵⁷ *Starr International Company v. United States* (2015), 2.

⁴⁵⁸ *Starr International Company v. United States*, 65.

to a conclusion where everyone wins, by the end, he commits us all to a shared identity as consumers. Following the court's logic, questions of right and wrong give way to utilitarian considerations; we have very little say about the larger framework that sets the moral standards for the economy.

According to Peirce, normativity is a question of how phenomena relate to their natural and considered ends, and in the "Three Normative Sciences," he concludes that the ultimate end of all action is one that can be "*deliberately* adopted," that "*reasonably recommends itself in itself* aside from any ulterior consideration."⁴⁵⁹ As opposed to the instrumental rationality of actors pursuing self-interest for private gain, this worldview necessitates that we commit to what David Bollier and Burns H. Weston call a "socialist ontology," to embrace long-term desires and "a more complex sense of human capacities, one which would allow us to recognize more subtle and diverse forms of value that cannot be monetized."⁴⁶⁰ Ideally, judicial rhetoric would empower this way of being and foster the development of new types of common institutions which may then direct moral allegiances to political self-determination and non-Market provisioning.⁴⁶¹

⁴⁵⁹ C.S. Peirce, "The Three Normative Sciences," in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998), 201.

⁴⁶⁰ Burns H. Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge: Cambridge University Press, 2013), 171.

⁴⁶¹ Weston and Bollier, 145.

4.1 The Japanese-American Internment Cases

Japanese-Americans began arriving to the West Coast of the United States in large numbers in the early 1900s, when the Issei, first-generation Japanese immigrants, brought knowledge and skills from Japan that revolutionized the agricultural industry.⁴⁶² By 1913, the white community had mobilized against them and lobbied to pass the Alien Land Law in the California State Legislature, which prohibited any immigrants from buying or leasing land for more than three years, as well as other laws which discriminated against Japanese people for employment and denied them the right to intermarriage.⁴⁶³ Lawmakers lobbied the federal government to end immigration from Japan, and the federal government eventually passed the Asian Exclusion Act of 1924, which barred Japanese immigration for permanent residence.⁴⁶⁴ The Nisei and Issei faced rising discrimination in the 1930s, when the Japanese military grew in strength and the American media propagated racist myths about Japanese people.⁴⁶⁵

When the Japanese nation bombed Pearl Harbor on December 7, 1941, anti-Japanese racism reached its apogee. On December 8, 1941, none other than the progressive President Franklin D. Roosevelt proclaimed Japanese resident nationals “enemy aliens” and on February 19, 1942, signed Executive Order 9066, which authorized military commanders to take whatever measures necessary to protect the nation “against espionage and against sabotage.”⁴⁶⁶ On June 21, 1942, the Supreme Court decided *Hirabayashi v. United States*, upholding the

⁴⁶² Leslie T. Hatamiya, *Righting a Wrong: Japanese Americans and the Passage of the Civil Liberties Act of 1988* (Stanford: Stanford University Press, 1993), 8.

⁴⁶³ Hatamiya, *Righting a Wrong*, 8.

⁴⁶⁴ Hatamiya, *Righting a Wrong*, 8-9.

⁴⁶⁵ Hatamiya, *Righting a Wrong*, 10.

⁴⁶⁶ Quoted in Chon et. al., *Race, Rights, and Reparation*, 100.

constitutionality of head of the Western Defense Command Lt. General John J. DeWitt's curfew order, which required citizens of Japanese descent living in designated military areas on the West Coast to remain in their homes between the hours of 8 p.m. and 6 a.m. And so the internment began. In March of 1942, Japanese Americans were given a few days' notice to comply with military orders forcing them to evacuate their homes. In total, over one hundred thousand Japanese-Americans had been transferred to internment camps by 1942. As the legal scholar Jerry Kang recounts, most of these camps were located in deserts or swamps which were surrounded by barbed wire fences and armed guards. On the inside, people lived in cramped quarters, were undernourished, and had limited access to medical care. During the almost three years that Japanese-Americans were interned, many infants and elderly people died due to a lack of adequate resources.⁴⁶⁷

DeWitt issued the first of 108 exclusion orders in March 1942, which designated Military Areas along all West Coast states, issued a curfew order on all enemy aliens, and eventually required people of Japanese descent to report first to assembly centers and then to internment camps.⁴⁶⁸ The JACL advised Japanese-Americans to comply with the orders to demonstrate loyalty to the government.⁴⁶⁹ Gordon Hirabayashi, who had been arrested for violating two military orders, first for violating the curfew, and second for refusing to comply with Civil Exclusion Order No. 57, which required Japanese Americans to report to a Civil Control Station where they would have to register for internment, objected to the orders on legal and moral grounds. Hirabayashi, a twenty-four-year-old senior at the University of Washington, was a

⁴⁶⁷ Jerry Kang, "Denying Prejudice: Internment, Redress, and Denial," *University of California Los-Angeles Law Review* no. 51 (2014): 941.

⁴⁶⁸ Kang, "Denying Prejudice: Internment, Redress, and Denial," 939.

⁴⁶⁹ Kang, "Denying Prejudice: Internment, Redress, and Denial," 942.

Quaker, social justice activist, and a leader in the JACL. “If I were to register and cooperate,” he said, “I would be giving helpless consent to the denial of practically all of the things which give me incentive to live. I must maintain my Christian principles. I consider it my duty to maintain the democratic standards for which this nation lives.”⁴⁷⁰ *Hirabayashi* was the first of the wartime cases to be decided by the Supreme Court, and the Court’s reasons for upholding the curfew set the stage for *Korematsu v. United States*, the famous decision in which the Court essentially upheld the constitutionality of the internment.

Of the thousands of people who were displaced, only 100 people violated the orders,⁴⁷¹ and the government picked three for prosecution, the cases of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui. Minoru Yasui was an army officer, lawyer, and JACL leader who conscientiously violated DeWitt’s curfew order and contended that since the orders made distinctions between citizens based on race, they infringed on his legal rights.⁴⁷² Fred Korematsu was not a conscientious objector, an activist, or a leader in community organizations. He was simply a shipyard welder in San Francisco who violated the evacuation order hoping that he could marry his partner and move to Arizona. Korematsu had even undergone plastic surgery a month before the evacuation order to make him look less Asian.⁴⁷³ The Supreme Court ended up upholding all three of their convictions, and only forty years later, after Korematsu, Hirabayashi, and Yasui filed petitions for ‘*coram nobis*,’ a legal process which allows courts to vacate earlier criminal convictions in extraordinary circumstances of manifest injustice, did they achieve some

⁴⁷⁰ Quoted in Megan S. Berthold, Harry H.L. Kitano, and Mitchell T. Maki, *Achieving the Impossible Dream: How Japanese Americans Obtained Redress*, (Chicago: University of Illinois Press, 1999), 35.

⁴⁷¹ Hatamiya, *Righting a Wrong*, 23.

⁴⁷² Hatamiya, *Righting a Wrong*, 167.

⁴⁷³ Hatamiya, *Righting a Wrong*, 168.

limited recognition from the court system. In 1983, based on recently discovered evidence that the government had suppressed and destroyed evidence, lawyers for Korematsu, Yasui, and Hirabayashi persuaded the courts to vacate the convictions.

In the original case filed in 1942, Gordon Hirabayashi made two allegations against the government: first, that the 1942 Act of Congress which authorized the military orders was an unconstitutional delegation of power; and second, that the orders the military had passed violated the due process clause of the Fifth Amendment because it discriminated between citizens of Japanese ancestry and those of other ancestries. Congress had passed an Act sanctioning and authorizing DeWitt's curfew order on March 21, 1942, but as the Court admits, the 1942 Act didn't establish a standard that a military commander had to meet nor did it require any findings of fact. DeWitt, in collaboration with Roosevelt and Congress, had almost total authority to do as he pleased if he determined that a curfew order was necessary to protect the nation's defense resources on the West Coast from "espionage and sabotage." Hirabayashi contended that there was no lawful basis on which to discriminate between people of Japanese descent or people of other ancestries, yet in a 6-0 decision, Chief Justice Stone wrote a majority opinion justifying the curfew order, with Justices Douglas, Rutledge, and Murphy lending measured support in their concurring opinions.

What is remarkable about the wartime cases is how consistently the judges avoid discussing the broader social and political context of the case, deliberately narrowing the issue at hand to a question of apportioning legal rights and duties. At the outset of his opinion, Stone sidestepped the more difficult issue of Hirabayashi's refusal to report to the Civil Control Station, since this would have required the Court to decide whether reporting to a Civil Control Station meant confinement in an internment camp and whether this was constitutionally

permissible. He reasons that since Hirabayashi had been sentenced to two concurrent prison terms, one for violating the curfew and one for failing to report to the Civil Control Station, it would suffice to decide the former to uphold the validity of the conviction. Stone begins *Hirabayashi* by outlining the charges against Hirabayashi and the outcomes of the lower courts' decisions, conspicuously failing to explain why Gordon Hirabayashi had not been given a hearing to prove his loyalty or disloyalty to the United States.

Stone begins his opinion by first establishing the government's rightful authority to pass the curfew order under Articles I and II of the Constitution. Contrary to what Hirabayashi alleged, he decided that Congress had this authority because it had acted in concert with the Executive and the military and exercised its (presumably legitimate) war-making powers to put their own citizens in concentration camps. Second, he argued that the government had its reasons to discriminate against those of Japanese descent because they were potentially a "fifth column," an enemy within, and the military had to act fast.⁴⁷⁴ Demonstrating Oliver Wendell Holmes's observation that the law develops as judges deploy concepts, "growing, sporting, spreading, and developing new niches," Stone uses the official language in Roosevelt's order to declare that the nation was vulnerable to "espionage and acts of sabotage,"⁴⁷⁵ heightening the threat of attack. While he acknowledges that making "distinctions between citizens solely because of their ancestry are, by their very, nature odious to a free people whose institutions are founded upon the doctrine of equality," he still goes on to justify the curfew order, this time by pointing to the executive and his rightful power to order the military to protect citizens from attack.⁴⁷⁶

⁴⁷⁴ *Hirabayashi v. United States*, 320 U.S. 81 (1943), 96.

⁴⁷⁵ *Hirabayashi v. United States*, 86.

⁴⁷⁶ *Hirabayashi v. United States*, 100.

Much as Norgle pointed to the actions of President and Congress, Stone goes on to justify the internment order by authorizing Congress's March 1942 Act, which made it unlawful to violate the military proclamations. Since Congress had ratified the President's Executive Order and discussed the curfew order in the Senate before passing the Act, he reasoned it was "an emergency war measure,"⁴⁷⁷ which Articles I and II of the Constitution empower the Executive and Congress to exercise, terrifyingly, in "all the vicissitudes and conditions of warfare."⁴⁷⁸ Not only did this vague and all-encompassing power authorize Congress to allow the military commander to impose a curfew, but it "extended to every matter and activity so related to war as substantially to affect its conduct and progress...it embraces every phase of the national defense."⁴⁷⁹ All the Court was therefore legitimately tasked to decide, in the face of these supposedly legitimate powers, was whether there was a substantial basis for concluding that imposing the curfew specifically on people of Japanese descent was lawful. Slyly, Stone rejected the idea that the military could have imposed the curfew on everyone on the West Coast by stating that although imposing a curfew was "an obvious protection against the perpetration of sabotage most readily committed during the hour of darkness,"⁴⁸⁰ it was unnecessary to inflict "obviously needless hardship on the many."⁴⁸¹

Stone went on to describe Japanese-American culture as a threat to national security. In fact, he openly claimed that it was because they were not white and preserved their non-white culture that they posed a threat to the nation. That "large numbers of children of Japanese

⁴⁷⁷ *Hirabayashi v. United States*, 92.

⁴⁷⁸ *Hirabayashi v. United States*, 93.

⁴⁷⁹ *Hirabayashi v. United States*, 93.

⁴⁸⁰ *Hirabayashi v. United States*, 99.

⁴⁸¹ *Hirabayashi v. United States*, 95.

parentage are sent to Japanese language schools outside the regular hours of public schools in the locality,” many Japanese-Americans were dual citizens, and about ten thousand had opted to live in Japan instead of the United States, he warned.⁴⁸² Also, at any time, he alerted the public that the “resident alien Japanese” who “are of mature years and occupy positions of influence in Japanese communities”⁴⁸³ could disseminate pro-Japanese propaganda. Furthermore, he reminded his audience that the fact that Japanese-Americans had been discriminated against was a “source of irritation”⁴⁸⁴ to them, and that this had “intensified their solidarity and...in large measure prevented their assimilation as an integral part of the white population.”⁴⁸⁵ In their concurrences, Justice Douglas and Justice Murphy, who had both waffled on the necessity of assimilation as a criterion for inclusion, replaced assimilation with the idea of loyalty to the United States. Douglas carefully distanced himself from the majority’s point of view by foregrounding loyalty over whiteness, and attached the protection of rights and liberties to “mind and heart, not race.”⁴⁸⁶ Yet even after he indicates that it was wrong for Hirabayashi not to be given a hearing at some point, Douglas nevertheless concludes that “speed and dispatch may be of the essence” and “peacetime procedures do not necessarily fit wartime needs.”⁴⁸⁷ Ultimately, he dismisses Hirabayashi’s rights, despite his obvious desire to present himself as slightly more progressive than his judicial counterparts. Murphy went farthest in expressing reluctance with the Court’s decision, and although he remained fairly adamant that wartime did not automatically permit curtailing individual rights and liberties, he still concurred with the majority, stating not

⁴⁸² *Hirabayashi v. United States*, 97.

⁴⁸³ *Hirabayashi v. United States*, 98.

⁴⁸⁴ *Hirabayashi v. United States*, 98.

⁴⁸⁵ *Hirabayashi v. United States*, 96.

⁴⁸⁶ *Hirabayashi v. United States*, 107.

⁴⁸⁷ *Hirabayashi v. United States*, 106.

that internment exceeded constitutional power but that it went to “the very brink of constitutional power.”⁴⁸⁸

The year after they decided *Hirabayashi*, the Supreme Court upheld Fred Korematsu’s criminal conviction for violating Civil Exclusion Order No. 34, which ordered all people of Japanese descent to leave designated military areas, including the area where Korematsu’s home was located. After Korematsu violated this order, the military passed Civil Restrictive Order No. 1, which required those of Japanese descent to report to “assembly centers” where they would be detained and then transferred to “relocation centers” by the War Relocation Authority (WRA).⁴⁸⁹ Once again, the majority in *Korematsu* sidestepped the bigger, more pressing issue of internment by reviewing the validity of Exclusion Order No. 34 and declining to review Civil Restrictive Order No. 1. Chief Justice Black deferred to the reasoning in *Hirabayashi* to claim that the military was justified in issuing the curfew order. Even in hindsight, the Court argued that it could not ignore the military’s finding that during a crisis, national security concerns must weigh heavily against individual rights. Unlike Gordon Hirabayashi, who had never been given a hearing to prove his loyalty, there was no question about Fred Korematsu’s loyalty to the United States, yet the court still ruled that “It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group.”⁴⁹⁰

As the legal scholar Jerry Kang argues in his excellent rhetorical analysis of the *coram nobis* cases, the Court in *Korematsu* “found a way to deny the obvious.”⁴⁹¹ After people of

⁴⁸⁸ *Hirabayashi v. United States*, 111.

⁴⁸⁹ Kang, “Denying Prejudice: Internment, Redress, and Denial,” 951.

⁴⁹⁰ *Korematsu v. United States*, 323 U.S. 214 (1944), 220.

⁴⁹¹ Kang, “Denying Prejudice: Internment, Redress, and Denial,” 951.

Japanese descent reported to the ‘assembly centers,’ they would be forced into the camps, which following the military, the Court calls ‘relocation centers.’ Kang points out that the governments’ brief before the Court made it clear that had Korematsu reported to the relocation center, he “would have found himself for a period of time, the length of which was then not ascertainable, in a place of detention.”⁴⁹² Justice Roberts is also clear in his dissent that the ‘relocation center’ was actually just a euphemism for imprisonment in a concentration camp. While the majority claims that departing from the military area, reporting to an assembly center, and being sent to a relocation center are three separate steps of a detention program and that the Court should only review the second, Roberts concluded that the three were “single and indivisible”⁴⁹³ and that the detention program was a clear violation of constitutional rights. The majority concluded that it was willing to decide “serious constitutional issues,”⁴⁹⁴ but to rule on the detention program would be to “decide momentous questions not contained within the framework of the pleadings or the evidence in this case.”⁴⁹⁵ Instead of taking responsibility for his decision, Stone deferred to ready-made statements. He didn’t sanction the internment so much as refuse to reason through it, disavowing Roberts’ clear contention that confinement in the internment camp amounted to a form of punishment, not a civic duty.

Aside from Felix Frankfurter, who also wrote a concurrence limiting judicial power and echoing the majority’s point that civil restriction orders are wartime measures that are up to the military and not for the Courts to decide, Justices Roberts, Murphy, and Jackson all foregrounded the majority’s racism and underscored that the Constitution was designed to

⁴⁹² Kang, “Denying Prejudice: Internment, Redress, and Denial,” 952.

⁴⁹³ *Korematsu v. United States*, 226.

⁴⁹⁴ *Korematsu v. United States*, 222.

⁴⁹⁵ *Korematsu v. United States*, 222.

protect the very kinds of official transgressions at issue in this case. Roberts contended that convicting a citizen for imprisonment in an internment camp based on race is so obviously a violation of civil rights that he need not even belabor the legal analysis. His opinion is a review of the detention program considered whole, and he concludes that this case far exceeds the temporary suspension of a citizens' rights due to a sudden emergency. It was simply a forced detention program. He concludes that to make the case turn on the narrow ground of violating an exclusion order is "to shut our eyes to reality."⁴⁹⁶ Jackson argues that deferring to military judgment compromises the separation of powers, which in turn subordinates the constitution to the military.⁴⁹⁷ Murphy went farthest in condemning the majority, calling their opinion a "legalization of racism" that is "utterly revolting."⁴⁹⁸ Unlike the majority, he conceived of unity based on inclusivity, not demonization of an other, and he refused to dodge responsibility for the internment by focusing on the narrow particulars of the case. Instead, he openly argued that "the majority decided the outcome of this case based on the assumption that all people of Japanese ancestry have a dangerous tendency to commit sabotage and espionage,"⁴⁹⁹ and he concluded that this presumption, alongside military orders that were based on "sociological and racial considerations"⁵⁰⁰ unrelated to national security, defied "reason, logic, or experience."⁵⁰¹ To no avail, he also cited academic studies proving that persons of Japanese descent had successfully integrated into American society and that the retention of culture and language is not a valid criterion on which to base rights and liberties. These dissents demonstrate that the majority

⁴⁹⁶ *Korematsu v. United States*, 232.

⁴⁹⁷ *Korematsu v. United States*, 245.

⁴⁹⁸ *Korematsu v. United States*, 242.

⁴⁹⁹ *Korematsu v. United States*, 235.

⁵⁰⁰ *Korematsu v. United States*, 241.

⁵⁰¹ *Korematsu v. United States*, 235.

chose to avoid confronting the full scope of the government’s actions, and as I will demonstrate below, provide symbolic resources through which to bring reparations claims back into circulation.

4.2 The Coram Nobis Cases

Forty years later, the historian Peter Irons and the congressional Commission on Wartime Relocation and Internment of Civilians’ (CWRIC) researcher Aiko Herzig-Yoshinaga discovered evidence in the National Archives proving that the Justice Department and military officials had suppressed and destroyed exculpatory evidence in *Korematsu*, *Hirabayashi*, and *Yasui*. This confirmed Roberts’ point that the reasons behind the military’s judgment were based on “misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans based on racial and economic prejudices.”⁵⁰² In April 1943, DeWitt had submitted his *Final Report* to the War Department, which outlined the reasons for the internment. The original version of the *Final Report* recommended exclusion based on his assessment that “the Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become Americanized, the racial strains are undiluted” and that it was “impossible to ascertain the identity of the loyal and the disloyal with any degree of safety” – not because there was “insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could

⁵⁰² *Korematsu v. United States*, 239.

not be made.”⁵⁰³ In other words, it was impossible to distinguish one Japanese person from another.

When the Justice Department requested access to the *Report* to write their briefs in *Hirabayashi*, *Yasui*, and *Korematsu*, the War Department had already altered it to conceal DeWitt’s remarks. At the time when DeWitt was issuing orders, the Office of Naval Intelligence (ONI) had issued its own report stating that potentially disloyal citizens were already in custody, directly contradicting DeWitt’s claim that people of Japanese descent were more likely to commit espionage. The FBI had concluded that DeWitt’s orders were based on unreliable data, and the FCC had reprimanded the Army for attributing broadcast signals picked up in Japan to sources in the United States. The government’s brief before the Court contained none of this evidence, and it only later came to light that the Justice Department had known that DeWitt’s report contained inaccuracies but did not inform the Court.

In 1983, a legal team backed by the JACL filed petitions for coram nobis to reopen *Korematsu*, *Yasui*, and *Hirabayashi* and vacate the criminal convictions. Although the immediate aim of the coram nobis cases was narrowly specific, the cases were part of JACL’s effort to put pressure on the legislature to pass the Civil Liberties Act of 1988. The first coram nobis case, *Korematsu II*, was decided by Judge Marilyn Patel on April 19, 1984 in favor of Fred Korematsu. Although Patel granted the writ in order to “correct fundamental errors and prevent injustice” she admittedly undertook what she called a “limited review” of the original case.⁵⁰⁴ Coram nobis cases provide the courts with an opportunity to correct errors of fact. The

⁵⁰³ Quoted in Kang, “Denying Prejudice: Internment, Redress, and Denial,” 977-8.

⁵⁰⁴ *Korematsu v. United States* [hereinafter *Korematsu v. United States II*], 548 F. Supp. 1406 (N.D. Cal. Apr. 19, 1984), 1412.

government had not opposed the petition, but filed a motion to set aside the conviction without opening the record, arguing that “there is no further usefulness to be served by conviction under a statute that has been soundly repudiated.”⁵⁰⁵ The court denied the government’s motion and stated that it would not “treat this matter in the perfunctory and procedurally improper manner it has suggested”⁵⁰⁶; at the same time, however, it circumscribed responsibility by declining to “reopen the partially healed wounds of an earlier period.”⁵⁰⁷ Patel declined to grant Korematsu a full evidentiary hearing, but decided the case based on reports by the CWRIC, the ONI, and the FCC, all of which indicated that there was evidence to counteract DeWitt’s sabotage and espionage claims. She decided that the Supreme Court had relied heavily on DeWitt’s report and that relevant evidence had been concealed in both *Hirabayashi* and *Korematsu*. Whether the suppressed evidence would have altered the case outcome or not, the fact that evidence was withheld at all meant that the conviction should be set aside. Tellingly, however, Patel didn’t address the Court’s original reasoning as part of the reversal.

In Seattle, *Hirabayashi II* also went to a full evidentiary hearing in June 1985. Judge Voorhees carefully reviewed the evidence suppressed in the original case, including the trial record, the government’s arguments, the Supreme Court’s reasoning in *Hirabayashi I*, and the successful arguments on behalf of Gordon Hirabayashi. He included excerpts of DeWitt’s original *Final Report*, citing DeWitt’s statement that Japanese people were for him undistinguishable, as well as correspondences between DeWitt, Colonel Bendetsen and the Brigadier General Barnett as they decided which changes to recommend to DeWitt’s order

⁵⁰⁵ *Korematsu v. United States II*, 1411.

⁵⁰⁶ *Korematsu v. United States II*, 1414.

⁵⁰⁷ *Korematsu v. United States II*, 1414.

before they submitted an altered version of *the Final Report* to the Justice Department.

According to Voorhees, the Supreme Court's opinion reflected "the Court's acceptance of the government argument that the lack of time to separate the loyal from the disloyal justified action directed toward all individuals of Japanese ancestry."⁵⁰⁸ He reasoned that had the Court had access to the full record, the Court would have set aside the exclusion conviction but upheld the curfew, since the curfew was a comparatively mild burden.

Voorhees's opinion contains several conspicuous absences, as does the appeal that was decided in the 9th Circuit by Judges Goodwin, Schroeder, and Farris. Although the appeal overturned both of Hirabayashi's convictions, overruling the District Court's judgment that the curfew was a relatively mild burden on people of Japanese descent and that the Supreme Court would not have allowed it to go forward having known about the suppressed evidence, both courts shielded the judiciary from critique. In what Kang calls "an epic whitewash,"⁵⁰⁹ Voorhees and the Circuit Court failed to call out the Supreme Court's racism, once again deciding the case on the basis of concealed military evidence, the narrowest grounds possible. Schroeder makes a tepid remark at the beginning of the decision that the "*Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history,"⁵¹⁰ but at every turn, the Circuit Judges failed to undertake an analysis of the Supreme Court's reasoning; they simply cited Stone deferring to the military's assessment of wartime necessity. The *Hirabayashi* Court "accepted the government's view of the facts"⁵¹¹ and according to the judges, both *Hirabayashi* and

⁵⁰⁸ *Hirabayashi v. United States*, 1453.

⁵⁰⁹ Kang, "Denying Prejudice: Internment, Redress, and Denial," 961.

⁵¹⁰ *Hirabayashi v. United States* [hereinafter *Hirabayashi v. United States II*], 828 F. 2d. 591 (9th Cir. 1987), 592.

⁵¹¹ *Hirabayashi v. United States II*, 603.

Korematsu took the military's word."⁵¹² In referring to the *Korematsu* dissents, Schroeder doesn't refer to Roberts or Murphy's dissents; instead, he points to Jackson, who wrote that the Court had no choice but to accept the military's judgment, as well as one of Murphy's statements that the situation was not as urgent or dire as the military had made it seem. The only differences the Circuit Court was willing to foreground between its position and the wartime court were wartime pressures and deference to the military.

Only in a vague statement towards the end of the opinion does the Court state that Hirabayashi was "lastingly aggrieved" because he was convicted based on his race.⁵¹³ Despite these limitations, however, the coram nobis decisions still played an essential role in the political strategy for reparations through the legislature, and as Kang points out, they are rightly hailed as victories. The publicity surrounding the cases, which included an Oscar-nominated documentary on the subject,⁵¹⁴ helped raise the public's awareness of internment to create a favorable political climate for passage of the Civil Liberties Act.⁵¹⁵ Yet as Kang argues, they represent a missed opportunity for the judiciary to acknowledge its own fallibility and set a precedent that would protect all minorities from future harm by declining to publicly articulate a shared moral norm against racism. As Kang argues, the litigation could very well have been a moment to "write truth into the law,"⁵¹⁶ but the courts allowed the reasoning behind the decisions to stand more or less unchanged.

⁵¹² *Hirabayashi v. United States II*, 603.

⁵¹³ *Hirabayashi v. United States II*, 608.

⁵¹⁴ Hatamiya, *Righting a Wrong*, 166.

⁵¹⁵ Hatamiya, *Righting a Wrong*, 166; Maki, 137; Berthold, S. Megan, Harry H.L. Kitano, and Mitchell T. Maki, *Achieving the Impossible Dream: How Japanese Americans Obtained Redress*, 161, 136.

⁵¹⁶ Kang, "Denying Prejudice: Internment, Redress, and Denial," 1004.

4.3 *William Hohri v. United States*

Congress made its first attempt at reparations on June 2, 1948, when President Harry Truman signed the Evacuation Claims Act authorizing the Attorney General to settle property loss claims by people of Japanese descent. The origins of the Act were notably diverse.⁵¹⁷ Redress was recommended by the House Select Committee Investigating National Defense Migration, the socialist leader Norman Thomas, as well as the African American journalist George Schuyler and the Women's International League for Peace and Freedom. The War Relocation Authority (WRA) initially responded that it had no intention to make reparations, but after some internal shifts in the Interior Department, they co-authored a reparations bill under the undersecretary Oscar Chapman in February of 1946. The Bill died once in the Senate even though its provisions were very limited; for example, it didn't cover claims for anticipated profits or wages, the deterioration of skills or earning capacity, or physical and psychological suffering, and it imposed a cap of \$2,500 on compensation.⁵¹⁸ In 1946, a lobbyist for the JACL, Mike Masaoka, undertook a new campaign asking the government to pay \$1,000 and allowing individuals to bring claims in Small Claims Court for any amount over that, but the White House's newly appointed 'minority liaisons' David Niles and Philleo Nash still rejected the idea. Masaoka then went to Attorney General Francis Biddle who said that because of the Supreme Court precedent in *Korematsu*, Japanese Americans wouldn't be able to recover. Next, Masaoka appeared before the President's Committee on Civil Rights, where he made a case against anti-

⁵¹⁷ "The Japanese American Evacuation Claims Act."

http://encyclopedia.densho.org/Japanese_American_Evacuation_Claims_Act/.

⁵¹⁸ "The Japanese American Evacuation Claims Act."

http://encyclopedia.densho.org/Japanese_American_Evacuation_Claims_Act/.

Asian discrimination and immigration laws and recommended property claims legislation. This legislation passed in the Senate, and Truman signed it in 1948. The terms of the Evacuation Claims Act were harsh and restrictive. Former internees had to provide receipts and proofs of purchase for what they had lost, and if they had losses over \$2,500, they had to initiate independent legal proceedings against the government. Former Japanese American internees filed a total of 23,689 claims. By 1950, the Department had only heard 200 claims, settling the last claim in 1965. In total, the government paid only \$35 million in damages.⁵¹⁹

Backed by the National Council for Japanese American Reparations (NCJAR), William Hohri filed *Hohri v. United States* on March 16, 1983. Hohri was convinced from the start that the JACL had pursued the wrong strategy by filing the coram nobis petitions,⁵²⁰ and he made twenty-two separate allegations for damages against the federal government on behalf of all 120,000 internees including the loss of constitutional rights, homes, businesses, educational opportunities, and careers, as well as physical and psychological injuries resulting from the loss of life, destruction of family ties, and social stigma.⁵²¹ The government responded by filing a motion to dismiss, asserted sovereign immunity, contended that the statute of limitations for making a claim had passed, and that the American-Japanese Evacuation Claims Act, which had authorized the Attorney General to determine claims for lost property filed by former internees, was an exclusive and adequate remedy for all property based claims resulting from the internment. From a legal standpoint, all the judges had to determine was where the case should rightfully be heard (federal or regional court), whether the case would go to a hearing, and from

⁵¹⁹ “The Japanese American Evacuation Claims Act.”

http://encyclopedia.densho.org/Japanese_American_Evacuation_Claims_Act/.

⁵²⁰ Hatamiya, *Righting a Wrong*, 173.

⁵²¹ Hatamiya, *Righting a Wrong*, 173.

there, proceed to a trial, based on two fairly narrow questions: 1) whether the plaintiffs had exercised “due diligence” in finding the incriminating evidence against the government before the statute of limitations had run; and 2) whether the plaintiffs could sue the government at all under the Constitution. Rhetorically, these cases demonstrate different degrees of sensitivity to the relationship between law and justice. In three of the five successive iterations of the case, the judges made an effort to reframe necessary technical decisions as opinions that might better resemble a just outcome.

In *Hohri I*, Judge Oberdorfer of the United States District of Columbia dismissed all but the claims for lost property, deciding that despite their substantive validity, they did not qualify as claims that mandated monetary compensation under the Constitution. Yet Oberdorfer’s opinion was a persuasive document through and through. Drawing on information in the complaint, the CWRIC’s 1982 report, and published accounts of the history behind the internment, his narrative provided the most thorough description of living conditions in the camp on judicial record. He described how the living units “were organized around ‘blocks,’” each housing 600 to 800 people, and that they were surrounded by fences, search lights, and military police, that the only people who were ever authorized to leave the camps were the men drafted to fight in the military,⁵²² how working outside the camps was otherwise not allowed and when it was, it was made available for only \$12 to \$19 per month. Even accounting for the food, shelter, and medical care that was provided, and despite ruling that they were not entitled to legal damages, Oberdorfer concluded fairly emphatically that the economic damage to Japanese-Americans done by the internment was “obvious.”⁵²³

⁵²² *Hohri v. United States*, 586 F. Supp. 769 (1984), 775.

⁵²³ *Hohri v. United States*, 775

Drawing more on pathos than one would find in a more routine legal opinion, Oberdorfer even concluded that since the Justice Departments had actively suppressed relevant evidence in *Hirabayashi* and *Korematsu*, had Hohri brought these claims in time, the case probably would have won. He downgrades the importance of the legal outcome by openly stating that his decision goes no farther than pronouncing on very specific legal provisions as applied to the facts, which as he states, plainly demonstrate “a questionable rationale of military necessity, to intern 120,000 citizens and residents because of their race.”⁵²⁴

Judge Skelley Wright’s narrative account in *Hohri II*, which was even more heavily titled in favor of the plaintiffs, also led to a more favorable legal conclusion. Where Oberdorfer describes the internment itself as having “proceeded on a voluntary basis”⁵²⁵ which “quickly proved unworkable,”⁵²⁶ Wright points out that actually, many Japanese-Americans were not given any option but to relocate, and if they demonstrated any resistance to authorities, “compulsion replaced exhortation.”⁵²⁷ “Given as little as forty-eight hours notice of their impending removal,” Wright continues on, they were then assigned to “tar-paper rooms” and were reduced to eating and bathing in mass facilities.⁵²⁸ Having thus established persuasive credibility, Wright reversed the District Court’s opinion, ruling that the statute started to run shortly after WWII. In his opinion, the FBI, FCC, and ONI reports, which were publicly available before the statute started to run, would not have sufficiently mitigated against the

⁵²⁴ *Hohri v. United States*, 795.

⁵²⁵ *Hohri v. United States*, 774.

⁵²⁶ *Hohri v. United States*, 774.

⁵²⁷ *Hohri v. United States* [hereinafter *Hohri v. United States II*] 782 F. 2d. 227 (D.C. Cir. 1986), 232.

⁵²⁸ *Hohri v. United States II*, 232.

Supreme Court's ruling in *Korematsu*, which he argued had constructed an almost insurmountable barrier of deference to military judgment.

Judge Markey's dissent in *Hohri II* berates the majority for deciding the case based on custom, what he called a "feel good result" rather than an earnest attempt to interpret the legal provisions according to what he identified as the proper sources of law: Congressional intent, judicial precedent, and official policy considerations. He began by stating "that wrongs were done to Americans of Japanese ancestry under Executive Order 9066 is disputed by *no one* involved in this case"⁵²⁹ and however blameworthy the government, for Markey, the court's role was narrowly circumscribed to upholding established law and policy. Despite the majority's "laudable desire to do justice," he concluded that the degree to which the internment was unjust was an issue for the legislature, not the judiciary, to decide. For him, the topic of consequence was whether it was wise for courts to set a precedent that would encourage the "evil of forum shopping,"⁵³⁰ and he spent much of his decision looking at the jurisdiction requirement. Any broader consideration than this would compromise the separations of powers.

In the petition for a rehearing in *Hohri III*, the Federal Circuit Judge Justice Bork, writing for Scalia, Starr, Silberman, and Buckley wrote a blistering dissent that took on what they perceived as the majority's explicit intent to do justice. They overturned the decision based on the proposition that "we administer justice according to law," and that the decision in *Hohri II* "illustrates the costs to the legal system when compassion displaces law."⁵³¹ Legally, the dissent took issue with what it considered to be the precedential value of the wartime opinions in

⁵²⁹ *Hohri v. United States II*, 232.

⁵³⁰ *Hohri v. United States II*, 232.

⁵³¹ Order. 793 F.2d. 304 (D.C. Cir. 1986), 13.

Hirabayashi and *Korematsu*. The *Hohri II* majority had argued that the Fifth Amendment's takings clause claim should be considered part and parcel of the internment program, while this court concluded that the taking of property and the internment were separate legal issues. Had the plaintiffs made their case by 1950, just after some of the suppressed evidence had been revealed, they argued that the government would not have been able to cite the reasoning in *Hirabayashi* or *Korematsu* as a viable defense for taking the plaintiff's property. For Bork, the topic of consequence was that the majority's opinion might create a rule that an argument for military necessity could never be challenged by a court of law absent an official statement from the political branches.

In the final decision, *Hohri V*, the Federal Circuit affirmed Oberdorfer's final judgment, but Judge Baldwin issued a qualified dissent where he concluded that the takings clause claims were not barred by the statute of limitations. Unlike Oberdorfer, who ruled that the statute began to accrue once the Ringle, Fly, and Hoover documents were published, Baldwin decided that the doors of the courthouse "were effectively closed" because of the presumption of deference to the military the Supreme Court had made in *Korematsu* and the plaintiffs could still bring their claims.⁵³² Once the Supreme Court had decided these cases, it didn't matter whether the potential plaintiffs had been injured or by whom, since the Supreme Court decisions effectively barred them from filing a legal claim in good faith.⁵³³ For him, the topic of consequence was preventing "abuse of citizens and individual groups of citizens" and his opinion stands as a

⁵³² *Hohri v. United States* [hereinafter *Hohri v. United States III*], 847 F. 2d. 779 (May 11, 1988), 783.

⁵³³ *Hohri v. United States III*, 784.

warning to consider the future effects of allowing “perpetration of fraud by the sovereign” to go unchecked.⁵³⁴

4.4 Conclusion

As an outsider, it is not up to me to decide whether the movement for reparations should continue, and if so, in what form. As a pragmatist, what I have tried to point out in this chapter is that the strategies which courts use to depoliticize the economy and perpetuate misrecognition ultimately affect us all. The judges in *In Re Slave Descendants* neutralized the moral wrong of slavery, refusing to allow for the possibility that citizens would exercise their agency collectively in any other way than as consumers. When with thinly veiled disapproval Judge Norgle mentioned that the movement for slavery reparations gained momentum when the Civil Liberties Act of 1988 was signed, according to him, it was because the legislature was “inclined to award compensation to victims of historical injustices.”⁵³⁵ This casual statement obscures the long history of activism behind the Act, which I have outlined, and it discounts the judiciary’s own responsibility for articulating shared standards, to which at least some of the judges in *Hohri* provided a counterexample.

These are not the only examples where judges have made moral arguments. The judge in *In Re Holocaust Victims Asset Litigation* approved a \$1.25 billion settlement between Holocaust survivors and the Swiss banks who collaborated with Nazis to steal their assets. He

⁵³⁴ *Hohri v. United States* III, 784.

⁵³⁵ *In Re African-American Slave Descendants Litigation*, 12.

acknowledged that the value of the victims' assets was probably much more than the settled-for amount, and while he openly regretted that "there was a practical problem created by the wholesale destruction of records, and to a degree, the passage of time," he openly articulated that it was reprehensible that the "banks do not feel a moral obligation to the victims of Nazi persecution."⁵³⁶ In *Batiste v. City of New Haven*, District Court Judge Stefan J. Underhill openly declared his disapproval that scores of low-income African-American residents were being displaced from their homes in the Upper Hill neighborhood of New Haven to make way for new developments. He reviewed the City's development plans, personally inspected several alternative sites for development, and concluded that "given the tremendous human and social costs associated with displacing numerous homeowners and tenants from their homes, it is surprising that the defendants [i.e. the City] did not consider alternatives."⁵³⁷ He eventually decided for the City based on technical legal considerations (he concluded that the residents did not file suit in time), but he also made sure to include that the ruling was not "the outcome the Court would have chosen."⁵³⁸ Even if rhetorical interventions of this kind are not legally actionable, they are at the very least legible as a starting point from which to remake the political economy.

⁵³⁶ *In Re Holocaust Victim Assets Litigation*, 105 F. Supp.2d 139 (E.D.N.Y. 2000), 158.

⁵³⁷ *Batiste v. City of New Haven*, 239 F. Supp. 2d 213 (D. Conn. 2002), 6.

⁵³⁸ *Batiste v. City of New Haven*, 6.

5.0 Precarious Workers and the Future of the 13th Amendment

A brief glance at the current economic and political context provides a bleak prognosis for the fate of unions. With no labor party to stop the onslaught of the neoliberal offensive that began in the 1970s, many people have come to accept that the market is the best way of structuring human activity.⁵³⁹ Outsourcing, privatization, and the growth of contingent labor have all contributed to declining union memberships, and especially after the Supreme Court's recent decision in *Janus v. AFSCME*, unions find themselves at a historic low point. *Janus* made it unconstitutional for labor unions to collect agency fees from non-unionized members in the public sector who are covered by union contracts. In practice, this effectively imposes "right to work" laws on public-sector unions in the twenty-two states that didn't already have them, the culmination of a decades long effort by the business community to restrict workers' rights by making it much more difficult for unions to cover collective bargaining and contract enforcement costs.⁵⁴⁰ Yet despite this loss and the many problems that inhere in the labor law framework, unions are not entirely devoid of progressive possibility.

The law as a whole is often rightly criticized for encouraging a masculinist approach to social change. The psychoanalytic theorist Jessica Benjamin, whose own approach to social

⁵³⁹ Dana Blanchard, "Lessons from the Teachers' Strike Wave," *International Socialist Review*, May 2, 2019, <http://isreview.org/issue/110/lessons-teachers-strike-wave>.

⁵⁴⁰ Elizabeth Tandy Shermer, "The Right to Work Really Means the Right to Work for Less," *Washington Post*, April 24, 2018, http://www.washingtonpost.com/news/made-by-history/wp/2018/04/24/the-right-to-work-really-means-the-right-to-work-for-less/?utm_term=.9b69bc735a28.

transformation foregrounds the importance of reciprocity, emotional attunement, and nurturance, warns us against looking to the law, or any other system which relies on “formal rules that refer to the hypothetical interaction of autonomous individuals.”⁵⁴¹ She explains that male domination, whether or not it is defended by men, works through “the hegemony of impersonal organization,” that it is its “protean impersonality” that makes it problematic as a tool for social change.⁵⁴² Unions in particular have a not undeserved reputation as patriarchal strongholds. Rather than developing a culture that is in solidarity with the most vulnerable, unions tend to focus on the ins and outs of contract negotiation and aim to enforce work rules through the formal grievance system instead.⁵⁴³ The AFL-CIO, the largest federation of unions in the United States, has admitted that unions also choose to protect the contracts of existing members rather than seek out new ones, which results in neglecting the interests of women and people of color.⁵⁴⁴ Women in particular are disproportionately underrepresented in unions relative to the number of women in the labor force, and they have been expected to assimilate into masculinist approaches to leadership and organization. Even organizations that advocate for women and minorities, for example, the Coalition of Labor Union Women and the Coalition of Black Trade Unionists, have focused their attention on either elected officials or union staff, leaving the structure and character of the labor movement as white and male basically intact.⁵⁴⁵

⁵⁴¹ Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York: Pantheon, 1988), 216.

⁵⁴² Benjamin, 216.

⁵⁴³ Don Clawson and Mary Ann Clawson, “What Has Happened to the U.S. Labor Movement? Union Decline and Renewal,” *Annual Review of Sociology* 25 (1999): 99.

⁵⁴⁴ Clawson and Clawson, 98.

⁵⁴⁵ Clawson and Clawson, 99.

In order for a new form of unionism to succeed, not only will unions have to actively build alliances with other progressive institutions in the community at large and rededicate themselves to social causes, but they will also have to redefine their role as institutions dedicated to building power from below. As bell hooks observes in *The Will to Change*, we live in a dominator culture where winning is especially valued and where power is essentially defined as violence, the ability to manipulate and control others.⁵⁴⁶ This way of life discourages healthy interdependency, autonomy, and especially mutual aid, the cornerstone of Section 7 of the NLRA, which grants workers “the right to organize, bargain collectively, and engage in strikes, picketing, and other concerted activities” explicitly for the purposes of “mutual aid and protection.”⁵⁴⁷ When in 2010 the AFL-CIO filed an amicus brief in support of Citizens United against the Federal Election Commission (FEC), they failed to view their role holistically, as connected with individuals and other organizations that might build a more autonomous labor force over the long term. Unions made a strategic choice to direct their efforts to electing officials instead of educating and mobilizing the workers themselves. In this chapter, I will argue that unions can play a bigger part in the political economy by drawing from the radical history behind the passage of the National Labor Relations Act (NLRA) and by empowering their membership to appeal to the power of Congress to enforce human rights under the Thirteenth Amendment.

When Philip J. Miscimarra was announced Chairman of the National Labor Relations Board (NLRB) not long after the election of Donald Trump, the labor community braced itself

⁵⁴⁶ bell hooks, *The Will to Change* (New York: Washington Square Press, 2004), 55.

⁵⁴⁷ Charles J. Morris, George E. Bodle, and Jay S. Siegel, *The Developing Labor Law* (Chicago: American Bar Association, 1971), 28.

for the worst. A graduate of both the University of Pennsylvania’s Law School and the Wharton School of Business, Miscimarra had made a long career representing employers against their workers, and despite his own working class origins, was well-known for representing Business Roundtable, a lobbying group for CEOs.⁵⁴⁸ Citing personal reasons, Miscimarra left the Board after only his first term, but not before issuing, during his last few weeks as Chairman, the majority opinion in a rapid-fire series of five anti-union decisions that included *Hy-Brand Industrial Contractors*⁵⁴⁹ and *PCC Structural*s.⁵⁵⁰ As predicted, these cases overturned *Browning-Ferris*⁵⁵¹ and *Specialty Healthcare*,⁵⁵² two cases which touch on perhaps the most fundamental issues in the labor-management world: the ability of workers to organize their workplace by defining their own ‘community of interest’ and the ability of employers to insulate themselves from negotiating with workers by disclaiming ‘joint-employer’ status. Significantly, in each of these cases as well as in *Columbia*, the case that granted Section 7 rights to graduate students, Miscimarra justified his claims by drawing from values which prioritize commerce over human rights. In the following sections, I will expose the limitations of his worldview and try to broaden the terms of the debate between the majority and the dissents in order to empower

⁵⁴⁸ “Chair of the National Labor Relations Board: Who is Philip Miscimarra?” May 29, 2017, *AllGov: Everything Our Government Really Does*, <http://www.allgov.com/news/appointments-and-resignations/chair-of-the-national-labor-relations-board-who-is-philip-miscimarra-170529?news=860195>.

⁵⁴⁹ *Hy Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (Dec. 14, 2017).

⁵⁵⁰ *PCC Structural, Inc. and International Association of Machinists*, 365 NLRB No. 160 (Dec. 15, 2017).

⁵⁵¹ *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).

⁵⁵² *Specialty Healthcare and Rehabilitation Center of Mobile* [hereinafter *Specialty Healthcare I*], 357 NLRB No. 934 (Aug. 26, 2011).

graduate students and care workers, segments of the labor force that have historically been ignored by unions, to build solidarities with the growing precariat.

5.1 Overturning *Specialty Healthcare* and *Browning-Ferris*

From an organizing standpoint, the success or failure of a union campaign often hinges on what exactly will qualify as a “community of interest” under law, which includes the crucial question of just how many members workers will be required to organize before they win Section 7 rights. Before *Specialty Healthcare*, the NLRB used what it called the *Park Manor* test to decide what constitutes an appropriate bargaining unit in nursing homes, rehabilitation centers, and other non-acute healthcare facilities. While the Board generally takes such factors into consideration as whether the employees are organized into a separate department, have distinct skills and training, have distinct job functions and perform distinct work, are functionally integrated with other workers, have frequent contact with other workers, interchange with them, have distinct terms and conditions, and are separately supervised,⁵⁵³ in 1989, the Board used its rulemaking proceedings to clarify and differentiate the standard for non-acute care facilities. In this case, a group of Certified Nursing Assistants (CNAs) at Specialty Healthcare Rehabilitation Center, a non-acute care facility in Mobile, Alabama, were asking the Board to revise that standard and open the door to ‘micro-unit’ organizing, whereby workers can more easily unionize by bringing small units of workers to the bargaining table with employers.

⁵⁵³ *Specialty Healthcare I*, 942.

The NLRB has often been critiqued for using an arbitrary and ad-hoc method, and as the legal scholar James Brudney points out, it has a reputation for being “unusually detached” even for a federal agency, one that he describes as “strangely removed from national conversations about the nature of employer-employee relations.”⁵⁵⁴ Typically, federal agencies adapt to changing circumstances and construe statutory text flexibly; yet for a multiplicity of reasons unfavorable to labor, the Board has made itself increasingly irrelevant to substantial changes in the terms and conditions of employment, changing markets in the product and service sector, and in labor-management dynamics.⁵⁵⁵ While it could advocate for collective bargaining by entering into a dialogue with both the circuit courts and Congress and use its rulemaking powers more often (which would allow them to obtain and analyze data, set an agenda, and involve the public in dialogue to respond to changes in the workplace), the Board has been content to consistently maintain a low profile, “exercising a subdued form of autonomy rather than promoting substantively or recognizing procedurally any continuing need for new policy directives.”⁵⁵⁶ Congress has not made any changes to the NLRA since 1959, and since the mid 1970s, the business community has blocked labor law reform and prevented efforts to reduce employer advantages during the union campaign process, deter employer misconduct, and prohibit employer activity that chills organizing and collective bargaining.⁵⁵⁷

Specialty Healthcare, which brought up the crucial matter of workplace representation, provided the Board with an opportunity to address a matter of more general concern within the

⁵⁵⁴ James J. Brudney, “Isolated and Politicized: the NLRB’s Uncertain Future,” *Comparative Labor Law and Policy Journal* 26 (2005), 223.

⁵⁵⁵ Brudney, 227-8.

⁵⁵⁶ Brudney, 230.

⁵⁵⁷ Brudney, 228.

context of care workers, which not incidentally, have not historically been a priority for unions. Made up of mostly female, non-white, and immigrant workers, care workers are less open to more traditional, militant unionizing strategies (like strikes) that they perceive might hurt those they care for.⁵⁵⁸ When the CNAs at Specialty Healthcare decided that they needed a union and filed for union representation, the for-profit corporation contended that they would have to organize almost everyone in their workplace before they were willing to come to the bargaining table. For the CNAs, this meant that not only would they have to persuade the CNAs to join the union, but they would also have to persuade activity assistants, dietary aides and cooks, the social services assistant, the staffing coordinator, the maintenance assistant, the central supply clerk, the medical records clerk, the data entry clerk, the business office clerical staff, and the receptionist.⁵⁵⁹ Faced with this unreasonable burden, the CNAs asked the Board to authorize them to bargain together as a micro-unit of only CNAs.

In her decision, the Board Chairman Wilma Leibman authorized micro-units by pointing to changed circumstances in the industry, and she concluded that the Board would more effectively uphold its statutory charge by broadening the standard. The majority overruled the *Park Manor* test, and concluded that the dated standard was no longer appropriate for non-acute care facilities. Instead, they ruled that the burden of proof should shift to the employer to demonstrate that excluded workers share an “an overwhelming community of interest” with the included workers.⁵⁶⁰ In his dissent, Brian E. Hayes accused the Board majority of neglecting to

⁵⁵⁸ Mignon Duffy, “‘We are the Union’: Care Work, Unions, and Social Movements,” *Humanity and Society* 34 (2010): 131.

⁵⁵⁹ *Specialty Healthcare and Rehabilitation Center of Mobile* [hereinafter *Specialty Healthcare II*], 356 NLRB No. 56 (Dec. 22, 2010), 1.

⁵⁶⁰ *Specialty Healthcare I*, 934.

balance worker's rights against "the public's right to uninterrupted health care delivery,"⁵⁶¹ and he accused the Board of acting against the public by supporting unions when "the recent independent efforts of unions to persuade employees to join or remain with them in large numbers have failed."⁵⁶²

Significantly, while both sides in this case claimed to uphold the Act in order to ensure workers the "fullest freedom" under law, neither side conceived of it as enabling workers to exercise full autonomy in their workplaces by altering the power dynamics therein.⁵⁶³ The Republican predictably came out on the side of employers, while the Democrat was content to try, in only the most subtle and indirect ways, to advocate for workers but without explicitly addressing the larger economic context, where union organizing faces considerable external obstacles. Nowhere does Liebman address Hayes's negative rights argument by mentioning the union's hidden but formidable nemesis in the anti-union consulting industry, the newest in a four-prong union-avoidance industry which also includes law firms, industrial psychologists, and strike management firms, a multi-million dollar business that is part of a systematic attempt by employers to thwart union organizing that began in the 1940s and exploded during the conservative political and economic climate of the 1970s.⁵⁶⁴ While Hayes makes it seem like workers have wisely opted out of the antiquated and ailing practice of workplace unionization, the union's attempts notwithstanding, both sides fail to address this reality. As enabling as Liebman's decision was to organizing, she missed an opportunity to make these factors legible in

⁵⁶¹ *Specialty Healthcare II*, 4.

⁵⁶² *Specialty Healthcare I*, 952.

⁵⁶³ *Specialty Healthcare II*, 939.

⁵⁶⁴ John Logan, "Consultants, Lawyers, and the 'Union-Free' Movement in the USA Since the 1970s," *Industrial Relations Journal* 33.3 (2008), 198.

her reasoning. She simply concluded that the Board should have the authority to decide on bargaining units, and that soliciting views from all sides is a commendable practice.

In contrast, when Miscimarra promptly overturned *Specialty Healthcare* in *PCC Structural*s, he structured his decision on overtly policy-based considerations. Significantly, he also used disabling metaphors drawn from representative democracy to describe the campaigning process. In the early days before the NLRA was passed, former NLRB Member Craig Becker explains how Senator Robert Wagner (after whom the Act was named) and other union advocates tried to legitimize the NLRA by using metaphors drawn from the language of representative democracy. In industry as in government, they argued, citizens required a system based on the will of the majority and popular representation. In Congressional hearings, for example, the representative Robert L. Hale testified that non-union employees were akin to “non-voting members of society,” and that wage earners should have the right to carry the rights of citizenship into their workplaces.⁵⁶⁵ An engineer for the automotive industry cited the American Revolution to explain that workers without a union were like citizens who had no voice in government, and Wagner himself equated the rights of citizenship with worker’s rights under the NLRA. As Becker points out, however, legitimating the NLRA by invoking the principles of popular sovereignty and majority rule as embodied in the Constitution had unfortunate consequences. It set the stage for a series of legislative and judicial interpretations that elevated the union election to the primary vehicle for workplace representation.⁵⁶⁶

⁵⁶⁵ Craig Becker, “Democracy in the Workplace: Union Representation Elections and Federal Labor Law,” *Minnesota Law Review* 77 (1993): 503.

⁵⁶⁶ Becker, 502-503.

Just after the NLRA was first passed, the NLRB issued 272 certifications in the absence of a formal election, and certification depended on a hearing where the union simply had to prove that the employees wanted union representation.⁵⁶⁷ As the progressive wave of the New Deal era ended, however, the Board came under intense political pressure from employers, and the Board itself decided, based on a vague allusion to “experience,” that they would no longer certify unions without a formal election of all the employees.⁵⁶⁸ The necessity of winning the union election resulted from employer pressure, but also, as Becker points out, an ideological bias that in a democracy, “it is all but indisputable that representatives should be chosen in elections.”⁵⁶⁹ Subsequently, the Board went on to produce what Becker observes is an unintelligible history of jurisprudence,⁵⁷⁰ “an intricate web of rules” permitting employers to use their economic power to force their employees to attend anti-union, captive audience meetings or risk termination, meetings where employers have also been authorized to remove not only union advocates but employees who ask questions when the employer has made it clear that questions will not be tolerated.⁵⁷¹

Becker demonstrates how the political election analogy belies a complicated reality that gives employers coercive power during a union campaign. Election timing, for example, is irregular and can be used by employers as a tactic to delay elections just when a campaign is gaining momentum. Unlike the result of a political election, the result of a union election has the potential to democratize the relationships in a workplace: it can reorder rather than renew the

⁵⁶⁷ Becker, 507.

⁵⁶⁸ Becker, 511.

⁵⁶⁹ Becker, 515.

⁵⁷⁰ Becker, 557.

⁵⁷¹ Becker, 560

relationship between employer and employee by displacing unilateral employer authority.⁵⁷² As Becker argues, the union election inaugurates the system of labor representation, whereas the political election is already embedded in the system of representational government and citizens' right to vote is always already guaranteed where the employees' right to organize is not. The political election and the union election thus serve fundamentally different functions; both grant individuals the right to vote for representatives of their own choosing, but they differ in altering the legal relationships between parties. As labor law developed, the courts gave employers the right to restrict the Section 7 rights of employees by allowing them to intervene in matters of representation by delaying elections and contesting the composition of units.⁵⁷³ When Miscimarra thus invokes the election metaphor, he strikes down the legitimacy of micro-units by continuing the Board's own jurisprudential history obscuring this power differential, which neither Liebman nor the dissent in *PCC Structural*s chose to address.

*PCC Structural*s was a case involving a unit of 100 full time and regular part time rework welders and rework specialists in which the employer contended that the smallest appropriate unit was a unit of 2,565 production and maintenance employees in approximately 120 job classifications, not the petitioned-for unit of 100 welders. In their petition for review to the Board, the employer contended that *Specialty Healthcare* was wrongly decided because it unlawfully gave controlling weight to the extent of organizing, and that the standard itself results in proliferation and fracturing of units while ignoring the importance of shared interests among

⁵⁷² Becker, 581-2.

⁵⁷³ Becker, 588.

employees. In an especially devious move, the employer also argued that the decision didn't adequately consider the Section 7 rights of excluded employees.⁵⁷⁴

In his decision, Miscimarra cites the principles of exclusive representation and majority rule to argue that the Board must balance the Section 7 rights of employees in the petitioned-for unit alongside the Section 7 rights of the excluded employees. He overruled the *Specialty Healthcare* majority by reasoning that the Board should strike down any unit that is "composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit."⁵⁷⁵ Not only does he obscure the power dynamics at play within the workplace, he also consolidates the Board's power by emphasizing that it has "wide discretion in setting up bargaining units" and that it is "the Board's responsibility" to make bargaining unit determinations "in each case" in "order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act."⁵⁷⁶

As the dissent pointed out, the majority made a clear test amorphous, thus making unit determination more unpredictable and inevitably favoring the party with more resources, i.e. the employer, to engage in legal wrangling: "The more subjective the standard is the greater the opportunity to litigate the appropriateness of the unit, and consequently, the greater the opportunity to delay and frustrate employees' right to organize."⁵⁷⁷ Dissenting Board Member McFerran pointed out the obvious: that the Board's "newly-constituted majority seizes on this

⁵⁷⁴ *PCC Structural*s, 1.

⁵⁷⁵ *PCC Structural*s, 5.

⁵⁷⁶ *PCC Structural*s, 4.

⁵⁷⁷ *PCC Structural*s, 24.

otherwise straightforward case as a jumping off point to overturn a standard that has been upheld by every one of the eight federal appellate courts to consider it.”⁵⁷⁸

From Miscimarra’s point of view, the NLRB exists to foster compliance with the NLRA on the most business-friendly terms, and as he openly states in his controversial decision in *Hy Brand* regarding the status of joint-employers under law, first and foremost, to facilitate the free flow of commerce. Until they decided *TLI Inc.* and *Laerco Transportation* in 1984, the NLRB had found joint-employer status when an entity exercised or had the potential to exercise direct or indirect control over the terms and conditions of employment, or where the reality of the employment relationship made it an essential party to collective bargaining. Yet these two cases narrowed that standard to direct control only, and until the NLRB decided *Browning-Ferris* in 2015, businesses regularly evaded collective bargaining by contracting with staffing agencies for workers instead of hiring employees directly. Backed by industry and corporate lobbyists, the Republicans John R. Kline and Lamar Alexander had since tried to pass two bills to negate the ruling, and the decision was a declared target for Republicans during the 2016 presidential election season.⁵⁷⁹

Part of the reason *Hy Brand* is important is because it involves the growing precariat, workers whose competencies have become redundant and undervalued in the current economy, and it highlights their increasingly vulnerable status on the periphery of the work force. Under the core-periphery model which employers now use, a core group of workers enjoy the benefits

⁵⁷⁸ *PCC Structural*s, 14.

⁵⁷⁹ Catherine Ho, “Industry Groups Push to Kill Ruling that Could Make it Easier for Fast Food Workers to Unionize,” *Washington Post*, November 12, 2015, https://www.washingtonpost.com/news/powerpost/wp/2015/11/12/industry-groups-push-to-kill-ruling-that-could-make-it-easier-for-fast-food-workers-to-unionize/?utm_term=.df8feffb40fa.

of full time work, job security, long-term employment, and the possibility of advancement as well as nonwage compensation, while a peripheral group of workers perform work on a contingent basis with none of these benefits or protections in place.⁵⁸⁰ The result is the precariat, a casualized workforce that exists in a perpetual state of placeless-ness within the established order, and as the sociologist Robert Castel points out, is often unable to sustain a common project through collective forms of organization.⁵⁸¹ This economy relies on outsourcing and subcontracting, which from an employer’s perspective, permits more continuous price competition within the labor market by subjecting those on the periphery to unchecked market forces.⁵⁸²

In *Browning-Ferris*, the case preceding *Hy Brand*, the union was petitioning to represent 240 full time, part time, and on call sorters, screen cleaners, and housekeepers governed by a temporary labor services agreement between BFI and Leadpoint. This agreement listed Leadpoint as its sole employer, and after reviewing the terms of conditions of employment, the Regional Director found that BFI was not a joint-employer under the existing standard because only Leadpoint set employee pay, provided benefits, and controlled recruitment, hiring, counseling, discipline, and termination issues, and was solely in control of scheduling employee shifts, overtime schedules, and administering requests for sick leave and vacation.⁵⁸³

In the case before the Board, BFI argued that “meaningful control” over employment should not be established by contractual right, but actual practice, and both BFI and Leadpoint

⁵⁸⁰ Craig Becker, “Labor Law Outside the Employment Relation,” *Texas Law Review* 74 (1996): 1530.

⁵⁸¹ Robert Castel, *From Manual Workers to Wage Laborers: Transformation of the Social Question* Ed. and Trans. Robert Boyd (New York: Routledge, 2003).

⁵⁸² Becker, 1535.

⁵⁸³ *Browning-Ferris*, 6.

argued that changing the law in this area would undermine predictability, replacing “a clear and understandable approach” with a “vague and ambiguous” standard.⁵⁸⁴ The union made two counterarguments: first, that BFI was qualified as a joint-employer under the existing standard because it shared or determined employment qualifications, work hours, breaks, productivity standards, staffing levels, work rules and performances, the speed of lines, dismissals, and wages, as well as direct control through regular oversight over employee’s work duties; and second, that the Board should adopt a broader standard to determine whether an entity qualifies as a joint-employer in order to respond to new industrial realities and better effectuate the purpose of the Act, to “ensur[e] employees’ bargaining rights to the fullest extent.”⁵⁸⁵ Furthermore, they claimed that the Board should find employer status, whether direct or indirect, in order to prevent the employer from insulating itself from “meaningful collective bargaining” through “calculated restructuring of employment,”⁵⁸⁶ arguments that extended beyond the narrow particulars of this case to employment conditions more broadly.

In *Hy Brand*, Charles Brandt and his three sons owned Brandt, which performs public works and other construction projects and employed 140 people, as well as Hy Brand, which employed 10 people and erected steel warehouses and other structures. All four owners played the same management role in both entities, maintaining identical workplace rules, sharing a single payroll and benefit administrator, and providing the same benefits. There was also considerable overlap between the employees in both plants, as they often shared equipment and did construction work for the other company.⁵⁸⁷ Five Hy Brand employees and two Brandt

⁵⁸⁴ *Browning-Ferris*, 7.

⁵⁸⁵ *Browning-Ferris*, 7.

⁵⁸⁶ *Browning-Ferris*, 7.

⁵⁸⁷ *Hy-Brand*, 36.

employees went on strike to protest unsafe working conditions and substandard wages and benefits, and when the Vice President Terrence Brandt fired all of them, the Administrative Law judge found that his actions were unlawful. He also found that according to Board precedent, Brandt and Hy Brand should be held liable as sole employers. In his decision in *Hy Brand*, Miscimarra conspicuously avoided discussing any of these facts. Instead, he focused his opinion on the evolution of the joint-employer standard through law,⁵⁸⁸ and recapitulating the arguments he made in his *Browning-Ferris* dissent, wrote the majority opinion overruling *Browning-Ferris*.

Rhetorically, *Browning-Ferris* and *Hy Brand Industrials* are strikingly different in how each majority interprets the purpose of the NLRA. In *Browning-Ferris*, Board Chairman Gaston Pearce had stated that the central purpose of the Act is to “encourage[e] the practice and procedure of collective bargaining”⁵⁸⁹ and that the Board should adapt its jurisprudence to the changing economic landscape. The *Browning-Ferris* Board majority spent much of the opening describing the increase in contingent work relationships and the widening discrepancy in power between employer and employee, taking issue with *TLI* and *Laerco* for narrowing the standard for finding joint employer status just at a time when worker contingency had exploded, thus threatening to undermine “the core protections of the Act for the employees impacted by these economic changes.”⁵⁹⁰ Later, Pearce cited the General Counsel, who argued that the Board should find joint-employer status in this case and in others where an employer “wields sufficient influence over the working conditions of the other entity’s employees such that meaningful

⁵⁸⁸ *Hy-Brand*, 5-6.

⁵⁸⁹ *Browning-Ferris*, 2.

⁵⁹⁰ *Browning-Ferris*, 1.

bargaining could not occur in its absence.”⁵⁹¹ Pearce cites the General Counsel’s references to recent Bureau of Labor Statistics data demonstrating how contingent labor has grown in a variety of industries and in a much wider range of occupations.⁵⁹² That projected figures estimated that employment services industry, which includes placement and temporary help services, would increase to 4 million by 2022 and make it one of the largest and fastest growing in the United States, “is reason enough to revisit the Board’s current joint-employer standard,” he argued, and he cited the Supreme Court’s injunction that the Board must “adapt the Act to the changing patterns of industrial life.”⁵⁹³

Both in his dissent in *Browning-Ferris* and the majority opinion in *Hy Brand*, however, Miscimarra interpreted the NLRA as a set of rules and standards designed to protect the free flow of commerce. Whereas Pearce foregrounded the NLRA’s protection of collective bargaining and workers’ rights, Miscimarra foregrounded stability, predictability, certainty, and the limits of the Board’s authority vis a vis Congress and the Supreme Court. The majority in *Browning-Ferris* acknowledged that one of the primary purposes of the Act was to promote peaceful settlement of labor-management disputes, but that “to the extent permitted by the common law” (a matter of legal contention between the dissent and majority) the joint-employer standard should encompass the full range of employment relationships where meaningful collective bargaining is possible.⁵⁹⁴ Miscimarra, on the other hand, began the *Browning-Ferris* dissent by characterizing the NLRB as an agency that exists to enforce rules, to, in his words, “foster compliance” with the NLRB, and he highlighted their duty to make sure that any changes are made according to

⁵⁹¹ *Browning-Ferris*, 8.

⁵⁹² *Browning-Ferris*, 11.

⁵⁹³ *Browning-Ferris*, 11.

⁵⁹⁴ *Browning-Ferris*, 13.

“substantive planning” and by depicting the majority’s decision as “dramatic,” “sweeping,” and “unprecedented,” liable to subject “countless entities” not only to obligations they never knew they had, but to “economic protest activity” and “other forms of economic coercion,”⁵⁹⁵ notably excluding the power dynamics surrounding the election itself. “No bargaining table is big enough to seat of all the entities that will be potential joint employers under the majority’s new standards,” he exclaimed, and dismissing the Board majority’s assessment that workers rely more on contingent work arrangements now than in the past,⁵⁹⁶ Miscimarra contended that the majority’s standard would produce arbitrary bargaining relationships between employees and putative employers and create difficulties in determining bargaining obligations “unlike any which have existed in the Board’s entire 80-year history.”⁵⁹⁷ Unable to freely terminate would, he concluded, “inhibit our economy and lead to labor strife...The Act is being applied in a manner Congress could not conceivably have intended.”⁵⁹⁸

According to Miscimarra, the Board in the *Browning-Ferris* majority was both exceeding its authority and waxing nostalgic for a time when employers did not have dealings with other entities, “an economy [that] has not existed in this country for more than 200 years,” he claimed.⁵⁹⁹ He went back in time and cited Congressional intent before the NLRA, arguing that “many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act,”⁶⁰⁰ and he rejected outright the Board majority’s desire to remedy the power imbalances caused by increasing contingency. “There are ‘more

⁵⁹⁵ *Browning-Ferris*, 21-2.

⁵⁹⁶ *Browning-Ferris*, 21.

⁵⁹⁷ *Browning-Ferris*, 38.

⁵⁹⁸ *Browning-Ferris*, 45.

⁵⁹⁹ *Browning-Ferris*, 22.

⁶⁰⁰ *Browning-Ferris*, 22.

powerful' business entities and 'less powerful' business entities," he tersely concluded, "and all pursue their own interests."⁶⁰¹ Miscimarra argued that that the majority's new standard would lead to bargaining instability and was contrary to the Act's policy, which he explicitly stated was to "eliminate the cause of the certain substantial obstructions to the free flow of commerce."⁶⁰² He also depicted employers as victims by accusing the Board majority of acting on "a desire to ensure that third parties that have 'deep pockets,' compared to the immediate employer, become participants in existing or new bargaining relationships, and that they will also be directly exposed to strikes, boycotts and other economic weapons, based on the most limited and indirect signs of potential control."⁶⁰³ Miscimarra then flaunts his business school acumen to describe the possible complications of a bargaining process from the employer's perspective by fleshing out a number of hypothetical scenarios involving a fictitious cleaning company which would compromise the company's bottom line.

Miscimarra's main point of contention was that the *Browning-Ferris* majority had overruled the existing test unjustifiably and impermissibly and so broadened the standard that it would "fail[] to provide any guidance as to what control, under what circumstances, would be sufficient to establish joint-employer status."⁶⁰⁴ According to him, the current test, which was essentially designed to insulate employers from the threat of unionization, reflected a "commonsense, practical understanding of the nature of contractual relationships in our modern economy."⁶⁰⁵ Miscimarra then appealed to fear. Unlike the current test ensuring "certainty and

⁶⁰¹ *Browning-Ferris*, 23.

⁶⁰² *Browning-Ferris*, 23.

⁶⁰³ *Browning-Ferris*, 28.

⁶⁰⁴ *Browning-Ferris*, 25.

⁶⁰⁵ *Browning-Ferris*, 25.

predictability,” this decision would lead to “confusion and disarray.”⁶⁰⁶ He lamented that the “indeterminate legal limbo” resulting from this decision would “thwart labor peace.”⁶⁰⁷ He reiterated that “stability and certainty” is why we have the Act in the first place, and he concluded by stating that the Board owes the public this certainty: “The majority essentially says that the Board will look at every aspect of a relationship on a case-by-case basis, in litigation, and then decide the limited issue presented. We owe a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that ‘we’ll see how it floats.’”⁶⁰⁸ Of course, Miscimarra’s decision acknowledges uncertainty from the employer’s perspective only. The experience of contingency from the worker’s point of view is entirely absent in his decision, and the public is not defined in its capacity as workers. In these arguments, Philip Miscimarra embodies the role of judge as Max Weber conceived of him in *The Protestant Ethic and the Spirit of Capitalism*. Weber describes how under capitalism, judges decide cases purely to secure the interests and functioning of capital. He is “more or less an automaton of paragraphs: the legal documents, together with the costs and fees, are dropped in at the top with the expectation that the judgment will emerge at the bottom together with more or less sound arguments – an apparatus, that is, whose functioning is by land large calculable and predictable.”⁶⁰⁹

Of course, Miscimarra’s conception of the NLRA is only one side of the story, and is challenged by James Gray Pope’s account of the rhetorical history behind the passage of the Act.

⁶⁰⁶ *Browning-Ferris*, 23.

⁶⁰⁷ *Browning-Ferris*, 23.

⁶⁰⁸ *Browning-Ferris*, 48

⁶⁰⁹ Max Weber, *The Protestant Ethic and the Spirit of Capitalism* Trans. Talcott Parsons (New York: Dover Publications, 2003), 66.

As Pope explains, when orthodox historians describe the history which led up to the passage of the NLRA (also known as the Wagner Act), they typically focus on the efforts of the executive and Wagner himself, and they affectionately describe how on the Senate floor, Wagner used his “talent,” “energy,” and “expertise” to advocate for the bill.⁶¹⁰ Notwithstanding Wagner’s introduction of the Bill and his cogent speech about organized labor as a vehicle for social and economic progress, the Wagner Act was not actually “the product of a single man’s efforts,” as is often claimed.⁶¹¹ While Wagner is often hailed as the “legislative midwife” that brought forth modern American labor law, Pope demonstrates that it was the labor organizers themselves who created a favorable climate both for the passage of the NLRA and the subsequent Supreme Court decisions which upheld its legitimacy.⁶¹²

In the early decades of the 20th century, the great social movements for gender, labor, and racial equality sought to achieve their aims by framing their claims in the language of human rights. The labor movement in particular demanded that Congress enforce the rights of self-organization and collective action under the Thirteenth Amendment, while civil rights activists claimed freedom and equality under the Thirteenth and Fourteenth Amendments, and the women’s movement argued for rights of bodily integrity and equal treatment under the Thirteenth and Fourteenth Amendments as well.⁶¹³ Yet as Pope demonstrates, the lawyers assigned to defend the constitutionality of the statutes that resulted from these movements downplayed the language of rights and freedoms in favor of the language of economics,

⁶¹⁰ Charles J. Morris, George E. Bodle, and Jay S. Siegel, *The Developing Labor Law*, 27.

⁶¹¹ Charles J. Morris, et. al., *The Developing Labor Law*, 27.

⁶¹² Charles J. Morris, et al., *The Developing Labor Law*, 27.

⁶¹³ James Gray Pope, “The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of the Post-New Deal Constitutional Order, 1921-1950,” *Columbia Law Review* 102.1 (2002): 4-5.

justifying these statutes as exercises of Congress's power to regulate interstate commerce.⁶¹⁴ Pope's constitutional history upends the idea that the NLRA was the result of either Wagner's solitary efforts or the result of lawyers driving for constitutional change by making arguments that remained within the possibilities set by existing legal precedent. Rather than clever legal arguments that eventually won judicial approval, Pope attributes the constitutional defense of the NLRA to a wave of labor militancy.⁶¹⁵ He also argues that the choice to ground the legitimacy of the NLRA in the Commerce Clause rather than the Thirteenth Amendment was short-sighted – the Court would have upheld the act anyway, and jettisoning the language of fundamental rights and freedoms contributed to a subsequent history of jurisprudence which expanded the Commerce Clause and left the human rights provisions in the Thirteenth and Fourteenth Amendments within 19th century limits.⁶¹⁶

While Wagner had argued that strengthening collective bargaining rights would strengthen commerce by increasing workers' purchasing power, William Green of the AFL-CIO argued that the authority for passing the Act should come from Article IV Section 4 of the Constitution, which guaranteed republican government.⁶¹⁷ The AFL rejected the Commerce Clause argument in favor of fundamental principles of democracy and freedom.⁶¹⁸ The movement's primary constitutional thinker, Andrew Furuseth, argued that a worker's right to organize and engage in collective action made the difference between freedom and slavery,⁶¹⁹ and unionists in the 1930s regularly argued that their rights to organize, boycott, strike and picket

⁶¹⁴ Pope, 5.

⁶¹⁵ Pope, 12.

⁶¹⁶ Pope, 6.

⁶¹⁷ Pope, 13-14.

⁶¹⁸ Pope, 14.

⁶¹⁹ Pope, 14

were protected by the First and Thirteenth Amendments well before the Wagner Act was passed.⁶²⁰ Non-binding language in common law precedent supported their legal theory, including a statement by Justice Brandeis that injunctions against strikes were reminiscent of involuntary servitude.⁶²¹ While employers consistently counter-argued that labor rights were violations of the constitutional principle of equality under the Equal Protection Clause of the Fourteenth Amendment, unionists contended that the Thirteenth Amendment compelled the law to treat capital and labor differently.⁶²² Labor was inseparable from the body, they argued, and the Thirteenth Amendment prohibited the sale of the body into slavery or involuntary servitude.⁶²³ Most importantly, they argued for freedom defined positively, as what Pope calls “effective freedom,” the ability not only to “influence the conditions of working life, but to do so consciously, in combination with one’s coworkers, using forms of action that yield immediate, unambiguous evidence of personal and collective potency.”⁶²⁴ While the idea that collective organization was essential to freedom was gaining ground with the public, legal professionals, including supporters of the labor movement, rejected it in favor of balancing the interests of labor and capital and preserving the influence of professionals over economic policy.⁶²⁵ For them, labor was a matter of economics, not freedom, with many legal commentators rejecting the Thirteenth Amendment theory based on the idea that the individual’s right to quit eliminated the question of involuntary servitude altogether.⁶²⁶

⁶²⁰ Pope, 15.

⁶²¹ Pope, 19.

⁶²² Pope, 22-23.

⁶²³ Pope, 23.

⁶²⁴ James Gray Pope, “Labor’s Constitution of Freedom,” *The Yale Law Journal* 106.4 (1997): 942.

⁶²⁵ Pope, “The Thirteenth Amendment versus the Commerce Clause,” 26.

⁶²⁶ Pope, 28.

When the Wagner Act came under judicial scrutiny in a series of New Deal era cases, government lawyers made a choice. Instead of defending the Wagner Act as a labor rights statute, they defended it as an exercise of Congress's power to suppress strikes, which the Supreme Court later upheld under the Commerce Clause.⁶²⁷ Pope and other historians attribute the Court's decision in no small part to three external factors: Roosevelt's election in 1936, his court packing plan, and a series of escalating sit-down strikes held by workers themselves.⁶²⁸ The decision to ground the arguments in the Commerce Clause was therefore not strictly necessary, but it reflected a fundamental disagreement over long-term constitutional goals. "While labor constitutionalists sought power for unions and workers," Pope explains, "progressive lawyers sought power for social scientists and other professionals, including themselves."⁶²⁹ Instead of promoting labor freedom, they enlarged the government's power to expand and restrict economic freedom in response to the demands of policymaking based on facts collected by social scientists.⁶³⁰ Where they could have constitutionalized the populist project of enshrining labor's conception of freedom in official constitutional law, they left it to the lawyers and judges interested in consolidating their own power. "In accord with the progressive view of law as a technical field requiring professional expertise,"⁶³¹ they prioritized jurisprudence over what the legal scholar Robert Cover calls "jurisgenesis," the creation of legal meaning through a cultural process that occurs in social settings inside and outside official settings.⁶³² Throughout his account, Pope underscores the importance of rhetorical practices. As

⁶²⁷ Pope, 88.

⁶²⁸ Pope, 96.

⁶²⁹ Pope, 113.

⁶³⁰ Pope, 85.

⁶³¹ Pope, 114.

⁶³² Pope, "Labor's Constitution of Freedom," 954.

he explains, even victorious claims can impair the long term prospects for change because of the way these claims are made, and in this case, the professionalist arguments of Wagner and the lawyers representing government played a substantial part in setting a direction for Supreme Court jurisprudence which truncated Congress's power to enforce human rights.⁶³³

Pope ends his account by lamenting that by the mid 1950s, labor's constitutional victories were eclipsed by a Supreme Court interested in empowering "the knowledge class," that even union leaders and labor politicians saw no need for integrity between the movement's goals and constitutional rationales, and he ends by describing what could have happened had Wagner tied the goal of effective freedom to the Thirteenth Amendment.⁶³⁴ In his imagined alternative history, the Supreme Court would have recognized that workers were not only entitled to a decent standard of living, liberty of contract, and adequate compensation for services, but that without the right to organize and strike, workers were in a condition of involuntary servitude, "slavery by contract."⁶³⁵ The Supreme Court would have reached different decisions in a number of key constitutional cases, reinvigorating the Thirteenth Amendment and leaving the Commerce Clause power within reasonable limits.⁶³⁶ Labor bills, in turn, would have been justified to promote freedom rather than facilitate the free flow of commerce, and civil rights laws would have been interpreted such that the involuntary servitude clause would prohibit even "subtly coerced labor as well as peonage-like working conditions and living standards."⁶³⁷ With the Thirteenth Amendment playing a bigger part in the rise of civil rights, the conditions of all

⁶³³ Pope, "The Thirteenth Amendment versus the Commerce Clause," 8.

⁶³⁴ Pope, 114-5.

⁶³⁵ Pope, 115.

⁶³⁶ Pope, 117-8.

⁶³⁷ Pope, 118.

workers would have been elevated to meet the Thirteenth Amendment standard, and by the time the Civil Rights Act was passed, the movement for racial equality would have channeled its momentum into extending Congress's power to enforce human rights.⁶³⁸ Pope's history reveals three tendencies that remain important to counter in the NLRB decisions as well as in our everyday discourse: prioritizing commerce over effective freedom, as Miscimarra did, continuing the dubious legacy of legal professionalism, and relying on social scientific models in lawmaking. Instead, by actively laying claim to our own lives, it might be possible to revitalize this argument for effective freedom under the Thirteenth Amendment.

5.2 Graduate Students in the New Economy

While graduate students at public universities may or may not be granted collective bargaining rights under the relevant state laws (which bear no legal relationship to federal labor laws), under the Clinton Administration in *New York University*, the NLRB had established the right of graduate students at private universities to unionize. The Board later reversed this decision under the Bush Administration in *Brown*, and then finally reinstated their decision under the Obama Administration in *Columbia*. The graduate students won certification for their union under the NLRB in mid-December 2017. In January 2018, the Columbia University administration contested the union's certification, and the case is currently on its way to federal court, where an appeals court judge will issue the final decision.

⁶³⁸ Pope, 118-9.

As it happens, the radical potential of this case was signaled most emphatically with the conservative Right to Work Legal Defense and Education Foundation’s argument against Columbia’s graduate student union. “Although the UAW may have Marxist dreams that students are ‘workers’ (as opposed to students), who will be in the vanguard of an economic revolution when the workers of the world unite,” they concluded that “the fact remains that teaching assistants principally *are* students, with little commonality of interest with most employees.”⁶³⁹ The Right to Work’s brief echoes the Board’s own acknowledgment that the prospect of graduate student unionization asks them to venture into a territory where collective bargaining rights are “historically uncommon”⁶⁴⁰; it is a demand that following Kathi Weeks, we might call utopian, one that produces what she calls “an estrangement effect” and could effect substantial change.⁶⁴¹ The demand for graduate student unionization is both strange and familiar, and it gestures toward the future, as she explains all utopian demands must do, by “registering as a credible call with immediate appeal.”⁶⁴²

In her recent book, *The Problem with Work*, Weeks argues that instead of valorizing work and what she calls its “instrumental and rationalist logic of productivity,”⁶⁴³ we would be better served by emphasizing the importance of “the process of demanding, organizing, winning,”⁶⁴⁴ “activating agents”⁶⁴⁵ that by making demands for better living and working conditions, are

⁶³⁹ Amicus Curiae Brief of the National Right to Work Legal Defense and Education Foundation, 14.

⁶⁴⁰ *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW* [hereinafter *Columbia*], 364 NLRB No. 90 (Aug. 23, 2016), 8.

⁶⁴¹ Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Durham: Duke University Press, 2011), 221.

⁶⁴² Weeks, *The Problem with Work*, 221.

⁶⁴³ Weeks, 82.

⁶⁴⁴ Weeks, 223.

⁶⁴⁵ Weeks, 222.

thereby transformed. Under her critical utopian vision, the most urgent task is not to prescribe alternatives to the status quo, but to make utopian demands that “allow its advocates to emerge in the collective process of demanding.”⁶⁴⁶ Weeks explains how the wages for housework movement in the 1970s usefully shifted attention from the sphere of production to the sphere of reproduction, despite its narrow focus, and how it called attention to the family as the hidden partner of the market. As she sees it, wages for housework had the potential to exceed its declared goals by inaugurating “a process of becoming the kind of people who – or, rather the kind of collectivities that – needed, wanted, and felt entitled to a wage for their contributions.”⁶⁴⁷ Throughout her book, Weeks’s target is no so much work as the work society, where the wage relation, which she identifies as “a relation of subordination which authorizes subjection,”⁶⁴⁸ replaces the “plurality of social practices and relations.”⁶⁴⁹ What is particularly useful about her argument, and what is readily applicable to the graduate student context, is how she identifies the terrain of conflict as life itself, not merely the sphere of work. The point isn’t to win better working conditions within the existing framework, but to contest the existing terms of the work society itself. As she explains, the struggle is to really “build something new.”⁶⁵⁰

Part of the imperative of a commons-based framework is to reclaim the university as a site of inquiry into the collective good, a claim that is at odds with what the SEIU’s Committee of Interns and Residents points out is a “more entrepreneurial” university, evidenced by more endowed professorships, sponsor courses, on-campus advertising, and aggressive marketing of

⁶⁴⁶ Weeks, 223.

⁶⁴⁷ Weeks, 133.

⁶⁴⁸ Weeks, 51.

⁶⁴⁹ Weeks, 82.

⁶⁵⁰ Weeks, 223.

scientific discoveries in addition to recent surveys of presidents and chief financial officers within higher education that showed declining support for tenure and a desire for greater institutional flexibility around employment.⁶⁵¹ In his own day, despite his lack of engagement with political or economic issues, C.S. Peirce was passionate about the mission of the university as a space that would serve humanity at large. In “Definition and Function of a University,” a speech he gave at a Fourth of July address in Paris in 1880, Peirce defined the university (in admittedly masculinist and albeit nationalist terms) proudly, as “an association of men for the purpose of study, which confers degrees which are acknowledged as valid throughout Christendom...and is privileged by the state in order that the people may receive intellectual guidance, and that the theoretical problems which present themselves in the development of civilization may be resolved.”⁶⁵² Time and again throughout his oeuvre, he insists that the purpose of education, which is one and the same as “the purpose of life,” is to lead us all to regard our own lives as “having a purpose beyond [our]selves.”⁶⁵³ It is not the “individual well-being”⁶⁵⁴ of scholars that should be encouraged but to “render ideas and things reasonable,” which consists in “association, assimilation, generalization, the bringing of items together into an organic whole,”⁶⁵⁵ and he is confident that “whoever makes his own welfare his object will simply ruin it utterly.”⁶⁵⁶ In this as in his other writings, he also invokes his ideal type, “the

⁶⁵¹ *Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae*, 17.

⁶⁵² C.S. Peirce, “Definition and Function of a University,” in *Charles S. Peirce Selected Writings: Values in a Universe of Chance* ed. Philip P. Wiener (New York: Dover Publications, 1958), 331.

⁶⁵³ C.S. Peirce, “Definition and Function of a University,” 333.

⁶⁵⁴ C.S. Peirce, 333.

⁶⁵⁵ Peirce, 332.

⁶⁵⁶ Peirce, 333.

scientific man,” more broadly understood as the seeker, who subordinates the lesser motives, “ambition, fame, greed, self-seeking of every description,” to discovering the truth.⁶⁵⁷ For Peirce, the genuine scientific investigator was “a simple fellow” who encouraged the “tendency toward union,” and the idea with both was that they would bring about greater integrity in general.⁶⁵⁸ As he explained, “the Law of Love and the Law of Reason are quite at one.”⁶⁵⁹ Peirce was always an advocate for honest inquiry, and he ardently believed that “inquiry of every type, fully carried out, has the vital power of self-correction and growth,” that “the more veraciously truth is desired at the outset, the shorter by centuries will the road to it be.”⁶⁶⁰ At the end of his life, while visiting his own alma mater, Harvard, he shared his vision of what the university should be:

I repeat that I know nothing about the Harvard of today, but one of the things which I hope to learn during my stay in Cambridge is the answer to this question, whether the Commonwealth of Massachusetts has set up this University to the end that such young men as can come here may receive a fine education and may thus be able to earn handsome incomes, and have a canvas-back and a bottle of *Clos de Vougeot* for dinner, – whether this is what she [sic] is driving at, – or whether it is, that, knowing that all America looks largely to the sons of Massachusetts for the solutions of the most urgent problems of each generation, she [sic] hopes that in this place something may be studied out of which shall be of service in the solutions of those problems. In short, I hope to find out whether Harvard is an educational establishment or whether it is an institution for learning what is not yet thoroughly known, whether it is for the benefit of the

⁶⁵⁷ Peirce, 334.

⁶⁵⁸ Peirce, 332.

⁶⁵⁹ Peirce, 332.

⁶⁶⁰ C.S. Peirce, “The First Rule of Logic,” in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. the Peirce Edition Project (Bloomington: Indiana University Press, 1998), 47.

individual students or whether it is for the good of the country and for the speedier elevation of man into that rational animal of which is the embryonic form.⁶⁶¹

In today's university, it is still worth asking whether we are driven by the "speedier elevation of man" or the profit motive, and to what extent these motives can really coexist.

As David Bollier describes in *Silent Theft*, the academic commons has been rapidly enclosed by private interests. Especially in the sciences, where previous generations would have refused to patent their discoveries as a matter of course, scientific research is being increasingly marketized. After Congress enacted the Bayh-Dole Act in 1980, which allowed university researchers to patent inventions made using federal funding, the broad consensus that intellectual property rights of federal research should stay in the public domain gave way to the new, industry-backed consensus that public ownership would impede the speed of research.⁶⁶² As the legal scholars Michael A. Heller and Rebecca S. Eisenberg point out, the opposite is actually the case, especially when it comes to life-saving innovations. Due to overprotection, they explain that there is a "tragedy of the anticommons" wherein biomedical knowledge is underused because "multiple owners each have a right to exclude others...and no one has an effective privilege of use."⁶⁶³ Research priorities are being shifted to meet the demands of corporate sponsors, with the end result that meaningful lines of research, for example, finding a cure for malaria, which is vitally important but not lucrative, are avoided for more profitable pursuits.⁶⁶⁴ This corporatization also extends to student life, where companies cut deals with administrators to use college campuses as marketing venues to reach the generation of consumers. As Bollier

⁶⁶¹ Peirce, "First Rule of Logic," 50.

⁶⁶² David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (New York: Routledge, 2002), 138-9.

⁶⁶³ Bollier citing Eisenberg and Heller, *Silent Theft*, 140-1.

⁶⁶⁴ Bollier, 144.

laments, “the humanistic and ethical values that should lie at the heart of higher education – the commitment to free and independent inquiry, wherever that may lead, and the ideals of service to a democratic culture – recede into the shadows as secondary, even discretionary concerns.”⁶⁶⁵

In sum, the corporate invasion of research has resulted in business/university partnerships that seek “to turn students into consumers, education into training for jobs, professors into hired-out consultants and researchers, and campuses into corporate research and profit centers.”⁶⁶⁶

Seen through this lens, graduate student unionization takes on new importance. Although it is still in its initial stages, graduate student mobilizations have been successful across the country, and although each campaign is framed differently, often for better wages and working conditions, the movement itself has the potential to exceed these demands. This is partially reflected in the briefs filed by both sides. In response to the Board’s invitation to file briefs, the entire Ivy League, the American Council of Education, the Association of American Medical Colleges, the College and University Professional Association for Human Resources, the National Association of Independent Colleges and Universities, the National Right to Work Legal Defense and Education Foundation, and the Higher Education Council of the Employment Law Alliance submitted amicus briefs on behalf of Columbia arguing that the Board should not permit graduate students at private universities the right to unionize. The General Counsel, United Steelworkers (USW), American Association of University professors (AAUP), Service Employees International Union (SEIU), the American Federation of Teachers (AFT), the AFL-CIO, the National Association of Graduate and Professional Students, and Individual Academic Professors of Social Science and Labor Studies filed on behalf of the graduate students.

⁶⁶⁵ Bollier, 146.

⁶⁶⁶ Bollier citing Ronnie Dugger, 137-8.

Alongside their technical arguments, the amici each offered their own ways of conceptualizing the relationship between worker's rights, the purpose of higher education, and the changing economy.

On the employer side, the Ivy League argued that unions undermine the spirit of collegiality that characterizes academic life, drawing a hard distinction between the conflictual collective bargaining process and the “civility of academic discourse,” which, they argue, bears no relation to the “collective search for truth.”⁶⁶⁷ Their brief amplified unionization into a threat to order, one that would cause “irreparable damage” by undermining academic freedom and expose educational decision-making to the “rough and tumble” of collective bargaining.⁶⁶⁸ Columbia's administration went so far as to claim that when determining stipends, their administrators doesn't consider “market value” or “value propositions.”⁶⁶⁹ Instead of these market driven considerations, they claim that they prioritize what will most benefit the students' educational experience, that the graduate student's relationship to the institution is not driven by economics at all.⁶⁷⁰ Similarly, the Right to Work Foundation argued that the academic sphere should remain insulated from the realities of work life outside the academy, stating that the “industrial model”⁶⁷¹ is inappropriate for the university, and adding its own twist, that graduate

⁶⁶⁷ Brief of Amici Curiae Brown University, Cornell University, Dartmouth College, Harvard University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Yale University, 16-17.

⁶⁶⁸ Brief of Amici Curiae Brown University et. al., 10.

⁶⁶⁹ Brief of Amici Curiae Brown University et. al., 10.

⁶⁷⁰ Brief of Amici Curiae Brown University et. al., 10.

⁶⁷¹ Amicus Curiae Brief of the National Right to Work Legal Defense and Education Foundation, 7.

students are the “consumers”⁶⁷² of education, as well as its “product.”⁶⁷³ Instead of addressing the tragedy of the anti-commons, the American Council of Education, the Right to Work, and the Ivy League identified the relevant issue as one of American supremacy in higher education.

The union-side briefs, on the other hand, foregrounded the labor practices of the university and connected the academic labor movement with worker’s struggles outside the university while also emphasizing the students’ basic democratic right to organize. The National Association of Graduate and Professional Students stated at the beginning of their brief that there is no sound “legal or moral” basis to deny graduate students this right, and with the General Counsel, argued that graduate students perform essential services for the university, rendering them an economic benefit which is subject to the university’s control, the hallmark of an employment relationship.⁶⁷⁴ The AAUP began its brief by condemning employers’ systematic attempt to manage the labor force while avoiding legal responsibility across the board,⁶⁷⁵ and they pointed out that while “Uber and the gig economy and franchise fast food companies may be most in the news for this...the phenomenon exists in universities as well.”⁶⁷⁶ For the AAUP, graduate students have a both/and relationship with the university as students and employees, not as consumers and producers. They state, clearly and emphatically, that “graduate students teach because they are paid, not because it is at the core of Ph.D. training.”⁶⁷⁷ Pointing to “common

⁶⁷² Amicus Curiae Brief of the National Right to Work Legal Defense and Education Foundation, 6.

⁶⁷³ Amicus Curiae Brief of the National Right to Work Legal Defense and Education Foundation 6.

⁶⁷⁴ Brief of Amicus Curiae of National Association of Graduate-Professional Students, 2; Amicus Brief of the General Counsel, 10.

⁶⁷⁵ Brief of Amicus Curiae American Association of University Professors, 2-3.

⁶⁷⁶ Brief of Amicus Curiae American Association of University Professors, 3.

⁶⁷⁷ Brief of Amicus Curiae American Association of University Professors, 7.

knowledge among university faculty and graduate students,”⁶⁷⁸ they also explained in detail how teaching assignments can be quite distinct from the students’ research and that primarily, graduate students work for the benefit of the undergraduates and the university’s bottom line: “Teaching is the work of universities and it is work for which graduate students must be paid, because if they were not doing it, the university would have to pay the existing faculty to do it or hire new faculty to cover teaching obligations.”⁶⁷⁹ As the USW’s brief highlights, graduate students are cheaper to employ than faculty. While the faculty at Columbia earn an average of \$151,479, graduate student assistants (GSAs) received stipends ranging from \$20,000 to \$44,000.⁶⁸⁰

By giving graduate students a voice in university governance, unions would enable students to collaborate with faculty on how best do shared teaching and research work,⁶⁸¹ and as the Individual Social Science and Labor Studies Professors argue, collective bargaining would help ensure what it calls “economic diversity” among the student population because it would be more likely that students would not have to incur debt or find outside employment during graduate school.⁶⁸² Furthermore, the USW cited a recent report from the University of California-Berkeley, which found that 47% of Ph.D. students and 37% of masters students suffer from depression, with financial concerns topping the survey responses as more pressing than

⁶⁷⁸ Brief of Amicus Curiae American Association of University Professors, 7.

⁶⁷⁹ Brief of Amicus Curiae American Association of University Professors, 8.

⁶⁸⁰ Brief of Amicus Curiae United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC in Support of Petitioner, 2-3.

⁶⁸¹ Brief of Amicus Curiae American Association of University Professors, 12.

⁶⁸² Brief of Amicus Curiae American Association of University Professors, 4-5.

others.⁶⁸³ Obviously, when graduate students have long-term personal commitments, including spouses and children, this results in even more financial pressure.⁶⁸⁴

The briefs submitted by the AFL-CIO, SEIU, and AFT highlighted the benefits that have already come as a result of collective bargaining in the public sector and in medical education. SEIU’s brief describes the corporatization of the modern American university and its increasing reliance on contingent labor, including graduate students. They recount how beginning in the early to mid 1970s, as colleges and universities faced declining state funding for higher education, they began to court private donors, corporations, and foundations to bolster their endowments, and how they gradually transformed knowledge into a “revenue-generating commodity – capitalizing on patentable research and copyrightable teaching materials.”⁶⁸⁵ The contingent faculty model aligns with these market-based values, and as the AFT points out, is “fundamental to the movement to run higher education institutions “more like a business.”⁶⁸⁶ While in the 1970s, tenured or tenure-track faculty comprised almost 80% of the instructional staff at nonprofit colleges and universities; today, they account for only 20%; contingent faculty, including graduate students, account for more than 75%.⁶⁸⁷

As the SEIU brief explains, a “contingent faculty position is not a secure, middle-class job.” Its hallmarks are low pay, job instability and second tier faculty working conditions, with

⁶⁸³ Brief of Amicus Curiae United Steel et. al., 3.

⁶⁸⁴ Brief of Amicus Curiae United Steel et. al., 4.

⁶⁸⁵ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 17.

⁶⁸⁶ Brief of Amicus Curiae American Federation of Teachers, AFL-CIO, 10.

⁶⁸⁷ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 18.

poor chances of promotion, inferior benefits, and lower status.⁶⁸⁸ Part-time contingent faculty members are paid per course, with an estimated 79% not receiving any healthcare benefits through the university and an estimated 86% not receiving retirement benefits. One third of adjunct professors earn less than 150% of the federal poverty level, and one in four is enrolled in at least one public assistance program.⁶⁸⁹ While SEIU admits that there may be an educational component to the student assistants' professional duties, there is also a clear economic relationship that is motivated by the universities' pursuit of "maximum flexibility over the cheapest possible workforce."⁶⁹⁰ A study at George Mason University found that teaching obligations for graduate students often prolonged their time to degree, and the AFT's brief points out that many teaching assistants are assigned to undergraduate courses that may or may not be related to their course of study.⁶⁹¹ For those with families, medical problems, or other economic challenges, they must resort to taking out more student loans, and many are left with six-figure debt.⁶⁹² "In addition to benefiting from low-cost labor while students are enrolled," the AFT also

⁶⁸⁸ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 19.

⁶⁸⁹ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 19-20.

⁶⁹⁰ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 20.

⁶⁹¹ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 21; Brief of Amicus Curiae American Federation of Teachers, AFL-CIO, 8.

⁶⁹² Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 21; Brief of Amicus Curiae American Federation of Teachers, AFL-CIO, 22.

demonstrates how “universities then draw from a pool of well-trained, familiar candidates for adjunct faculty hiring.”⁶⁹³

With collective bargaining, SEIU argues that students themselves can begin to enhance the quality of education by improving wages, benefits, and working conditions. Unionized medical residents and interns won paid leave to attend medical conferences, funding for journals, and textbooks, and have since been able to bargain for funding to purchase equipment to aid in the care of patients, winning contract language that has created programs designed to improve patient care.⁶⁹⁴ Citing an article published in *Academic Medicine*, the AFT further argued that the union has acted as a “responsible partner with the ability to mobilize residents that had contributed to organizational culture change, resulting in the empowerment of the organized residents.”⁶⁹⁵ Medical residents, the AFT points out, have “gained a voice at the workplace through their union that has enabled them to share their experiences as health care providers with their employers in a serious forum that otherwise would not be available to them.”⁶⁹⁶ The AFT also demonstrated how graduate assistants at public universities writ large have been able to use unionization to “amplify their collective voice” and improve their working conditions by winning family leave, reimbursement for child care costs, increasing stipends, and obtaining fee waivers.⁶⁹⁷ They conclude that “the numbers of academic workers are hired without effective

⁶⁹³ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 21; Brief of Amicus Curiae American Federation of Teachers, AFL-CIO, 22.

⁶⁹⁴ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 6-7.

⁶⁹⁵ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 12.

⁶⁹⁶ Brief of Service Employees International Union Committee of Interns and Residents, SEIU Healthcare as Amicus Curiae, 11.

⁶⁹⁷ Brief of Amicus Curiae American Federation of Teachers, AFL-CIO, 3-4.

job security, without decent salaries and benefits, and without a guaranteed role in academic decision-making is of great concern to those who value a free and independent academy.”⁶⁹⁸

When Kathi Weeks attempted to remake the wages for housework movement, her primary mission was to broaden its scope. As she observes, the movement was “too narrowly conceived and the remedies that could and have been offered for the problem the advocates publicized and politicized – including work-life balance initiatives and commodified domestic services – have served more to sustain the existing system than to point us in the direction of something new.”⁶⁹⁹ Instead of organizing together as producers, she calls for us to make demands based on “the common reproduction of life.”⁷⁰⁰ Much like the wages for housework movement, which usefully shifted the terrain of struggle from production to “getting a life,”⁷⁰¹ one of the main tasks of the academic unionization movement is to “activate agents,” to transform the university not so much into an anti-work space as into a “laboratory in which different subjectivities can be constituted and paths to alternative futures opened.”⁷⁰² The demand for a grad student union, like the demand for wages for housework, has the potential to become a site for commons governance, especially when campaigns are framed to allow student voices to emerge, gather together as a collective, and demand a more equitable distribution of resources.

With the *Columbia* case, the Board thus found itself at an interesting historical juncture. Neither *NYU* or *Brown* were the first cases where the Board had considered the status of graduate

⁶⁹⁸ Brief of Amicus Curiae American Federation of Teachers, AFL-CIO, 10.

⁶⁹⁹ Weeks, *The Problem with Work*, 229.

⁷⁰⁰ Weeks, *The Problem with Work*, 230.

⁷⁰¹ Weeks, *The Problem with Work*, 233.

⁷⁰² Weeks, *The Problem with Work*, 101.

students, but especially with the emerging consensus that socialism is common sense, they found themselves in position to lead a hegemonic alliance with an educated and interested readership to boot. Before arriving at their decision, the Board reviewed the common law history of graduate student unionization. In *Adelphi University* in 1972, they had excluded graduate assistants from a bargaining unit of faculty members for not sharing the required ‘community of interest,’ leaving the question of whether graduate students were statutory employees open. Two years later in *Leland Stanford*, they held that graduate students were not employees, and decided that research assistants at the university were primarily students and that the tasks they performed were not “designated and controlled” by the university, reasoning which was later upheld in *Cedars-Sinai Medical Center* and *St. Clare’s Hospital* in the context of staff at teaching hospitals, and which was then overturned in *Boston Medical Center*.⁷⁰³ In the latter case, the Board found that the policies of the Act would be advanced by extending employee status to house staff. *NYU* was the first case in which the Board found employee status for graduate assistants, and they did so according to the common law agency doctrine, the so-called “master servant” doctrine, which states that an employment relationship exists when “a servant performs services for another, under the other’s control or right of control, and in return for payment.”⁷⁰⁴ In an acerbic aside that would characterize the tone of their decision, the Board issued a win for graduate students by noting to Columbia and Trustees that the *NYU* Board had relied on *Boston Medical Center*, and that “after 16 years, Boston Medical Center remains good law today – with no evidence of harm to the medical education predicted by the dissenters there.”⁷⁰⁵

⁷⁰³ *Columbia*, 2.

⁷⁰⁴ *Columbia*, 2-3.

⁷⁰⁵ *Columbia*, 2.

Ultimately, the Board granted worker's rights to grad students for a simple reason. Section 2(3) of the NLRA defines an 'employee' as someone who works for another person in return for compensation, financial or otherwise. Since student assistants at Columbia work for the university and are not specifically excluded from the definition of employee either by statute or Congressional amendment, they obviously qualify. The Supreme Court had made it clear that it is up to the Board to determine what an employee is,⁷⁰⁶ and "in accordance with the statute's broad definition and with the Supreme Court's approval, the Board has interpreted the expansive language of Section 2(3) to cover, for example, paid union organizers (salts) employed by a company, undocumented aliens, and 'confidential' employees, among other categories of workers."⁷⁰⁷ Even in the most doubtful of cases, the Board carefully explains that the Supreme Court has instructed them to consider economic and policy considerations when interpreting the Act, despite the possible centrality of common-law agency principles to the contrary.⁷⁰⁸ For example, in *Bell Aerospace*, which was cited by the *Brown* Board, the Supreme Court had held that managers (who are employees under common law principles) should not have employee status under the NLRA because it would contradict the Act's purpose to facilitate fairness in collective bargaining. The *Columbia* Board takes the *Brown* Board to task for its poorly justified conclusion that because graduate students at Columbia "are primarily students and have a primarily educational, not economic, relationship with their university," they are not entitled to worker's rights. According to the Board, *Brown* disavowed the need for empirical considerations and mistakenly relied on the unsubstantiated claim that the employment

⁷⁰⁶ *Columbia*, 4.

⁷⁰⁷ *Columbia*, 5.

⁷⁰⁸ *Columbia*, 5.

relationship must be primarily economic to fall under the Act.⁷⁰⁹ Graduate students have an employment relationship with their university, and the Board simply concluded that statutory coverage is “not foreclosed by some other, additional relationship that the Act does not reach.”⁷¹⁰

Echoing the union-side briefs, the Board flatly rejected the notion that collective bargaining would somehow intrude into the educational process and be fundamentally inconsistent with the purposes and policies of the Act. In a somewhat tempered defense of the Board itself as well as the NLRA, an undercurrent that is legible in the opinion as a whole, the Board reiterated that the purpose of the NLRA according to federal labor policy is to “‘encourage the practice and procedure of collective bargaining’ and to protect workers’ ‘full freedom’ to express a choice for or against collective bargaining representation,”⁷¹¹ and they found that there was no reason that there could not be a “both and” relationship with respect to the university administration, “a university may be both the student’s educator *and* employer.”⁷¹² Not only would bargaining over the terms of employment preserve “genuine academic freedom,” they went on, rejecting the *Brown* Board’s argument that doing so would raise First Amendment questions about the students’ “right to speak freely in the classroom,” but should First Amendment issues arise, the Board would be fully capable of addressing any issues on a case-by-case basis.⁷¹³ Additionally, they made sure to include that there is “little, if any, basis here to conclude that treating employed graduate students as employees under the Act would raise serious constitutional questions.”⁷¹⁴

⁷⁰⁹ *Columbia*, 3.

⁷¹⁰ *Columbia*, 2.

⁷¹¹ *Columbia*, 6-7.

⁷¹² *Columbia*, 7.

⁷¹³ *Columbia*, 8.

⁷¹⁴ *Columbia*, 7.

Constrained though the Board members were with their objective to pen a decision that would withstand further judicial scrutiny and inevitable changes in the Board’s composition, their disapproval of the way universities do business unmistakably shines through. They point out how the university directs and oversees student assistants’ teaching activities and that they possess “a significant interest in maintaining such control, as the student assistants’ work advances a key business operation of the University: the education of undergraduate students.”⁷¹⁵ They explain how teaching assistants frequently take on a role akin to that of faculty and are responsible for teaching, “one of a university’s most important revenue-producing activities.” While not characterizing the student’s relationship to the university as primarily economic, they do state that “the student assistants’ relationship to the University has a salient economic character,”⁷¹⁶ and using language that implicitly rejects the Ivy League’s claim that the university does not use market driven considerations when making employment decisions, they point out how graduate student workers allow the university “the efficiency of avoiding a traditional hiring process.”⁷¹⁷ In another departure from their otherwise morally neutral tone, they remark that “teaching assistants are thrust wholesale into many of the core duties of teaching – planning and giving lectures, writing exams, etc., including for such critical courses as Columbia’s Core Curriculum – suggests that the purpose extends beyond the mere desire to help inculcate teaching skills.”⁷¹⁸

⁷¹⁵ *Columbia*, 15.

⁷¹⁶ *Columbia*, 16.

⁷¹⁷ *Columbia*, 16.

⁷¹⁸ *Columbia*, 16.

While limiting the scope of their decision to the relatively narrow legal issue of whether graduate students should be permitted to bargaining collectively,⁷¹⁹ the Board goes part way in acknowledging broader economic problems by defending its role as an arbiter between employers and workers by stating openly that the academic world is not “somehow removed from the economic realm that labor law addresses.”⁷²⁰ The Board responded to the Ivy League’s brief directly, specifically their claim that collective bargaining would harm the educational process, by pointing to the “historic flexibility of collective bargaining as a practice and its viability at public universities where graduate students are represented by labor unions and among faculty members at private universities.”⁷²¹ Rather than prescribe answers to the issues that may arise, they pointed out that the agreements that unions at public universities have negotiated with administrators, including course content, assignments, exams, class size, grading policies, methods of instruction and progress over their own degrees, have all been successfully executed.⁷²² At the twenty-eight public universities where graduate students are represented, they readily admit that there have indeed been strikes, grievances against teaching workloads, and tuition waivers, but the Board establishes its own authority vis a vis the Ivy League administration by pointing out that “labor disputes are a fact of life – and the Act is intended to address them,”⁷²³ and reminds them that other “critical sectors have done fine.”

In sum, the Board denies the Ivy League’s contention that the university is and should remain removed from common economic concerns, calling the amici’s complaints “generic,” and

⁷¹⁹ *Columbia*, 7.

⁷²⁰ *Columbia* [citing *Brown*], 3.

⁷²¹ *Columbia*, 9.

⁷²² *Columbia*, 9.

⁷²³ *Columbia*, 10.

arguing that collective bargaining has not proven “unduly burdensome to countless other unionized workplaces.”⁷²⁴ They once again point out that to the extent that disputes arise, the process of resolving them is common to all collective bargaining contexts, including “critical sectors such as national security and national defense,” where the Board observes, there has been no case where protecting worker’s rights has jeopardized national security or defense, nor in hospitals has there been harm to patients, where the house staff have unions. They dismiss the idea that collective bargaining would harm graduate education by pointing to graduate medical education, and that it was hardly “irreparably harmed”⁷²⁵ through unionization. The Board plainly disapproves of Columbia and amici’s stance that unionization can’t bring benefits to a workplace, particularly a university, where there is mounting financial pressure on graduate students and “the eagerness of at least some student assistants to engage in bargaining suggests that the traditional model of relations between university and student assistants is insufficiently responsive to student assistants’ needs.”⁷²⁶

Strangely, a liberal institution like Columbia found an ally in Miscimarra, who wrote the dissent before becoming NLRB Chairman. Once again, Miscimarra reasoned that collective bargaining would undermine educational quality because collective bargaining would jeopardize graduate and undergraduate education by exposing the university, a sphere separate from the workplace proper (“the lecture hall is not the factory floor”⁷²⁷) to uncertainty, disruption, and even the NLRB itself. Drawing out the differences between the various kinds of graduate students, he first laments that in the majority’s decision, “no distinctions are drawn based on

⁷²⁴ *Columbia*, 11.

⁷²⁵ *Columbia*, 11.

⁷²⁶ *Columbia*, 12.

⁷²⁷ *Columbia*, 24.

subject, department, whether the student must already possess a bachelor's or master's degree, whether a particular position has other minimum qualifications, whether graduate is conditioned on successful performance in the position, or whether different positions are differently remunerated."⁷²⁸ While the majority found that graduate students shared a legally required community of interest, since their duties are "functionally integrated into a system designed to meet the university's teaching and research missions in non-faculty roles,"⁷²⁹ Miscimarra began by identifying what he considered an obvious failure on their part to consider how graduate students are improperly "made part of a single, expansive, multi-faceted bargaining unit."⁷³⁰ Despite faulting the majority for failing to recognize the difference between different types of graduate students,⁷³¹ however, he goes on to erase the differences between graduate and undergraduate students by stating that they are both "enrolled"⁷³² in the university. He discusses unionization in terms of "college and university students" whose "attendance at a college or university" might be impacted by collective bargaining and the use of economic weapons.⁷³³

Once again, Miscimarra appeals to fear, which as bell hooks points out, is the primary means through which power is maintained in a dominator culture. He describes education as a high stakes financial investment that is already uncertain, with roughly 40 percent of students never graduating and 60 percent not finishing in four years, and he warns (presumably with an audience of parents in mind) that "a student's efforts to attain an undergraduate or graduate degree are governed by the risks and uncertainties of collective bargaining and the potential

⁷²⁸ *Columbia*, 22.

⁷²⁹ *Columbia*, 19.

⁷³⁰ *Columbia*, 22.

⁷³¹ *Columbia*, 22.

⁷³² *Columbia*, 23.

⁷³³ *Columbia*, 25.

resort to economic weapons [a strike or lockout] by students and universities.”⁷³⁴ In a signature move, he also ends his opinion by constructing a series of hypotheticals in which the university or the union might resort to these “economic weapons.”⁷³⁵ While he admits that there might be “some type of transient benefit as a result of collective bargaining...there are no guarantees, and they might end up worse off.”⁷³⁶ “Add these up,” he concludes, “and the sum total is uncertainty instead of clarity, and complexity instead of simplicity, with the risks and uncertainties associated with collective bargaining – including the risk of breakdown and resort to economic weapons – governing the single most important financial decision that students and their families will ever make.”⁷³⁷

Making no mention of how better working conditions for academic laborers might improve the quality of education, undergraduate and graduate, he makes one of his more colorful claims – that unionization would eliminate civility in academic culture. First, he cites the Supreme Court which in *Yeshiva* stated that the NLRA does not properly apply to universities because the university, “which relies so heavily on collegiality, ‘does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world.’”⁷³⁸ He then outlines the Board’s shifting opinions in a series of three cases, *Yeshiva*, *NLRB v. Catholic Bishop of Chicago*, and *Boston Medical Center* which deny and worker’s rights to academic workers. With what he calls this “uneven track record” in its efforts to apply the NLRA to colleges,⁷³⁹ he then claims that these three cases

⁷³⁴ *Columbia*, 25.

⁷³⁵ *Columbia*, 29.

⁷³⁶ *Columbia*, 23.

⁷³⁷ *Columbia*, 24.

⁷³⁸ *Columbia*, 24.

⁷³⁹ *Columbia*, 24.

illustrate not only a fearsome lack of predictability, but according to him, they highlight the Board's lack of expertise in matters pertaining to the academic world. Despite the legal framing, his argument is more accurately cultural, and this becomes most evident in a long section of the dissent where he once again imagines his audience as concerned family members and then warns them that collective bargaining evokes "extraordinarily strong feelings."⁷⁴⁰ Parents must "take heed," he goes on, that collective bargaining would affect a student's college experience by exposing them to "disrespect and profanity directed to faculty supervisors," "outrageous social media postings by student assistants," and also "outrageous conduct by student assistants."⁷⁴¹ In an unforgettable passage, he then proceeds to describe in vivid detail what exactly this outrageous conduct might consist in. If, for example, "a student assistant objects to actions by a professor-supervisor named 'Bob,' the university must permit the student to post a message on Facebook stating: 'Bob is such a nasty mother fucker, don't know how to talk to people. Fuck his mother and his entire fucking family,' or "the university may not take action against a student assistant who screams at a professor-supervisor and calls him a 'fucking crook,' a 'fucking mother fucking' and an 'asshole' when the student assistant is complaining about the treatment of student assistants."⁷⁴² The opinion climaxes when Miscimarra emphatically declares that students are not "the means of production – they are the product" and that collective bargaining would absolutely worsen education, a "life-changing procedure," where 'winning isn't everything, it is the only thing,' and I believe winning in this context means fulfilling degree requirements, hopefully on time."⁷⁴³

⁷⁴⁰ *Columbia*, 28.

⁷⁴¹ *Columbia*, 30.

⁷⁴² *Columbia*, 30-1.

⁷⁴³ *Columbia*, 23.

Difficult as these passages are to take seriously, Miscimarra was at the very least right to recognize that more was at stake in this decision than the routine NLRB decision. While the Board majority's final decision in *Columbia* was favorable, it is disappointing that neither the Board members nor the union-side amici address enclosure of the academic commons. While several of the briefs mention academic freedom, they fail to specify how the corporatization of the university results in new norms which not only influence research agendas, but leads to more prevalent ethical misbehavior and retards the progress of knowledge production, particular in disciplines which depend on cooperation to preserve their integrity.⁷⁴⁴ The Board only very briefly mentions "genuine academic freedom" without explaining that the marketization of the academy not only erodes its historic commitment to the public interest, but that genuine academic freedom necessarily depends on a gift economy, which as Bollier explains, "nurtures internal commitments that cannot be easily maintained through external rewards such as money."⁷⁴⁵

Furthermore, they fail to recognize how by allowing graduate students to unionize, the effects could reverberate beyond the university. Unionized graduate students take positions on important political issues and are in good position to change the union itself (by, for example, voting not to allow police unions, which are notorious for playing an instrumental role in making regressive reforms in the community), they have already formed coalitions with organizations such as United Students Against Sweatshops (USAS), a group which has formed a worker's rights advocacy coalition that partners with NGOs and human rights organizations to oppose free trade agreements and support worker's struggles worldwide, and can leverage their power to

⁷⁴⁴ Bollier, 137.

⁷⁴⁵ Bollier, 136-7.

force the university administration to disclose how they invest university endowments, and as for example, to divest from the fossil fuel industry. As many of the amici briefs pointed out, one of the benefits of unionization is that it encourages broader participation and collaboration between employees of different ranks. Differently situated employees are in better position to determine where to devote more resources than are administrators operating at a remove from the university's daily operations, and as students most of whom will enter the work force outside the university, the academic union provides a setting where they can obtain good working knowledge of how to make resource allocation decisions, assess the efficacy and character of their supervisors, and develop an awareness of what constitutes reasonable working conditions and performance expectations. Unions can be a critical site for developing political agents active in shaping their economic lives rather than servants blindly submitting to received authority. In Weeks's words, a grad student union could be a site in which we could hail "potential antagonists" to privatization across the board.⁷⁴⁶

In today's competitive university, graduate students are especially prone to exploitation. The university is one of the few remaining spaces where they can develop their capacities to think, feel, and reason as they make discoveries, invent new technologies, and find new ways of being. Unionization, which levels the hierarchical relationship between faculty and graduate student, can function as a space where at the very least, students can raise awareness of these power dynamics. It is disappointing that the Board doesn't address this specifically when they conclude that allowing graduate students to unionize would "ameliorate labor unrest."

⁷⁴⁶ Weeks, *The Problem with Work*, 229.

6.0 Epilogue

This dissertation began to take shape in the Fall of 2010, while I was living in Busan, South Korea teaching English Writing to private high school students and preparing to go to graduate school. At that time, I was a recent law school graduate looking for an alternative career path. In my second year of law school, I had a choice between taking one of two roads: the first was to put my head down and compete, which in that context, meant internalizing the legal writing template known as “TRAC” (topic, rule, analysis, conclusion), participating in moot courts and legal clinics, making law review, and preparing myself for the bar; the second, which I took more or less unconsciously, was to follow the subject matter of a few scattered undergraduate papers I had written on rhetorical theory, international law, and philosophy, and sign up for the “Law and” offerings at my law school. Looking back, I realize that it was in the “Law and” classes, particularly Law and Literature, Law and Science, Law and Interpretation, Law and the Welfare State, and Law and Philosophy, where I began to ask questions about the relationship between law, language, and justice.

By the end of Fall 2010, my graduate school admissions packet contained a tentative description of a future project on law and revolution, as well as a writing sample exploring the differences between Stanley Fish’s and Ronald Dworkin’s rival legal theories. This was also when the Arab Spring was beginning to unfold. Not long after I was watching protestors take over Tahrir Square on the television while on a weekend trip to Seoul, I found myself on the streets of Pittsburgh as a newly enrolled graduate student, protesting, for the very first time, as part of the Occupy Wall Street movement. In many ways, this dissertation reflects my development as an activist as much as a scholar, and each of the chapters marks the beginning of

a way to define a historically-situated, forward looking praxis to partner with the state and reclaim the commons from the market.

The first chapter begins by going back in time and imagining how C.S. Peirce might have contributed to the history of jurisprudence had he been more evolved during his Metaphysical Club meetings with Oliver Wendell Holmes, Jr. One of the joys of reading the later Peirce is how attentive he becomes to the particularities of his own experience. In his later writings, where even his inkstand becomes fodder for serious philosophizing, he has become someone more mature and far more interesting than the cold logician that comes across in his early manuscripts. As a young man, Peirce would reason abstractly about probabilities, and he was as likely to calculate and deduce as he was to systematize and persuade. In the later Peirce, however, we discover someone venturing excitedly into what were for him the uncharted territories of aesthetics and rhetoric. Always the anti-establishment philosopher, Peirce began to attune to the people around him, asking questions about the motives of and methods of investigators in different academic fields while inventing mini-dialogues between imaginary investigators to weigh their respective virtues. In his best moments, he describes how it feels to be carried away by what he calls the “energizing reasonableness” in the universe, and how it feels, when face to face with a great work of art, to realize that it is just right as it is, that it is beautiful.⁷⁴⁷ It is this Peirce that inspired the German philosopher Karl Otto-Apel to call Peirce “certainly the greatest American thinker of all,” and it is this Peirce that I found missing in

⁷⁴⁷ C.S. Peirce, “Laws of Nature,” in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998), 68.

Roberta Kevelson's otherwise masterful appropriation of his work in *The Law as a System of Signs*.⁷⁴⁸

Peirce does not yet have a firm place in the rhetorical tradition, and in future iterations of this project, I would like to engage more thoroughly with contemporary rhetorical scholarship to situate my case studies and Peirce's theory of rhetoric in the emerging field of Law and Rhetoric. As they stand, the remaining chapters of the dissertation provide narratives of lower level judicial opinions as they engage with new and ongoing movements for economic justice. I hope they demonstrate the potential of engaging with materials that originate from engaged advocacy in combination with lower level judicial decisions. In Chapter Two, I chose two cases that exemplified the judiciary's misrecognition of the concept of the commons, and I tried to demonstrate both the limitations of radical left activism that refuses to engage with the state as well as the judiciary's unwillingness to adapt to the changing times. While I began that chapter convinced that my comrades and I needed to "smash the state" and ignore the older generations of activists and their tired attempts to turn Pittsburgh into a "human rights city," I ended with the sober recognition that the perfect is often an enemy of the good.

On the second day of tabling for Occupy on Schenley Plaza, I met Peter Linebaugh's former student, who had just arrived at the University of Pittsburgh to begin his Ph.D. work with Markus Rediker, Linebaugh's *Many-Headed Hydra* co-author. After sharing our revolutionary aspirations, he recommended that I read *The Magna Carta Manifesto*. Chapter Three, which grew out of my engagement with Linebaugh's book, describes the beginning of a global legal initiative to redefine sovereign legitimacy by turning to the Charter of the Forest's five commons

⁷⁴⁸ Karl Otto-Apel, *Charles S. Peirce: From Pragmatism to Pragmaticism*, Trans. John Michael Krois (Amherst: University of Massachusetts Press, 1981), 5.

principles as a resource for inventing new legal rights. *Alec L. v. McCarthy* and *Juliana v. United States*, the latter of which is still ongoing, illustrate Jules Lobel’s courts-as-a-forum-for-protest model at work, and they demonstrate what the legal rhetorician Marouf, Hasian, Jr., calls “rhetorical consciousness” in legal advocacy, a middle ground between the belief that there are self-evident constitutional truths in legal doctrine and the nihilistic relativism of the CLS school.⁷⁴⁹ While I try to draw out the potential of leveraging the courtroom as a space for commons advocacy by reviewing the legal and rhetorical arguments, the chapter also clarifies my frustrations with proceeding agapistically. As I argue, it is the amicus briefs themselves that illustrate the full scope of current injustices, not by calling them out so much as unconsciously reproducing their assumptions. In the United States, climate advocacy usually provides openings through which to push for more progressive agendas across the board, but the briefs in *Alec L.* suggest that whether climate activism falls on the left or center of the political spectrum is still open to negotiation. In the coming months, it will be interesting to see how judges redirect the national conversation on climate change as they mediate between the interests of industry, the public, and future generations.

While in Chapters Two and Three I look at new movements for economic justice, in Chapters Four and Five, I try to present new ways of looking at two ancient claims for economic justice, reparations and labor. Chapter Four, which in many ways is my least successful chapter, begins with an analysis of the judicial response to *In Re Slave Descendants*. My interest in this case, which grew out of a Law and Science seminar just before the Professor, a dual Ph.D. holder in Economics and Philosophy had been suspended from teaching for raising questions about how

⁷⁴⁹Marouf Hasian, Jr., “Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies Toward Rhetorical Consciousness,” *Legal Studies Forum* 17 no. 4, 1994, 349.

much better off black people are today than they were just after slavery. In what felt like an eruption of feeling in the otherwise logical, argument-based curriculum, Professor Birmingham had us listen to the oral arguments on behalf of the plaintiffs in that case, and it was at that time that I heard Posner's voice for the first time and realized that he was genuinely not able to comprehend, like my conservative Law and Welfare State classmates, the effects of trauma on individuals that often span generations. While the rest of the chapter needs more careful attention to materials outside the courtroom, my analysis of the ways in which white supremacist arguments undergird arguments for the free market makes a timely intervention into the public reparations debate. With the reparations movement only very recently winning a Congressional hearing to revive H.R. 40, what is missing from the left is a comprehensive discussion of how the movement to reclaim the commons and the reparations movement can work together. In the coming months, it will be worth looking to the arguments circulating in the public sphere, and to analyze how rhetors from different walks of life negotiate between the ideals of law and pragmatic solutions to issues of resource distribution.

In the second half of the chapter, I looked to the history of judicial precedents in the Japanese-American redress movement. Initially, I was hoping to find a working model for reviving reparations claims by looking to moments of possibility in the judicial opinions. On a personal note, especially after the Supreme Court upheld the Muslim ban and with some 30% of the population supporting internment for Arab-Americans after 9/11, I was also hoping to find that over the long arc of history, judges had at the very least set a rhetorical precedent against internment based on race and national origin. What I found was that the judges consistently decided these cases as narrowly as possible, and consistently deferred to the executive and legislature on matters of national security. In future iterations of this chapter, I would like to

follow Hasian's work in his book, *Legal Memories and Amnesias in America's Rhetorical Culture*, to do a traditional critical legal rhetorical analysis in order to discern the ways in which the Japanese civic organizations were able to mobilize public opinion behind their cause. As Hasian points out, it is incumbent upon rhetorical critics to look to the ways in which the public has used decisions, statutes, and interpretations in materials that fall outside the history of precedents in order to find reconstructive possibilities. Chapter Five, in which I critique Donald Trump's NLRB Chairman by turning to James Grey Pope's scholarship on the forgotten human rights arguments behind the NLRA, illustrates the potential of making rhetoric a more self-conscious term in legal scholarship and looking outside the history of judicial precedents for legal arguments. Not incidentally, many of the claims that Pope uncovered can be productively recirculated in scholarship and in activist circles.

One of the missing pieces in this dissertation has been an attempt to flesh out a pedagogy, specifically, one that would be geared toward making rhetoric a more prominent part of the undergraduate and law school curriculum that would encourage students to engage more effectively as activists and citizens. As James Boyd White points out, law is a collective composition, and language is poetic as much as it is propositional. Starting with White in *Justice as Translation*, I would like to develop ways of teaching students that as compositions, legal texts are as much about establishing meaning and relations with others than they are about taking sides and winning. I would also like to teach students that the language of the law offers rhetorical resources for making arguments about justice outside official legal contexts. At its best, the legal process is about recognizing that all ways of speaking, including our own, are subject to change. By bringing the concept of the commons into these discussions, the idea of the human that economic discourse makes possible could give way to the awareness that we are

rhetorical beings, and that through language, the legal system and our subjectivities are mutually constitutive. In my most desperate moments as a scholar and especially as an activist, I find myself wanting simplicity and authority, for relieving myself of the responsibility of facing complexity and uncertainty and making my own judgments in uncertain situations— something White warns against.⁷⁵⁰ If the current economic context teaches us anything, however, it is that the way forward will be multiple and eclectic, as David Bollier wisely points out, and that it will require engaging with difficulty, including, for us leftists, the difficulty of engaging with the liberal mainstream. As a field, Law and Rhetoric helps us conceive of the legal system as an ally, part of a communicative and cultural legacy, which as White points out, gives us the chance to create a world in which each person is fully recognized.

One of the upsides of living in a bleak political and economic times is that the center is finally beginning to recognize that change is urgent and necessary. As Peirce was wise to caution, any arguments that prioritize “the stability of society” over other animating concerns are suspect and prompt “the *cui bono* at once... Truth is truth, whether it is opposed to the interests of society to admit it or not.”⁷⁵¹ Over the past few weeks, I have found the dialogue around making reparations claims, cancelling all student debt, and making public higher education free particularly hopeful. Many of these conversations began anew with Occupy, and that they are now taking place at a national level backed by the support of elected officials is a testament to the reconstitutive power of making long-term commitments to justice.

⁷⁵⁰ See generally James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

⁷⁵¹ C.S. Peirce, “Pearson’s *Grammar of Science*,” in *The Essential Peirce, Selected Philosophical Writings Volume 2 (1893-1913)*, ed. The Peirce Edition Project (Bloomington: Indiana University Press, 1998), 60-1.

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