From Madison to Zuccotti Park: Confronting Class and Reclaiming the American Dream
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Abstracts

11/12/12

Aziza Ahmed (Northeastern University School of Law)
"Human Rights, Epidemiology, and the Co-production of Identity/Risk Narratives in HIV Legal Advocacy"

Identity has become the primary prism by which to understand and organize in response to the HIV epidemic. In this article I examine how identity is co-produced by HIV epidemiology and through international human rights activism. Beginning with the engagement of feminist activists identity became central to international human rights organizing around gender, sex, and sexuality. HIV complicated this engagement by reintroducing biological and epidemiological narratives of risk and vulnerability. Further, HIV brought sex workers and gay men to international legal advocacy scene as new actors with complex relationships to feminist organizing.

Through the continued engagement of identity groups with rights-claiming and epidemiology ideas of vulnerability categories reproduce themselves. I call this the "identity / risk narrative": the common-sense knowledge about an identity group's HIV risk. The creation of identity/risk narratives has particular consequences for HIV: it masks our understanding of HIV transmission, excludes individuals who do not fit neatly into identity demarcated territory, and deradicalizes HIV activism.

At the end of this article I offer ways to minimize the downsides of identity-based activism through shifting the mode of legal advocacy around HIV. By remaining vigilant about destabilizing identity, taking a consequentialist approach, and remaining focused on the background rules advocacy can remain agile and responsive to the impact of HIV.

Lisa Alexander (University of Wisconsin Law School)
"Culture, Law & Social Movements 2.0"

This paper analyzes the interaction between cultural endeavors, social movements and law in the context of Web 2.0. It also explores how communities, activists, and community organizers deploy culture to frame advocacy strategies and use Web 2.0 technologies to disseminate these cultural frames or narratives.

William Arrocha (Monterey Institute of International Studies)
"Globalization, The Occupy Movement and the Forgotten Underclass: The Struggle for the Undocumented Migrant to Be Part of the Counter-hegemonic Discourse"

In this paper we will attempt to further the explanation of how globalization has created the conditions for such movements to raise and put forward a set of what could be clear strategies, supported by a solid counter-hegemonic discourse. However, as these movements rise and take control of what is leftover of the public space, other aspects of globalization, such as the ever growing number of undocumented workers who are criminalized, including their labor, seem to fall deeper into the shadows of oblivion, yet are critical social actors if the present system of domination is to be transformed. We will attempt to articulate a neo-Gramscian model on how the movement can strike a balance between its very fragmented yet dynamic nature with its need to create the conditions to become a truly anti-globalization movement that can effectively change the dominant culture and discourse that are at the core of the idea of the American Dream – a dream of which true ownership has always been in the hands of the dominant classes sustained by a very powerful historic bloc. Reclaiming the American Dream needs to embrace not just the social groups that seem to be entitled to it by being citizens of a the state but also by those who with their toil have kept such dream alive yet struggle to be heard and to be part of a long overdue transformation of a system that has become more unequal, unjust and oppressive.

Shalanda H. Baker (University of San Francisco Law School)
"Contracting in the Binary: Fissures Along the Public-Private Border and the Growing Systemic Risks of International Development"

The emperor has no clothes. Large energy and infrastructure projects around the world exist squarely within the public sphere but regularly don the private mantel to obfuscate risky activity and externalize the social and environmental costs of development. This creates a situation in which risk is pervasive and, arguably, systemic. This article argues that the public-private distinction that dominates the development discourse should be collapsed in order to stem this risk and permit a more innovative approach to risk management. Challenges to the public-private distinction have a long tradition in Western legal thought;

however, in this article, I do not challenge the foundation of the distinction but I explore the implications of this framework in the development context. In particular, this article contributes to the literature by providing an important foundational lens for understanding how the boundary between public and private is continually contested and systemic risks are created.

Jordan Barry (University of San Diego School of Law)
"Political Free Riding"

There are two basic reasons why a citizen may choose to engage in political activity: She may wish to achieve particular results ("extrinsic motivations") or she may simply enjoy engaging in the political activity itself ("intrinsic motivations"). However, most citizens' ability to affect political outcomes is extremely limited, and attempts to do so impose real costs. Thus, citizens are strongly discouraged from acting on their extrinsic motivations, in the hope that others with similar policy preferences will act for them. This Article explores how this dynamic, known as the "free-rider problem," pervades the democratic process and makes government less responsive, less efficient, and less accountable. It also illustrates how the free-rider problem tilts the political playing field in favor of those actors, particularly large corporations and unions, who are least subject to it. This Article contends that the best solution is to provide citizens with resources ("Political Dollars") that can only be used for political purposes. This approach directly addresses the free-rider problem because it makes engaging in political activity much less costly. This Article argues that a Political Dollars program should reduce the cost of a broad range of political activities, give citizens the flexibility to allocate their Political Dollars as they see fit, and should not prevent citizens from contributing non-Political Dollars. This Article considers alternative proposed reforms and concludes that they fall short because they do not squarely address the free-rider dynamic.

Tonya Brito (University of Wisconsin Law School)
"What We Talk About When We Talk About Matriarchy"

This article addresses the question of equality in family law by examining the status of single mother households in society. It takes on and critically evaluates the claim that a nascent Middle Class Matriarchy is emerging in post-recession U.S. society. Pointing to the progress that women have made in a number of domains, (e.g., education, workplace, family) alongside the declines that men have experienced, claims are being made (by, among others, author Hanna Rosin in her recently published book, *The End of Men*) that women are becoming the dominant sex. This article places its emphasis on the family and the relative position of men and women within families and the larger political economy. In so doing, the article unpacks the meaning of the term "matriarchy" and explores continuing societal anxieties surrounding single, female-headed households. The article begins its analysis from a historical perspective, examining earlier instances of "matriarchies" existing in other racial and economic subgroups in the United States, particularly the experiences of lower income black single motherhood in the 1960s and white single motherhood in the 1980s & 1990s. The article assesses the distinct features of those matriarchies and compares and contrasts them along several dimensions, including to what extent they reflect and/or reinforce gender inequality within families and in society more broadly. Finally, the article considers whether those earlier experiences speak to the current phenomenon and what lessons they hold for the field of family law.

Samuel D. Brunson (Loyola University Chicago School of Law)
"Mutual Funds, Fairness, and the Income Gap"

The rich, it turns out, are different from the rest of us. The wealthy, for example, can assemble a diversified portfolio of securities, or can invest through hedge and private equity funds. When the rest of us invest, we do so largely through mutual funds. Nearly half of American households own mutual funds, and mutual funds represented a significant portion of the financial assets held by U.S. households.

The tax rules governing mutual funds create an investment vehicle with significantly worse tax treatment than investments available to the wealthy. In particular, the tax rules governing mutual funds force shareholders to pay taxes on "forced realization income," even though such income does not increase their wealth.

Because mutual fund investors must pay taxes on non-existent gains, while the wealthy can use alternative investment strategies to avoid such taxes, the taxation of mutual funds violates the tax policy objective of vertical equity. To correct the inequities faced by mutual fund investors, the tax law needs to permit low- and middle-income taxpayers to exclude from their income 10 percent of the capital gain dividends they receive each year.

Cheryl Nelson Butler (Southern Methodist University Dedman School of Law)
"Kids for Sale: Does America Recognize Her Own Sexually Exploited Minors as Victims of 'Human Trafficking'?"

Domestic child sex trafficking – the trafficking of children within United States borders – is a national epidemic. Under-aged girls compose a large percentage of sexually exploited persons in the United States. While the media, policy makers and scholars have focused primarily on international child sex trafficking, the similar plight of minors exploited within the United States arguably, has not received the same degree of public attention. Child sex trafficking laws have failed to address the root causes of the problem. In particular, states limit their statutory definition of "trafficking victim" to those few cases in which "force, fraud or coercion" is proven – thereby refusing to recognize as "trafficked" those prostituted minors who are groomed by adults by more nuanced exploitative means.

This article argues that sex trafficking laws that require proof of force, fraud or coercion in cases fail in their obligation to protect minors from prostitution and other forms of sexual exploitation. By imposing an FFC requirement in cases involving minors, state trafficking laws perpetuate a distorted portrait of how juveniles are trafficked. This article highlights the existing conflicts between international, federal and state laws and explores why these various laws treat sexually exploited minors so differently.

Part I introduces the issue of domestic child sex trafficking and the need for effective legal responses. Part II discusses the conflicting treatment of sexually exploited minors under state anti-trafficking law. Part III argues that domestic sex trafficking in the United States has multiple faces and reflects several paradigms of which the "force, fraud, or coercion" paradigm codified in U.S. domestic trafficking laws is only a part. Thus, the statutory "force, fraud, coercion" ("FFC") test fails to capture the means in which minors are commercially exploitation in the United States. Part IV addresses the flawed legal and policy assumptions drive America's failure to consistently recognize all domestic sexually exploited minors as victims of exploitation. Part V explores how international and federal statutes, as well as recent U.S. Supreme Court cases support the adoption of an alternative legal framework for child prostitution – one that considers how a child's unique vulnerability to sexual exploitation drives the market for child prostitution. The article concludes by calling upon state legislators and judges to reject the FFC test and instead, to adopt an alternative legal framework for child prostitution based on children's vulnerabilities.

Jared Ruiz Bybee (University of Georgia, Fanning Institute)
"In Defense of Low-Income Homeownership"

Once an icon of the American Dream, homeownership has risks and downsides that are clearer today than ever before. Scholars have begun to seriously question the place of homeownership in American society. And yet, homeownership can result in a variety of benefits to the individual homeowner and community. I argue that homeownership can remain a powerful tool of economic mobility for low-income individuals and families.

June Carbone (University of Missouri-Kansas City School of Law)
"The End of Men or the Rebirth of Class? How Hanna Rosin Leaves out the 1% and Family Law Fails the Other 99%" (coauthored with Naomi Cahn)

The end of men or the recreation of class? As the information economy has increased the rewards for education and lowered the male premium, women have come to outnumber men at all levels of education, constitute almost one-half of the workforce, and prove to be better at business, as management values "softer" executive styles. Some have heralded the overall effect as women power; or, in the words Hanna Rosin, "the end of men."

We think these conclusions are misleading on two counts. First, these economic changes have come in part with greater income inequality among men. The emergence of a more increasingly hierarchical society creates a winner-take-all dynamic that spurs competition for the top slots and worsens the consequences of coming in second – or failing to place. In the fastest growing and most lucrative economic sectors women have lost ground, even as they have gained it vis-à-vis the men at the bottom of the more steeply banked social hierarchies. We argue in this paper that greater inequality increases the dominance of elite men, cedes political power to a conservative elite that has removed women's issues from the agenda, and destabilizes families – even if it also increases some women's relative income and independence.

Second, greater inequality among men has upped the stakes underlying mating and dating. Increased inequality segments marriage markets, writes off a high percentage of men as effectively unmarriageable, and creates gender mismatches. Where men outnumber women, the result tends to be greater emphasis on marriage and more traditional roles. Where women outnumber men, the "good men" become more likely to play the field and women become more likely to give up on commitment. Today, men outnumber women in relationship markets only at the top. For college graduates, the wage gap has increased, marriage is on the

rise, divorce is down, and traditional values are back in vogue. For everyone else, marriage has become a bad deal for women. The sharing principles that feminists championed in another era and elite women continue to prize make marriage a trap for the working class. Hanna Rosin is perhaps at her most perceptive when she describes the young mother who explains that committing to the father would just mean "one less granola bar for the two of us."

In this paper, we explain how the changing family is the consequence of greater societal inequality rather than the product of greater gender equality. We see these developments as part of a larger societal construction of class-based hierarchies. We conclude that greater power for women would focus on greater overall equality and, until that happens, will continue to reinforce rather ameliorate inequality.

Kenneth Casebeer (University of Miami Law School)
"'Public ... Since Time Immemorial:' The Labor History of *Hague v. CIO*"

Most people recognize *Hague v. CIO* as a landmark Free Speech case. The contest was actually over the right to assemble in public areas by labor unions fighting both non-union companies and a locally corrupt municipality. The upstart CIO against Boss Hague. Organizing economically AND politically was impossible without assembly on the streets. The juridically neglected right of public assembly becomes ever more crucial for the success of the 99% in the United States and around the world – from Occupy to Arab Spring to Solidarity to Greece.

Amy Cohen (Ohio State University Moritz College of Law)
"Occupy Process: Consensus and Capitalism"

This paper examines the radically democratic decision-making procedures of contemporary anarchists – an increasingly important part of anti-neoliberal and Occupy protest movements around the world. But because today horizontal consensual procedures are not simply the stuff of anarchism but also global capitalism, the paper compares anarchist practices of decision-making with more professionalized consensus building processes that have emerged as part of the ADR movement. Although both sets of practices are intensely focused on generating consensus, this comparison highlights the different conceptions of process that they employ. Professional consensus building's capacity to render itself "merely" procedure "a means to further another set of ends" makes it remarkably easy to scale up to imperial proportions. By contrast, anarchism's vision of process aspires to collapse distinctions between means and ends, refuses to constrain anyone who does not participate, and seeks transformation deep in the minutia of selves, social practices, and political relations. As a result, it is much more recalcitrant "and, perhaps more to the point, much less desirable" than ADR to redirect for profit-seeking ends. The paper thus explores how consensual processes offer their subjects an ideal of decision making and dispute resolution that is alternatively amenable or hostile to imperial ambitions.

Justin Desautels-Stein (University of Colorado School of Law)
"Liberal Legalism and the Two State Action Doctrines"

By all accounts, the constitutional and antitrust state action doctrines are strangers. Courts and scholars see the constitutional state action doctrine as preoccupied with questions about the applicability of constitutional rights in private disputes, and the antitrust state action doctrine as a judicial negotiation between the scope of the Sherman Act and the demands of federalism. In this conventional view, the only thing the doctrines share in common is that they are both an awful mess. This Article challenges the conventional wisdom and argues that the two state action doctrines are, in fact, fundamentally connected, and really not even all that messy. It's not that the traditional readings of the two doctrines have been wrong, so much as they persistently fail to take notice of the political theory that threads the two doctrines together. That theory is liberal legalism, and in the context of liberalism the two state action doctrines bear witness to a story about American "competition law" that is only half-told in the conventional fields of law and economics. To better understand the legal foundations of market society, as well as the requisites of market reform, we need something other than an "economic analysis of law," much less a singular focus on various forms of economic regulation. What is needed instead is a fuller understanding of our underlying premises about the market, and in the service of that goal this Article maps the manner in which they inform the background rules of the market through the use of the constitutional state action doctrine, and simultaneously manage the market through the use of regulatory devices like antitrust law. These are the premises of our liberal legalism, and a fruitful field of their study lies in the surprising unity of the two state action doctrines.

Matthew Dimick (SUNY Buffalo Law School)
"Reciprocity and Redistribution"

This paper develops a political economic model of voting and redistribution using "fairness" preferences – rather than the more common "self-interested" preferences – to explain patterns of taxes, transfers, and redistribution across developed countries. The model can explain the empirical finding of why countries that redistribute more have *less* inequality to begin with. Social scientists have called this the "Robin Hood" paradox, since the standard, "self-interest" model of redistribution from economics – as well as a kind of "What's the Matter with Kansas" intuition – predicts that there will be more redistribution when the pretax, pretransfer distribution of income is greater, not lower. The paper's main argument is that when income inequality is higher, the distribution of economic rewards will appear "earned": higher inequality obscures rewards due to "luck" factors. By contrast, when the earnings distribution is more compressed, extremes in income appear "abnormal" and therefore the consequence of luck. Voters with fairness preferences will find the first circumstance fair and not want to redistribute, while voters in the second will view the distribution as unfair and will redistribute. To explain variation in pretax, pretransfer earnings, the model will include different forms of wage setting procedures to demonstrate an institutional complementarity between centralized wage bargaining and welfare state spending. The normative take away is that the current policy emphasis on taxation, its fairness and progressivity, the "Buffet" rule, etc., puts the cart before the horse. A more robust welfare state is likely only if we first address "market" inequality through institutions such as labor unions, minimum wage laws, and the like.

Rashmi Dyal-Chand (Northeastern University School of Law)
"Harmonizing Entrepreneurship and Community Economic Development" (coauthored by James V. Rowan)

This paper takes a critical look at the general assumption, both among many policymakers and in the public rhetoric, that entrepreneurship is a viable means of poverty alleviation and economic development. The paper argues that there is instead a fundamental conflict between entrepreneurship and economic development that public interest lawyers who support low-income entrepreneurs are not explicitly acknowledging. The problem exists both as a matter of theory and pragmatic application. At the theoretical level, much community economic development theory assumes entrepreneurship is a means to avoid a zero-sum game by creating access to markets that suffer from information and coordination problems. The trouble here is that it is hard for people below the poverty line to solve these market failures. At the pragmatic level, there is much empirical data on the characteristics of successful entrepreneurship, but many of these characteristics do not really exist among low-income populations. In light of these significant conflicts, our paper proposes a reassessment of goals. In short, if we continue to support entrepreneurship, it must be for different reasons, reasons which are yet to be articulated and defended.

Nancy Ehrenreich (University of Denver Sturm College of Law)
"Class, Race, and Breastfeeding at Work: Exploitative Control of Lactation as Status Regulation"

Professor Reva Siegel has argued that the prevailing "physiological" understanding of abortion (as a problem of a body within a body) obscures the fact that abortion prohibitions have historically been used to control and disempower women – e.g., by consigning them to motherhood, the very role that has been central to their subordination. Similarly, in her forthcoming book, Pamela Bridgewater argues that "reproductive coercion," deployed in the interest of property and profit, was central to plantation economies. Thus, for her, modern forms of reproductive coercion effectively reinstitute slavery. This paper takes off from Siegel's and Bridgewater's works to critique the laws failure to protect lactating women from firings and harassment by employers and co-workers. Courts' rulings that such treatment does not constitute sex discrimination can be seen as instantiating both gender status regulation and reproductive coercion. For those women who can afford to stop working in order to continue breastfeeding, lack of judicial recourse results in relegation to the domestic sphere – consignment to the traditional role of stay-at-home mother. In contrast, those women who cannot afford to stop working are forced, instead, not only to sacrifice the well-being of their children by foregoing breastfeeding, but also to violate societal norms (norms that increasingly associate breastfeeding with "good motherhood"). While arguably not as extreme in their impact as other types of reproductive coercion (eg, forced Cesarean sections or prosecutions for prenatal abuse), judicial rulings that allow employers to force marginalized women to forego a central aspect of mothering such as breastfeeding still evoke the depredations of the slave era, raising the question of whether such legal rules implicate not only gender equality concerns, but class and race equality as well.

Sarah Jane Forman (University of Detroit Mercy School of Law)
"Kidulthood"

The paradox of American inequality is nowhere more starkly illustrated than in the disparate conceptualizations of adolescence along socio-economic lines. What does it mean to be a teenager – are you preparing for college or preparing for prison? The greater the economic resources a family has, the longer a child in that family can maintain an adolescence-like state of limited responsibility and accountability. The indiscretions of youth are just that: temporary lapses of judgment, small, barely noticeable blemishes on inevitably bright futures. For poor children, the burdens and responsibilities of adulthood are often forced upon them at a much earlier age and when mistakes are made, less leeway is given. Professor Forman refers to this phenomenon as "adultification." Few question the swift application of the "criminal" label to these youth because the context of their lives justifies it. Thus, even though there have been significant legal advances with regard to how adolescents are treated within the criminal and juvenile justice systems, there is still an extreme overrepresentation of poor, minority youth within these systems. Abuse, neglect, domestic and community violence, and poverty all contribute to the adultification of low-income youth. Without effective intervention and help, these youth suffer, struggle, and fall into despair and hopelessness. Some young teens cannot manage the emotional, social, and psychological challenges of adolescence and eventually engage in destructive and violent behavior. Sadly, many states have ignored the crisis and dysfunction that creates adolescent delinquency and instead view them as adults, subjecting them to further victimization and abuse in the adult criminal justice system This project examines the relationship between the adultification of poor, minority youth and the overrepresentation of such youth in the juvenile and criminal justice systems. Particularly, Professor Forman looks at the issue of waiver to adult court, and the severity of sentences once the youth are transferred there. This project argues against the prevailing models through which juvenile court jurisdiction is waived in favor of a more rigorous, in-depth and individualized inquiry into the youth and the circumstances of the offense. The current paradigm is over-inclusive and results in arbitrary decision-making which is evidenced by the extreme overrepresentation of low-income, minority youth among those cases that are waived. Even the best model, judicial waiver, fails to adequately take all relevant factors into account. Professor Forman sets forth a new protocol for juvenile court waiver which directly addresses overrepresentation.

Charlotte Garden (Seattle University School of Law) and
Nancy Leong (University of Denver Sturm College Law)
"'So Closely Intertwined': Labor and Racial Solidarity"

Racial minorities have suffered disproportionate hardship as the result of the current economic recession. This is in significant part because of layoffs and hiring freezes in the public sector, as well as cutbacks in diversity programs and documented increases in out-group bias that accompany economic hardship. At the same time, the list of state governments seeking to divest public sector unions of their role in bargaining is growing ever-longer, in part as the result of a political climate that scapegoats and marginalizes union members. These phenomena are generally discussed separately. There are several possible reasons for this separate treatment, including labor's historically ambivalent relationship with minority workers, the existence of a "divide and conquer" strategy that seeks to exploit racial divisions in the working class, and the lack of intellectual overlap among scholars and advocates who aim to advance the interests of labor and those who aim to advance the interests of racial minorities. Yet this separation is, in fact, illusory and unwarranted. This Article bridges these two narratives by exploring the relationship between labor unions and racial minorities in the context of the Great Recession. It discusses unions' potential to foster cross-racial solidarity at work, and how increased unionization is likely to improve pay and working conditions for workers of color. Finally, the article concludes with some observations about the current narrative regarding labor and race.

Michele Gilman (University of Baltimore School of Law)
"Occupy the Supreme Court"

This paper examines how the Supreme Court's jurisprudence would differ if it accepted the tenets of the Occupy Wall Street (OWS) movement. The OWS movement is loosely organized around revealing and rebelling against the causes and consequences of economic inequality. For instance, while the top 1 percent of households received 8.9 percent of all pre-tax income in 1976, that percentage share had more than doubled to 21.0 percent by 2008. For the other 99 percent of Americans, incomes are at their lowest point since 1997, after adjusting for inflation. Not surprisingly, poverty rates have simultaneously increased, and now nearly 1 in 2 Americans have either fallen into poverty or live on earnings that classify them as low-income. As a result, OWS contends that the remaining 99 percent of Americans are left with less social mobility, declining incomes, job insecurity, and an unfair tax burden.

OWS contends that the widening income and wealth gap results from a tainted political system in which the government hands out tax breaks, bail outs, and other economic advantages to banks, corporations, and the super-rich due to their outsized influence on policymakers. While the ultimate success of the OWS movement remains to be seen, it has already dramatically impacted public discourse. Recent public opinion polls reveal greater recognition that our nation's vaunted meritocracy is largely a myth and that structural economic and political factors have much to do with inequality. Will these insights impact the judiciary? While OWS aims its charges at the political system, the movement has not focused on how the judicial system reinforces the economic and political advantages held by the top 1 percent. Politicians may create the system, but courts uphold it.

For its part, the Supreme Court largely ignores economic inequality and in so doing, it maintains the current skewed distribution. Economists have identified four main causes of economic inequality: insufficient education; a frayed social safety net; corporate rent-seeking; and the influence of money in politics. The Article examines the Court's jurisprudence in each of these areas, concluding that the Court generally takes a class-blind view of the Constitution that rejects attempts to redistribute societal benefits while presuming that market-based results are natural, inevitable, and beneficial. The Court generally defers to legislative decisions that contribute to economic inequality, but denies deference to lawmakers' redistributive efforts. While a popular conception of the Court is that it is designed to protect vulnerable minorities at the hands of majoritarian impulse; instead, the Court is helping to protect a very powerful minority at the expense of the majority. This Article examines possible explanations for why the Justices uphold results that foster economic inequality, including the attitudinal and majoritarian models of judicial decision-making. The Article then recommends strategies for bringing OWS insights into social justice lawyering. In sum, this Article is one step to understanding how law intertwines with politics and economics to create economic inequality.

Paul Gowder (University of Iowa College of Law)
"'One Law for the Lion and the Ox is Oppression': Class and the Rule of Law"

In this paper, I argue that the requirement that the law be general ("the generality principle") gives rise to strong demands of economic and social equality. The generality principle, which is conventionally associated with the normative value of the rule of law as well as with U.S. constitutional principles such as equal protection, ordinarily is taken to prohibit formal discrimination in legal rules. In other work, I've shown that the formal conception of generality is philosophically incoherent, and that we ought to take the generality requirement to require that legal distinctions between citizens be justifiable by public reasons, in John Rawls's sense. This paper follows up that previous work by arguing that much ostensibly general law becomes unjustifiable by public reasons, and hence nongeneral, when combined with unequal social circumstances. This can include legal rules often considered to be basic to contemporary societies, such as strong property rights. It follows that the generality principle demands either the abolition of those legal rules (i.e., the weakening of individual property rights) or the abolition of the underlying social and economic inequalities.

Angela Harris (University of California, Davis)
"Power to the People: Environmental Justice Beyond the Crossroads" (with Daniela Simonovic and Camille Pannu)

A tension that has percolated within the environmental justice movement for many years is between its reactive and proactive fronts. Some of the most storied environmental justice campaigns involve efforts to block hazardous projects, or to clean up the damage caused by pollution and environmental destruction. Yet a more proactive, even utopian, strain of thinking also exists within the movement, evident for instance in some of the Principles promulgated at the first national environmental justice conference in 1991. A great deal of the difficulty in encouraging the movement's proactive front, however, has to do with the way "the environment" is governed. Environmental regulation in the United States is governed primarily by the market, and existing property and liability rules ensure that environmental "bads" can continue as long as they are profitable. Not only does attempting to block environmental "bads" mean, potentially, opposing "jobs" and "progress;" environmental justice advocates are pushed into a reactive posture by the fact that (profitable) environmental destruction is the default.

Two new social and political developments, however, have made new space for proactive campaigns that foster the environmental health of poor and minority communities. These are the movements around healthier food production and consumption, and the movement to develop a "green economy," which is linked to a broader international conversation about economic and environmental "sustainability." In this article, we provide a case study of one legal-political campaign in California's Central Valley to illustrate how environmental justice traditionally conceived, food justice, and the movement for economic

sustainability can come together. The "Power to the People" (P2P) campaign being run by the Center for Race, Poverty, and the Environment (CRPE) is an effort to support farm worker communities – mostly Latino and mostly poor – in imagining and implementing a post-agribusiness, "green" economy in the Valley. Our article highlights both the promise of this campaign, and the obstacles it faces, given the dearth of counter-hegemonic thinking about political economy among ordinary folks in the United States.

Osamudia James (University of Miami School of Law)
"Opt-Out Education"

In her 2003 *New York Times Magazine* article, "Opt-Out Revolution," Lisa Belkin presented to the public a narrative that attributed the absence of women from the workplace, in part, to choice: American women were increasingly "opting-out" of the workforce, choosing instead to return to the home. In January of 2011, Kelly Williams-Bolar's choice to falsify records so that her daughters could attend a better public school resulted in a felony conviction. Long before Belkin's article or William-Bolar's conviction, however, feminist scholars have been deconstructing the rhetoric of choice that dominates narratives about women's lives, and society more generally. Rather than exercising individual and autonomous choice that reflects true desires, choice is socially constructed and limited. Moreover, the absence of an understanding of vulnerability and interdependency in social and political life has created a vacuum within which the myth of autonomous individuals is perpetuated, resulting in legal doctrine and public policy that further constrain choices.

Despite these critiques, choice rhetoric has endured, due to its sanitizing effect on inequality and vulnerability: if the result of one's choice is problematic, it was only her fault. As a foundation of American liberal thought, choice rhetoric is utilized beyond women's issues, justifying schemes of private participation and public abdication in any number of policy areas from social security to higher education. School-choice, most recognizably in the form of charter schools, voucher programs, and their lax accompanying regulation, have come to embody public education reform. To the extent that choice is adamantly touted as the answer for poor, working class, and minority communities, students from these communities are predicted to enjoy improved educational experiences as long as they have broadened choice on the education "market." Although school-choice has shown little actual evidence of improving education, poor and minority students nevertheless enroll in charter schools at disproportionate rates in testament to the seductive power of choice rhetoric, encouraged by progressive scholars to do so, and ever mindful of the cultural-deficit models that will place blame for failure squarely at their feet. Like Williams-Bolar, however, these students and their families have less power in the education market, have limited access to quality options in that market, and are impacted by social dynamics that dictate their decisions in the market. These students may, indeed, be "opting out" of traditional public education, but those decisions neither improve educational outcomes nor represent manifestations of genuine choice.

As choice rhetoric is celebrated and advanced in education reform, legal jurisprudence undergirded by the rhetoric outsources public schooling decisions to families and individuals, thus privatizing conversations that belong in the public sphere. This is particularly troubling given the extent to which quality education, and the academic and social lessons it imparts, is dependent on the make-up of classrooms, and the interactions of the students therein. In the meantime, the real impediments to equal access to quality education – segregation by race and class, food and housing insecurity, inadequate financing – are ignored, even as they maximize vulnerability and further limit the very choices that marginalized populations are encouraged to exercise.

In the absence of critical scholarship on choice rhetoric in school reform, this paper considers further the impact of school-choice, using feminist deconstructions of choice, as well as scholarship on vulnerability and interdependency, to explore not only the unique harm that school-choice poses for marginalized students, but also the opportunity for blame-placing that occurs when individual choices fail, the fault lines that are exposed when identity politics collapse under the individualism that choice rhetoric promotes, and the continuing cachet of choice, even when exposed as an illusion.

Lucy Jewel (Atlanta's John Marshall Law School)
"Merit and Mobility: A Progressive View of Class, Culture, and the Law"

Rising income inequality and financial trauma in the middle class beg the question of whether social mobility, long a part of America's narrative identity, is truly available to Americans residing in the lower rungs of society. This paper addresses the connection between culture and social mobility, looking particularly at how culture impacts social outcomes in America's meritocratic educational system. Analyzing culture and cultural capital from a progressive perspective, this paper concludes that culture operates subtly, helping some retain or improve their existing position but interfering with the mobility of others. The rhetoric of individual merit, however, obscures the role that culture plays in reproducing existing social structures.

In the context of merit and mobility, this paper also analyzes class-disadvantage as it relates to affirmative action. As the Supreme Court is set to decide another affirmative action case this term, we are reminded that barriers of disadvantage continue to prevent educational institutions from achieving acceptable levels of diversity. Often operating in tandem with economic and racial disadvantage, cultural disadvantage obstructs mobility in a powerful way. Accordingly, cultural disadvantage, captured using a robust set of socio-economic and race-conscious factors, should be something that institutions consider when formulating diversity plans. However, affirmative action plans, while necessary, cannot be the only solution to the problem. More radical and systemic solutions are needed to reboot social mobility in this country.

Part II of this paper provides a foundational understanding of progressive cultural theory, placing it in the context of the two opposing theories most often used to explain unequal outcomes in America: individual merit versus environmental/societal factors. Progressive cultural theory posits that unequal outcomes are not fully explainable by differences in individual merit. Rather, pre-existing cultural advantages help some advance, but for others, unequal structures produce cultural barriers that impede mobility. Relying upon recent social science research, Part III of this paper examines how culture and cultural capital interact with our merit based educational system; how cultural differences within the middle class impacts social mobility; and how culture interacts with pre-existing structures of racial inequality. As diversity within higher education mostly affects individuals in the middle class, Part IV analyzes what cultural disparities within the middle class mean for the affirmative action debate. Part IV concludes that the Supreme Court, in *Fisher v. University of Texas at Austin*, should reaffirm Justice O'Connor's diversity rationale for using race-conscious measures to achieve a critical mass of minority students but also argues that we should not be trapped into a false choice between racial diversity or class-based diversity.

In grappling with the issues of disadvantage and mobility within the affirmative action debate, I ultimately conclude that the entire merit and selectivity system should be collapsed. Thus, Part V offers some suggestions for making our merit system less insular and more inclusive, including the salvo that successful professionals who have "won" the merit game take a hard look at ourselves and ask whether we are contributing to the trend toward oligarchy.

Lisa M. Kelly (Harvard Law School)
"Narrating Innocent Suffering in Abortion Law"

What role do narratives of poverty, sexual innocence, and family harmony play in abortion law and discourse? And, what are the stakes of these narratives for how we construct and regulate adult and adolescent sexualities at law? This paper addresses these questions in the context of contemporary transnational abortion rights litigation from Latin America. This wave of international advocacy marks the first time that United Nations treaty bodies have considered communications about abortion. I analyze the significance of a specific sexual narrative that weaves through many of these cases: a poor adolescent girl, figured often as a child, is raped, becomes pregnant, and with the support of her family seeks to terminate the pregnancy at a public hospital. When she is denied legal access to abortion, the state emerges as the antagonist. The themes I trace in this narrative are of sexual violation, innocence, and parental beneficence. I theorize the work such narratives perform in distancing abortion from chosen sex, impurity, and family discord. Abortion emerges as an act of compassion, its denial as shameful. Contesting abortion restrictions incrementally in this register of sexual innocence has specific benefits and costs for adolescents and adults, respectively. A clear upside is that these narratives resonate with publics and legal decision-makers in restrictive abortion jurisdictions and internationally. Yet, it may be precisely through their resonance that these narratives reinforce constructions of youthful innocence, deviance and protection that are regularly deployed toward more conservative ends. Reproductive justice advocates emphasize that adolescent access to sexual health services and information remains one of their greatest challenges in Latin America and elsewhere. My work invites us to consider the intended and unintended consequences of the stories we tell in law. I hope in doing so to illuminate the complicated and shifting role of sexuality in abortion law, and of abortion law in sexuality.

Nancy Leong (University of Denver Sturm College Law) and
Charlotte Garden (Seattle University School of Law)
"'So Closely Intertwined': Labor and Racial Solidarity"

Racial minorities have suffered disproportionate hardship as the result of the current economic recession. This is in significant part because of layoffs and hiring freezes in the public sector, as well as cutbacks in diversity programs and documented increases in out-group bias that accompany economic hardship. At the same time, the list of state governments seeking to divest public sector unions of their role in bargaining is growing ever-longer, in part as the result of a political climate that scapegoats and marginalizes union members. These phenomena are generally discussed separately. There are several possible reasons for this separate treatment, including labor's historically ambivalent relationship with minority

workers, the existence of a "divide and conquer" strategy that seeks to exploit racial divisions in the working class, and the lack of intellectual overlap among scholars and advocates who aim to advance the interests of labor and those who aim to advance the interests of racial minorities. Yet this separation is, in fact, illusory and unwarranted. This Article bridges these two narratives by exploring the relationship between labor unions and racial minorities in the context of the Great Recession. It discusses unions' potential to foster cross-racial solidarity at work, and how increased unionization is likely to improve pay and working conditions for workers of color. Finally, the article concludes with some observations about the current narrative regarding labor and race.

Francine Lipman (University of Nevada, Las Vegas)
"Just a Matter of Fairness: Tax Consequences of the Service's Revised Community Property Treatment of California Registered Domestic Partners (RDPs)"

This paper describes the federal tax treatment of California registered domestic partners (RDPs) historically and prospectively. In May 2010 the federal government issued guidance that materially revised the government's prior position of ignoring state law property characterizations and determined that "the federal tax treatment of community property should apply to California registered domestic partners." The paper discusses the tax implications of this guidance on registered domestic partners in California and other community property states (e.g., Nevada and Washington) as well as for the 18,000 same-sex married couples in California. While the guidance recognizes income allocation similar to opposite sex married couples in California, under the Defense of Marriage Act these couples are not considered "married" or "spouses." Therefore, the resulting federal income tax treatment is inconsistent with fundamental tax policy resulting in unintended tax consequences and inequality.

Tayyab Mahmud (Seattle University School of Law)
"Debt & Discipline: Neoliberal Political Economy and the Working Classes"

Over the last three decades, neoliberal restructuring of the economy created a symbiosis of debt and discipline. New legal regimes and strategic use of monetary policy displaced Keynesian welfare, facilitated financialization of the economy, broke the power of organized labor, and expanded debt to sustain aggregate demand. Public laws and policies created a field of possibility within which financial markets extended their reach and brought ever-increasing sections of the working classes and the marginalized within the ambit of the credit economy. Reordered public policies and new norms of personal responsibility demarcated the horizon within which the economically vulnerable pursued strategies to secure their wellbeing. Constructs of individual responsibility and human capital were refashioned to facilitate assemblage of subjects who would engage the financialized economy as risk-taking entrepreneurs. Faced with restructured labor markets, wage pressures, and shrinking welfare, working classes were obliged to fund their basic needs through debt. Engulfment in debt induced self-discipline and conformity with the logic of the financialized economy and precarious labor markets. This ensemble sutured debt with discipline.

Martha R. Mahoney (University of Miami School of Law)
"Class and Law as We Fail to See Them: Current Trends and Developments"

This paper is the fourth piece in a series on class theory and race in American law.* Previous essays defined class as a concept involving relationships between groups (relational rather than gradational, to use Erik Olin Wright's framework) and criticized simplistic concepts of socioeconomic status often adopted in legal scholarship. They also explored the ways in which legal reasoning made class interest invisible in cases involving affirmative action cases and even in cases involving workers and collective organizing.

The current paper briefly summarizes some of the ways in which legal rules affect potential for developing solidaristic class activism and using working class solidarity to build communities. Then, it explores the interaction of law, activism and class consciousness and examines the ways in which class interests are hidden or clarified in a series of recent social and legal developments: the Occupy movement and its popularization of "the 99%" as a framework for shared interest; the increasingly formal treatment of racial classifications in Parents Involved; and the extraordinary expansion of huge amounts of money in politics in the series of cases known generally to the public as Citizens United.

**See* Martha R. Mahoney, *Constructing Solidarity: Interest and White Workers*, 2 U. PA. J. LAB. & EMP. L. 747 (2000); *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003); *What's Left of Solidarity? Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515 (2009).

Saru M. Matambanadzo (Tulane University Law School)
"Queering Social Welfare: Beyond Status and Toward Legal Recognition"

Cultural artifacts of resistance from the Great Recession often depict the current economic crisis through the stories of individuals, like over burdened student loan debtors, or families who have lost jobs and homes. A survey of these narratives reveals almost no representations of gay, lesbian or transgender individuals or families. However, long before the Great Recession, gay, lesbian and transgender individuals and families experienced economic marginalization in relation to their similarly situated heterosexual peers. For example, 64% of transgender people made less than $25,000 per year before the Great Recession. And according to the 2000 and 2010 U.S. Census, the average income for same sex couples raising children is significantly less than the income of a similarly situated straight family. In fact, the Williams Project has reported that children of gay couples are twice as likely to be poor than children of straight couples. Add to this difference the fact that because of DOMA and the insufficient patchwork of state anti-discrimination laws, same sex couples do not benefit from the social safety net or from the benefits packages of many private employers and it becomes clear how many gay, lesbian and transgender individuals and families might fall through the holes in the social safety net. This paper starts first with a query. What do the lives and experiences of sexual minorities, particularly gay, lesbian and transgender individuals, have to teach us about the great recession? To answer this query, the paper first examines the lives of gay, lesbian and transgender individuals in the context of income inequality and highlights the ways in which the economic marginalization of these individuals and their families has been excluded from the larger narrative of the Great Recession. It response to this examination, first, it argues that legal exclusion " particularly the exclusion arising for gay, lesbian and transgender individuals from federal antidiscrimination protections and the exclusion of gay and lesbian families from the traditional social welfare safety net " has had serious economic consequences for these families and individuals in the wake of the Great Recession. Second, this paper argues that this systematic exclusion of gay and lesbian individuals reveals how the structure of "social welfare" in the United States depends less upon a social welfare contract between the state and the individual or family and more upon one's social status. The current social welfare safety net is inextricably bound up with the contingencies of social status. People are economically rewarded (often in the most minimal and meanest of ways) not for being a member of society but for being worthy and deserving in terms of status - for being married, employed, healthy, straight, or appropriately bio-sexed. From this claim, the paper begins to argue for a queering of our current social welfare regime pushing it beyond rewarding status and toward fulfilling the promises of the social contract to all individuals and families.

Martha T. McCluskey (SUNY Buffalo Law School)
"Dreaming the Big Pie: How Efficiency versus Equity Mystifies Class Conflict"

By framing the question of justice as the 99% versus the 1%, the Occupy movement has potential to upend contemporary U.S. legal theory, which instead frames justice as a choice between "dividing the pie" (equity) or "making a bigger pie" (efficiency). The seemingly neutral definition of equality as a goal fundamentally distinct from economic growth sets the stage for a virtually unchallenged jurisprudence of the 1% – a jurisprudence resolutely centered on class blindness even while appearing to remain open to class concerns. My paper will use the Occupy vision to critique this mainstream framework and to develop an alternative that rejects the fundamental concept of "bigger overall pie" abstracted from equity concerns in dominant legal theory. It will show how attention to class inequality gets deflected in this framework and why examining these underlying concepts are important to reviving effective class analysis in law. My presentation will also develop this question of re-framing the dream of "big pie" by applying it to a local example of involving the diversion of state funds and authority from public higher education and public workers to support the politics of the 1%. That example shows how class conflict or politics gets masked in the public debate about economic development and government spending, even while public employees' unions effort to enforce neutral standards of ethics get constructed as improper class politics.

Audrey McFarlane (University of Baltimore School of Law)
"The Upscale and Subprime Dilemma: Race, Markets, Development and Dispossession"

If you can't be rich, at least you can feel rich. David Siegel, Queen of Versailles (2012) (film)
"All life, no matter how we idealize it, is nothing more or less than exploitation." Nietzche
"there is no alternative [to capitalism]" Margaret Thacher
"The space for predatory behavior is uniquely American." Audience member at writing workshop.
"Why is everyone running away from black people?" AGM
"Justice? Just us." Richard Pryor

The black-white paradigm has been the crucial paradigm in racial geography of land use, housing and development. In light of the reality that economic development utilizes redevelopment to meet the social needs and consumption tastes of the affluent, the issue of local governments' autonomy to engage in redevelopment for economic development purposes is really about an under-acknowledged socioeconomic class struggles over land use. For example, the eminent domain debate, steeped in the language of property rights, lacks language and conceptual space to address what is really at issue in today's cities: complex, fundamental disagreements about market, race, class and community. Instead we have development that is skewed upscale and skewed towards the interests and tastes of the affluent. The mechanics of exclusion in the formulation and operation of today's commercial retail shopping venues typically included in today's urban redevelopment projects have become high art.

Accompanying this reality is a powerful yet under-recognized counter-reality, a recurring instability experienced by minority property owners in ownership of their homes. The subprime mortgage crisis reflects a policy embrace of markets that ignores the reality that real estate markets are racially segregated, and due to the nature of those disparate markets, easily subject to predatory exploitation. The racially concentrated subprime mortgage crisis revealed longstanding truths: that fraud, exploitation, and desperation are not anomalous. This suggests there is a dark side of economic development and property ownership: that concentrated affluence and an obsession with the upscale accompanied by fraud, exploitation, and desperation are the bad that enables the supposed good of markets. Because this "bad" is both ubiquitous and geographically situated, it suggests that stability for some is provided at the expense of instability for others.

Teresa Miller (SUNY Buffalo Law School)
"Bright Lines, Black Bodies: The Florence Strip Search Case and its Dire Repercussions"

In April 2012, the Supreme Court decided *Florence v. Board of Chosen Freeholders of County of Burlington*, a case involving a Fourth Amendment challenge to categorical, suspicion-less strip searches conducted by jails. Justice Kennedy, writing for the slimmest majority, held that jails could conduct such searches on any individual booked into the general population of a jail without violating the Fourth Amendment. The opinion departed from the reasonable suspicion standard for strip searches that had was followed for several decades and, until very recently, was the policy of the federal circuit courts of appeal. Kennedy erred in his selection and interpretation of precedents, many of which addressed very different situations than the case at a hand, and his opinion also diverged from the Court's position in recent Fourth Amendment cases involving arrestees. After reviewing the history of Fourth Amendment case law and considering Kennedy's decision and its supporting precedents, this paper will address four major points in regards to the Florence decision and the plight of Albert Florence, and future arrestees. First, Albert Florence's arrest and detention was predicated on law enforcement's overreliance on information databases, which in this case contained inaccurate information. Second, strip searches are degrading to those subjected to them and in the vast majority of cases are simply unnecessary. The bodily submission, surveillance and inspection entailed in strip searches eerily resembles previous rituals of coercive, discriminatory race-making, especially those associated with slave markets. Third, Kennedy's endorsement of categorical rules and "bright line" tests as constitutional guides for law enforcement practice puts far too much discretionary power in the hands of law enforcement and invites abuse of authority. Restriction of these kinds of rules has in fact marked recent Fourth Amendment decisions involving searches of arrestees and their belongings. Finally, the Florence decision and categorical strip searches both exemplify policies informed by fear, which oscillate between depictions of inflammatory dangerousness and super villains, like Timothy McVeigh, and hyper-vigilant, risk management. The paper concludes with a discussion of the possible repercussions of Florence on future Fourth Amendment litigation involving jails and prison.

Frank Munger (New York Law School)
"The Wal-Mart Law School"

This will be a brief reflection inspired by an article by John Nichols in the JOURNAL OF LEGAL EDUCATION eight or nine years ago describing well-documented class-inequity and class-injustice caused by law that is never conveyed to law students. The recent debate about the overpricing and underperforming of law schools because so many graduates cannot find work is likely to exacerbate the problem that Nichols describes. My first purpose is to update Nichol's indictment and my second will be to speculate about the impact of the job market crisis, and the on-going debate about accreditation standards, on law school curriculums and on the faculty most likely to be address class inequity and class injustice through their teaching.

Athena Mutua (SUNY Buffalo Law School)
"Banana Republic USA: The Intersections of *Citizens, Ricci, Carhart* and *Fisher* (?)"

This paper, likely part of a longer work, examines the legal and political linkages and possible long-term consequences of the Supreme Court's most recent cases involving issues of class, race, and gender. It suggests, that the conservative majority's decisions re-inscribe traditional social hierarchies for the purpose of facilitating a conservative political agenda. This agenda in part seeks to solidify white cultural corporatized rule in the context of a globalized world and increasingly American demographic diversity. It justifies these decisions in part by denying any moral, legal or common sense difference between practices of management and labor, living persons and artificial persons or unborn fetuses, and race awareness and racial oppression. The effect, in the short term, is a working coalition of people and groups with varying interests, who support aspects of the overall agenda which, as Kevin Kruse notes, includes limited government, "individual rights over communal responsibilities, privatization over public welfare" (including the privatization of public services, resources, and the commons), "and 'free enterprise' above everything else." Together these policies support the accumulation of wealth by the individual – but more likely the corporation. The possible long-term effect is to render the United States a Banana Republic.

More specifically, in most of the cases explored in this essay, the Court's conservative members have prevailed. This paper suggests, as others have, that these members seek to reinforce and cement in social structure through law, the goals and ideology of a conservative movement shaped by the backlash against the civil rights and other social movements of the 1960s. It argues that these goals and cases re-inscribe hierarchies that privilege rich over poor, white over black, and men over women. They do so, in part for some, out of political and religious belief but also out of political necessity. That is, that corporatized governance, itself culturally white and a goal furthered by the *Citizens United* case, can only be accomplished, in this historical moment of globalization and white rule but increasing American diversity, through shrinking democracy and divide and rule politics.

The Court justifies the legal outcomes of these cases in part, by discounting any difference between "a welcome mat and a trespass sign," – to use Justice Stevens' words. Said differently, these members choose not to see or to minimize any moral or legal difference between management and labor, living persons and artificial persons or unborn fetuses, and race awareness and racial oppression. While the collapse of these differences is factually wrong and readily apparent in most cases, this argumentation not only supports corporatized state governance, meant to sustain if not augment the short-term profits of the few at the long-term expense of the majority but also supports color-blind racism and equality-bound sexism. The potential outcome of the success of these Court-facilitated policies, given the current state of the world, is the Banana Republic of the USA, whereby profits are privatized, debts socialized and borne by an improvised working class who earn money, instead of making it, for the benefit of the private commercial enterprises of the oligarchy, plutocracy, plutarchy, or whatever one might call them.

Julie Nice (University of San Francisco School of Law)
"The Price of No Rights"

This paper explores the price of having no rights, which is the status of have-nots in the U.S. The paper seeks to respond to the arguments of law-and-economics thinkers, such as Judge Richard Posner and Professor Lynn Baker, who defend the extant distribution of wealth by arguing that the law is "a pricing mechanism designed to bring about an efficient allocation of resources." Specifically, I consider whether New Governance or New Realism offer a theoretical framework for a rebuttal of Law-and-Economics.

Fernanda G. Nicola (American University Washington College of Law)
"Reclaiming the City: Substantive Equality and Territorial Justice in the EU"

Even though the Lisbon Treaty represents a milestone for European political integration with the Charter of Fundamental Rights and the explicit inclusion of localities in the subsidiarity principle; yet the European financial crisis is threatening to dissolve the Union, exclude its poorer members, strengthening the executives of the Member States and introduce new penalties to punish the violators of the public deficit ceilings. The financial crisis and the occupy movements have sparked new interest among legislators, politicians and judges to address the conflicting tensions in conceptualizing cities as actors for European Integration. Cities offer on the one hand a promise for the rebirth of the Internal Market as the sites where industrialism and neoliberalism have flourished; but on the other they represent political communities expressing, with the Occupy movements, resistance to European as well as global markets for creating massive inequalities. In a similar way, the economic development model of European regional policy, that has successfully become a global model for economic development, has to reconcile cities as actors able to create new capital influx versus sites of urban despair. While cities have been romanticized as the sites where free movement takes place, however those who are stuck and live in poor neighborhoods or deprived regions have to negotiate benefits daily with local, state and European regulators. This essay offers criteria of substantive equality to ameliorate the territorial condition while enhancing the capabilities of those people living in the European peripheries.

Shu-Yi Oei (Tulane Law School)
"Collecting in the Shadow of Bankruptcy Law: The Case of Tax Debts"

This paper explores the relationship between the design of administrative-level tax collections policies and procedures and federal bankruptcy law. It asks how the IRS's processes for actually getting its hands on the tax owed in the case of taxpayer default or distress should be designed and should occur, when considered in conjunction with the interests and dictates of federal bankruptcy policy. Conversely, it also considers how the treatment of taxes in bankruptcy should relate to the operation of tax collection – particularly tax collection in cases of taxpayer default or financial distress – outside of bankruptcy. At core, these questions are simply a specific iteration of the question of how the design of creditor enforcement rights under non-bankruptcy law (usually state law) should relate to the design of these rights under federal bankruptcy law. The answers partially turn on the goals of the bankruptcy statute. They also turn on how one understands the objectives and functions of the tax collector with respect to defaulting or distressed tax debtors, both independently and in relation to bankruptcy law.

Jessie Owley (SUNY Buffalo Law School)
"The Perils of Neoliberal Land Conservation"

Private land conservation programs in North America tend to convey the greatest benefits to those who are already relatively well off in terms of land, wealth, and quality of life. For example, conservation easements"the fastest growing method of land protection in the United States"reward landowners with cash payments and tax breaks. At the same time, these programs tend to focus protected land in areas with low densities. Conservation easements are part of a worldwide trend of compensating landowners for environmental services and amenities. A soft environmental policy, they reinforce the neoliberalization of conservation. Neoliberalism restructures conservation tools to facilitate the spread of market-based mechanisms. Commodification of the landscape to make it fit more easily into a free-market system neglects to consider equity and justice. This article examines the trend of neoliberal conservation in the United States, using the example of conservation easements to illustrate the enthusiastic embrace of neoliberal tools along with reasons to caution against this view of the environment. While largely arguing against the parcelization of property rights to address environmental concerns, the article concludes with an effort to re-envision conservation easements as tools promoting, instead of hindering, social justice.

James Gray Pope (Rutgers University School of Law-Newark)
"The Supreme Court, the Betrayal of Reconstruction, and America's Tangled Knot of Race and Class"

By any objective standard, *United States v. Cruikshank* (1876) would be prominently featured in our mainstream constitutional narrative. It was *Cruikshank*, not the far more famous Civil Rights Cases, that first limited the Fourteenth Amendment to protect only against state action. And it was *Cruikshank*, not the notorious Slaughter-House Cases, that narrowed the privileges and immunities clause of the Fourteenth Amendment to exclude the rights enumerated in the Bill of Rights. Finally, *Cruikshank*, not *Washington v. Davis*, first announced that the Fourteenth Amendment's equal protection clause and the Fifteenth Amendment's ban on racial exclusions from voting protected only against provably intentional race discrimination. Jurisprudentially, then, *Cruikshank* may well be the single most important civil rights case ever decided by the Supreme Court. In this paper, I argue that *Cruikshank* was as momentous in its social as

in its jurisprudential impact. In the short term, *Cruikshank* put an end to Reconstruction. In the long term, *Cruikshank* fostered racial schisms in the American working class that persist today. Moreover, intentionally or not, the omission of *Cruikshank* from our constitutional narrative has tended to validate those schisms. In the featured cases of our canon, civil rights claimants are middle class or classless, while workers are white. By contrast, the facts of *Cruikshank* reflected the reality that then, as now, the overwhelming majority of African Americans belonged to the working class. Finally, the omission of *Cruikshank* allows us to forget that, in the crucial decades following the Civil War and emancipation, the Supreme Court chose to place the interest of employers in controlling labor above the interests of African Americans in freedom from the most vicious, bloody, and systematic unofficial terrorism in American history.

Anne E. Price (The Insight Center for Community Economic Development)
"What Will it Take to Restore Prosperity for Communities of Color?"

We are witnessing the greatest stripping of wealth among communities of color in modern history and ever growing racial wealth disparities. A Pew Research Center report released last summer shows that the median wealth of American white households is 20 times that of African American households and 18 times that of Latino households. During the recession, Latinos lost a staggering 66 percent of their wealth and blacks and Asians lost over one-half of their wealth, compared to just 16 percent of wealth loss for whites. There are many reasons for growing racial wealth disparities. American policies of mandated discrimination, segregation, and wealth seizure negatively impacted communities of color. But policies of exclusion cannot be discounted as relics of our uneasy past. They form the cornerstones of our ongoing policies, such as the discriminatory mortgage lending still happening today, and ensure that certain groups reap a greater share of all America offers while others are intentionally left out. The participants in this session will engage in a dynamic, roundtable discussion lead by members of the Experts of Color Network, a national network of the leading minds on asset building from the African American, Asian American, Latino, and Native American communities. Drawing upon a new report that explores the relationship between education, race and wealth, panelists offer strategies to tear down unfair barriers to economic security and narrow the racial wealth gap for the next generation. The panelists will discuss the set of aggressive wealth building policies needed now to restore prosperity by mid-century and explore how communities of color can begin to recoup losses in wealth focusing on areas such as housing, land, employment and retirement.

Lisa R. Pruitt (University of California, Davis)
"Diminishing Access to Higher Education and the Elusive American Dream"

[no abstract]

Jessi Quizar (University of Southern California)
"Farming in the Motor City: Crisis, Food Sovereignty, and Alternative Imaginaries in Detroit"

Detroit's growing grassroots agriculture movement, particularly those farms which advocate for food sovereignty and black economic self-determination propose a very different vision for the future of the city than do typical urban development advocates in the U.S. While these projects have grown out of need for accessible healthy food in the city, their visions for the city extend far beyond food security to such issues as cultural and economic sovereignty, land redistribution, and a serious questioning of the underpinnings of a capitalist economy that has failed so dramatically in Detroit. Drawing from post-development theory from the global South, as well as critiques of urban development literature in the North, this study examines the urban agricultural projects in Detroit whose roots lie in radical black and labor movements in the city, through participatory mapping, ethnography, and interviews. Conversations and strategies around development in both the global North and the global South tend to revolve around particular views about what is a "good city" and ultimately what it means to life a "good life," generally defined by such markers as high GDP and integration into a global economy. The visions and analysis of radical Detroit farmers of what it means to be a "good city," and to live a "good life" in that city call these ideas into question, and they ultimately offer a critique of development for a city that has long been in economic crisis.

Rachel Rebouché (University of Florida Levin College of Law)
"Prenatal Genetic Testing and Sex Selective Abortion Bans"

Questions about the use of abortion to select the sex of a child have received considerable attention lately. In June 2012, the House narrowly voted against PRENDA, the Pregnancy Non-Discrimination Act, which would have criminalized abortions performed because of the fetus's sex. Eight states debated similar bans in 2012, and four states already prohibit sex selective abortion. This attention is due partly to the introduction of a new prenatal genetic test that can determine the fetus's sex much earlier in pregnancy – at five to six weeks. This non-invasive test does not depend on an ultrasound image or amniocentesis, but rather a simple blood sample collected from a pregnant woman.

However, evidence of sex selection practices in the United States is unclear. A study undertaken in 2011 suggests that sex selective abortion may be a concern within certain ethnic populations. But there is no clear evidence that these reproductive practices actually take place on a large scale or across communities. Without better proof of sex selection in the United States, bills like PRENDA rely on comparisons to practices abroad, such as in China and India. Perhaps more importantly, legislators opposed to abortion invoke feminist discourses to defend sex selection bans. Bills refer to the problems of gender inequality that make son-preference a global phenomenon; imagine a world in which men outnumber women with violent, destructive consequences; and forecast increased prevalence of prostitution and sex trafficking resulting from selection practices.

I will consider what the co-optation of gender equality arguments portends for the introduction of non-invasive prenatal genetic testing and how politics of the sex selection debates might shape issues like informed consent and genetic counseling moving forward.

René Reich-Graefe (Western New England University School of Law)
"Deconstructing Corporate Governance: The Mechanics of Trusting"

The phenomenon of trust among firm participants is a much neglected academic inquiry in corporate governance research and the theory of the firm. This Article elaborates on the comparatively small sample of existing legal research on the intersection of trust and corporate governance and tries to interrupt the selective (in-)attention given to the philosophical, psychological, political, sociological, economic and legal phenomenon that is our individual as well as collective everyday trust (or distrust) in the functionality and explainability of the world tomorrow in accordance with our preferences of today and our experiences of the past. Trust – as a phenomenon – is a concrete but severely underappreciated reality for the success of corporate investments and the accountability of corporate management. It constitutes part of a complex solution for encouraging investor confidence in the face of absolute decision-making power of corporate directors. Trust efficiently combines and balances otherwise unrestricted managerial power with a robust measure of accountability of corporate management – a measure which is entirely elusive within the realm of corporate governance law. It thereby provides a sophisticated, yet poorly understood, remedy to the most significant but unresolved academic dilemma in corporate governance theory – namely, the lack of predictive ability of existing microtheoretical models of the firm. This Article primarily discusses trust (and trustworthiness) as a mechanism, not as a virtue. By focusing on the procedural and substantive mechanics of trusting as a phenomenon, this Article explains the cohesive power and low-transaction-cost functionality which is built into successful exercises of trusting for purposes of encouraging and establishing pervasive corporate investments as the rational-choice baseline for voluntary firm participants.

Brishen Rogers (Temple University Beasley School of Law)
"A Legal Theory of Class"

In response to growing divides between rich and poor, both within and among nations, recent years have seen a resurgence of interest in economic inequality and class divisions among both liberal and left legal scholars. Yet there appears to be little, if any, consensus regarding the salience of "class" as a category of analysis. Liberal egalitarians tend to consider economic inequality as a serious barrier to social inclusion, but tend not to discuss class. While left scholars do discuss "class," some use the term interchangeably with "inequality," while others focus on the interrelation among class, nationality, race, gender and other identity categories. None of these groups, in other words, articulates what is unique and analytically powerful about "class" per se. This article seeks to do just that. It argues that class and economic inequality are distinct in ways that are important both analytically and normatively. Drawing from various sociological theories of class, the article defines class as (a) a persistent system of social hierarchy; (b) which emerges out of – and reinforces – differences in groups' economic resources and access to economic resources; and (c) which substantially limits individuals' life chances. This inequality/class distinction – which seems implicit in many left scholars' analyses – is thus somewhat analogous to the sex/gender distinction, and to the distinction between race as biological difference and race as social category. Class, in this view, should be of significant concern to liberal egalitarians, insofar as it substantially limits individuals' life chances based upon morally arbitrary differences. To demonstrate the utility of this conception, the article considers several elements of labor and employment law, the field I know best, though far from the only field in which issues around inequality and class emerge. While both liberal and left scholars have often considered labor and employment regulations to be means of limiting economic inequality, the article argues that they can often better be explained as means of limiting class division.

Brian Sawers (University of Maryland Carey School of Law)
"Property Law as Labor Control in the Postbellum South"

During the nineteenth century, the landowner's right to exclude expanded while public rights contracted. Since first settlement, unfenced land was open to public grazing, fishing, and hunting. Later, states closed the range and granted landowners the right to exclude the public from even unused land. In most parts of the country, the impetus for closing the range was economic. In the South, however, states moved quickly after emancipation to restrict the economic opportunities of newly-freed slaves, including denying them access to unfenced land. Racial animus was not the only motivation; new laws coerced newly-freed blacks into returning to the fields and suppressed wages. The historical experience of the South conflicts with the optimistic narrative favored by lawyers and economists, which emphasizes the supposed efficiency of the broad private property rights.

Paul Secunda (Marquette University Law School)
"The Wagner Model of Labor Law is Dead, Long Live Labor Law"

This paper concerns the labor law aspects of both the Wisconsin public sector labor protests and the Occupy Wall Street movement. In particular, this paper will discuss how the current structure of labor law under the Wagner Act magnifies, rather than alleviates, class conflict in the United States. After describing the story of the Wisconsin labor protests from an insider's perspective, this paper will discuss how these reforms had no connection to the global economic recession. It will conclude by discussing normatively why unions are so vital to the democratization of our workforce and remain an essential element of the Occupy Wall Street Movement.

Lahny Silva (Indiana University School of Law)
"The Best Interest Is The Child: A Historical Philosophy For Modern Issues"

Thomas Majcheski, a fourteen year-old, was arrested for stealing. The arresting officer told the judge that the boy's father was dead and his mother could not leave work to come to court. It was discovered that the boy was never arrested prior to this incident and the boy subsequently admitted the crime. The judge had three choices at this juncture: dismiss the matter, placement of the child in a detention facility, or transferring the matter to adult court. The judge decided to place the boy in a detention facility because at the very least the boy would receive schooling. Suddenly a man from the audience shouted declaring the sentence inappropriate. With that, the judge asked the man if he would take charge of the boy to which the man accepted responsibility. The boy was then placed in the man's charge. The year was 1899 and the prevailing philosophy at the time was not punishment of America's youth but the "best interest of the child."

In the new millennium the United States is forced to confront a costly and overburdened prison industrial complex which has resulted in the deleterious phenomenon referred to as "the era of mass incarceration." While adult offenders comprise the majority of those incarcerated, America's youth adds to the number of individuals imprisoned. Over two-thirds of America's youth ordered into residential placement or are confined to secure facilities while the remainder are kept in detention halls. For those youth detained, they are in effect imprisoned.

The types of crimes that many of these youthful offenders are accused of committing are non-violent offenses ranging from stealing to possession of marijuana to vandalism. In fact, over sixty percent of the crimes committed by juveniles are non-violent with most offenses committed after school hours. While state lawmakers have noticed a decrease in violent crime among juveniles, many have refrained from advocating a "best interest of the child approach" and instead have maintained a focus on law and order thereby allowing for frequent secured facility and detention center placement based on non-violent offenses.

This article advocates for a return to "the best interest of the child" approach based on fresh empirical data demonstrating the ways in which alternatives to detention including community based interventions and services, psychological treatment and counseling, as well as education and life skills, may better serve the child. While popular in the early 20th century, "the best interest of the child" no longer serves as the springboard for juvenile justice policy. Instead, juvenile justice has taken the form of a modified adult criminal process resulting in the incarceration of numerous youth. When released, these children are often faced with problems reintegrating back into their respective communities. With this, this article also calls for the implementation of workable transitional re-entry programming on the back-end of the juvenile justice process. While some programs do exist, they typically do not have a significant effect on juvenile recidivism nor do they provide the treatment and counseling that many of these youth desperately need. With a return to "to the best interest of the child" approach as the primary philosophy guiding juvenile justice policy coupled with strong transitional programming for those youth placed in detention facilities, it is possible that juvenile justice in America could place many misguided youth on the right path.

Phyllis C. Smith (Florida A&M University College of Law)
"Exploding Wealth and Income Inequality and the Failures of the Taxing System"

An objective evaluation of our tax policies, as a whole, reveals our current system is grossly imbalanced. Even though the structure of the tax system is labeled as a progressive system, the reality is our system, in operation, is a regressive taxing system. The benefits and treasures of society flow to those of greater wealth while the burdens of raising revenue are squarely shouldered by those with less wealth. Tax policies have shaped the tax structure and economic climate and overwhelmingly favor the wealthy, propertied taxpayers. To that end, out taxing system has failed. This paper will discuss specific tax policies that work in collusion to systematically shift wealth to the wealthiest taxpayers. This paper offers proposals to reverse the phenomenon, by shifting the greater burdens to those who reap the greater benefits by measured reforms to move toward the ideal progressive taxing system thereby bringing about social justice.

Jennifer Taub (Vermont Law School)
"The Great Betrayal"

After the burst of the housing bubble, the federal government decided to bailout large financial firms and allow underwater homeowners to sink. Policies such as bankruptcy reform to permit bankruptcy courts to impose principal reduction and mortgage modification would have prevented millions of foreclosures. This presentation will focus on that lost opportunity, which is the subject of my in-progress book entitled *The Great Betrayal*.

Zephyr Teachout (Fordham Law School)
"Antitrust and Political Equality"

This Article addresses itself to two of the most significant political moments in the last five years: the Supreme Court decision in *Citizens United v. FEC*, and the 2008 bailout of the "Too Big To Fail" companies. It proposes that in light of these two watershed moments, new antitrust laws with absolute size caps should be enacted. Limiting company size might do more to stop the financial takeover of the political process than efforts to limit donations. It presents several hypotheses about the relationship between political rules and corporate rules, arguing first and foremost that corporate rules are political rules, and should be treated as such, and understood in terms of their impact on democratic design. Second, it argues that large-scale companies have unjustifiable advantages in the political marketplace because of their size, and engages the rent-seeking literature, using models to show why spending money on politics becomes cheaper and more likely with size. The model suggests significant economies of scale in the production of political power, and therefore greater incentives for larger companies to spend money seeking wealth through changes in laws and regulations instead of innovation and development. Third, it proposes new laws that would limit the absolute size of all limited liability companies. The laws would be enforced through the antitrust framework, but also rely on the self-enforcement of liability rules (companies over a certain size would lose limited liability). Fourth, the Article anticipates several objections to the proposal, including the objection that limiting size would be harmful for our economy.

Matthew Titolo (West Virginia University College of Law)
"Leasing Sovereignty"

Infrastructure privatization is in the news. Pennsylvania, California, Colorado and Indiana, among many other states and municipalities, have in the past ten years privatized-or attempted to privatize-toll roads, parking meters and other public infrastructure. State and federal policy has encouraged these public-private partnerships and infrastructure privatization. We've been here before. Private development of public infrastructure was common in states and municipalities in the nineteenth century. This was typically done through granting corporate charters and franchises. Widespread disillusionment with failures of many of these ventures led to a public finance counterrevolution in the twentieth century. Privatization re-emerged in the 1980s and 1990s. Headlines such as "Why Does Abu Dhabi Own All of Chicago's Parking Meters?" and "Cities for Sale" attest to the continuing controversy surrounding these arrangements.

Ellen Dannin provides the most extensive academic critique of infrastructure privatization contracts to date. The typical agreement can run over a hundred pages, span the better part of a century, and include contract terms that make the public the guarantor of the contractor's risk. Such provisions may curtail otherwise routine exercises of sovereign power that would disturb the contractor's revenue stream. Dannin identifies three clauses designed to reduce contractor risk by limiting the range of government action. First, "compensation event" clauses require the government to pay the contractor when certain triggering events occur, such as an emergency road closure. Second, non-compete clauses prevent the government, for example, from building or repairing competing infrastructure. Third, the contractor retains the right to object to government decisions that affect the profitability of the contract. Each of these provisions requires the government to exchange some quantum of sovereign power for up-front cash payments desperately needed to cover short-term budget shortfalls – a need all the more acute in the aftermath of the financial and real estate crises.

This paper builds on Dannin's work by supplying a legal analysis of one of the more troubling feature of infrastructure contracts: non-compete clauses. In one such clause, a Colorado lease allowed the contractor to object to proposed road improvements that could divert traffic away from the leased toll road. In another, the

Chicago parking meter concession, the contract required the city to agree not build additional parking meters within one mile of the concessionaire's leased meter. The relevant constitutional and common-law doctrines include the Contracts Clause, the reserved powers doctrine, legal prohibitions on alienating sovereignty and the inherent police powers of the state. I conclude that the non-compete terms in infrastructure contracts run afoul of deeply-rooted common law and constitutional principles. If we are going to pursue public-private infrastructure deals we need to preclude terms that allow the alienation of sovereignty. To be sure, there is no clear line separating the acceptable limitations on government power that are inherent in every government contract from excessive and unacceptable alienations of sovereignty. Governments as a general rule must fulfill contract obligations like anyone else. But there is a deeper principle at work here. A necessary and inherent tension exists between two roles of government: government as sovereign trustee of the public interest and government as equal counterparty in private contract. Because the government is not just a private party, advancing the broader public interest-however difficult to define-is not precisely symmetrical with advancing aggregate private interests. I argue that whatever their purported financial viability, our common law and constitutional norms limit the scope of public-private arrangements. I end by discussing promising developments in several states that have attempted to rectify the inherent legal problems with non-compete clauses. I recommend that states contemplating public-private infrastructure deals follow the lead of the federal government and several states in eliminating non-compete clauses from infrastructure contracts.

Eli Wald (University of Denver Sturm College of Law)
"The Class Opportunity"

This paper explores the role and meaning of class and its interplay with ethnic and racial identity to examine the experience of minority lawyers at large law firms.

Camille Walsh (University of Washington, Bothell)
"'We Are Tax Paying Citizens:' Race, Resistance and School Taxes from the Great Depression to the Great Recession"

This article argues that a discourse of "taxpayer citizenship" was consistently deployed by both advocates of school equality as well as those defending racial inequality in numerous instances in the 20th century. African American individuals and families writing to the NAACP before Brown used "taxpaying citizen" language to argue for a more inclusive and equal society, rooting their claims in an idea of taxpayer status that could be part of a social justice movement. Segregationists, however, claimed the right to unequal and separate schooling based on the supposed proportionality of taxes paid by white and black taxpayers, an argument that echoes today in the rhetoric of many seeking to justify unequal funding. This legal consciousness of taxpayer citizenship and taxpayer rights to education drew on the nature of property-tax school financing to entrench fiscal inequality in public schools even as the formal legal protections for racial segregation were eroding. Ultimately, by premising their claims of a right to education on participation in taxation, both sides facilitated an idea that public school resources should legitimately be linked to the amount of taxes and taxable wealth in a community, an idea that simultaneously solidified the racialization of "taxpayer citizenship" language and entrenched the idea that the proportionality of the tax burden was an excuse for disproportionate resources in public education.

Ahmed White (University of Colorado School of Law)
"The Little Steel Strike and the Limits of Labor Reform"

This paper derives from book the author is writing on the history of the Little Steel Strike of 1937. It draws from the course of the strike and the litigation and political conflicts surrounding it lessons about the limits of labor law reform in liberal society.

Alan White (CUNY School of Law)
"Banks as Utilities"

Banking is an industry whose "product" consists of trading in IOU's, a commodity whose value ultimately depends on the state's willingness and ability to honor those IOU's through taxation. The Dodd-Frank financial reform ratifies the massive concentration of the United States banking industry in private hands, does little to separate the vital payments and savings intermediation functions from speculation, and virtually guarantees future taxpayer bailouts while paying lip service to ending them. Utility regulation is founded on the theory of natural monopolies, i.e. that in some industries, economies of scale and large capital costs will result more or less inevitably in monopoly, and thus competition cannot be relied on to achieve fair and efficient pricing. This paper will evaluate a utility regulation model for retail banking as an alternative to either an antitrust model, i.e. breaking up big banks to foster competition, or partial de facto nationalization and oligopoly with limited prudential and consumer protection regulation, the current path. I will consider the problems of capture and interest group politics raised by public choice theory, and consider the likely distributive effects of the various alternatives.

James G. Wilson (Cleveland-Marshall College of Law)
"Applying the Public/Private Distinction to Modes of Production"

Who should control the intermediary institutions that produce goods and services? For the past two centuries, socialists and communists have recommended public control, while capitalists have advocated private control. Some extend the argument: Plato wanted to eliminate families, which created private personal lives. Many contemporary conservatives believe that the public sphere should be limited to coercion – against invaders, internal criminals, revolutionaries, and purveyors of fraud. This project originally followed that path, asking how and why private power has been able to successfully defeat so many ideological enemies (religious, philosophical, economic, republican, and environmental) for over two thousand years.

The project sought answers in ancient texts. Homer's *Iliad* and *Odyssey* demonstrated that the public/private distinction is a powerful descriptive tool but not always a useful normative device: the ancient Greeks divided up the public and private realms in ways that we might either admire or find bewildering. For example, they created the public assembly, private personal property, but had little notion of public enforcement of private rights.

If one considers our problems from an environmental perspective (the ultimate struggle between the few humans and the rest of the earth), we probably would be facing a crisis irrespective of allocation of ownership. Once the scientific revolution combined its discoveries with cheap fossil fuels, the species had access to an extraordinary amount of power, power that corrupted as well as liberated. Unless we accept the status quo or merely complain about its excesses, we need to imagine, in some detail, alternatives that might resonate in this particular society. The Buddha's notion of "righteous wealth" provides guidance. Some wealth is legitimate so long as it does not involve harming and the entrepreneur treats the workers decently and respectfully. Gibson Guitar appears to be an example of humane private power that encourages creativity through the profit motive. Some public institutions and worker-owned companies are very productive. The Green Bay Packers, owned by the city, have been very successful.

The real issues may be size and capital mobility, not public and private: we need to transform existing anti-trust law and corporate charters to ground and limit corporations of all types (public, private, hybrid, worker-owned). In other words, competition among smaller units would trump the "free market," which currently means the ability of concentrated private power to destroy such commons as the environment, local communities, the public arena, and the market system itself. Americans like competition and are wary of big institutions. Unfortunately, any such changes will increase the power of the State: it must develop rules to prevent free riding, corruption, and excessive size. To some degree, the rules will vary by industry. There are innumerable implementation issues, such as determining the effect on the present value of many securities that are the foundation of many pensions. But I don't think our existing system can last; it is failing the basic environmental standard of turning the world into a better place. Efficiency, defined as creating the maximum amount of goods and profit for the least cost, is not the same as effectiveness, defined as a humane, stable community based upon love, compassion, and hard work.

Rebecca E. Zietlow (University of Toledo College of Law)
"Is There A Constitutional Right to Organize?"

This talk will ask the question of whether workers have a constitutional right to organize into unions, based in the First and Thirteenth Amendments. The Thirteenth Amendment reflects the broad free labor ideology of the antislavery activists who formed first the Free Soil, Free Labor Party, and then joined the nascent Republican Party. The argument in favor of a constitutional right to organize cannot be based solely on an originalist interpretation of the constitution. The proponents of the Thirteenth Amendment did not take a position on labor unions, and neither did the Free Soil party platforms. These omissions are due to the fact that labor unions were not widespread during the Civil War era, and industrial labor unions were virtually non-existent in the United States at that time. Nonetheless, the Free Soilers advocated a broad view of workers' autonomy. Labor leaders in the late Nineteenth Century seized on that aspect of the Free Soil ideology to claim that the Thirteenth Amendment protected the individual workers' right to organize. They also drew on the First Amendment for constitutional support, claiming a collective right to freedom of expression which could only be protected through collective action. Members of Congress evoked their arguments during debates over the National Labor Relations Act, which created a statutory right to organize. The right to organize is a crucial tool for remedying class discrepancies in our society. Indeed, the widening gap between rich and poor in this country in the past several decades has coincided with the decline in union membership. Recently, the question of whether workers have a constitutional right to organize has taken on a new level of importance since state governments have enacted measures restricting that right to public workers. Other states are now enacting "right to work" measures that further limit the scope of the right to organize. To some degree, the answer to this question depends on one's theory of constitutional interpretation. No court has ever identified such a right, nor is any court likely to do so. The argument in favor of a constitutional right to organize is based, not on court doctrine, but on the constitutional interpretation of political actors. When determining whether there is a constitutional right to organize, then, it is necessary to consider the impact of democratic constitutionalism on constitutional development.