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What is a Law and Political Economy Movement without Law and Economics or Political Economy?

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WHAT IS A LAW AND POLITICAL ECONOMY MOVEMENT WITHOUT LAW AND ECONOMICS OR POLITICAL ECONOMY?

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INTRODUCTION

The Law and Political Economy (LPE) project is an initiative at Yale Law School that "brings together a network of scholars, practitioners, and students working to develop innovative intellectual, pedagogical, and political interventions to advance the study of political economy and law."[1] Since 2017, it has led to the establishment of the Journal of Law and Political Economy; the formation of student groups at schools including Harvard, Columbia, Cornell, NYU, Penn, Georgetown, and Berkeley; an ongoing series of regular conferences, workshops, symposia, and other events; and a network of over 50 academics at top law schools who speak and publish under the banner of the Law and Political Economy Project.

In recent years, academics writing under this banner have published articles with titles such as *The Law and Political Economy of Workplace Technological Change*;[2] *"There Is No Such Thing as An Illegal Strike": Reconceptualizing the Strike in Law and Political Economy*;[3] *The Law and Political Economy of a Student Debt Jubilee*;[4] *Taxation and Law and Political Economy*;[5] and *"Social Engineering": Notes on The Law and Political Economy of Integration*.[6] A dozen articles referring to Law and Political Economy as an "emerging," "growing," or even "burgeoning" movement have been published in the past two years.

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[1] The LPE Project, *About*, https://lpeproject.org/about (last visited Oct. 24, 2022).

[2] Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. REV. 531 (2020).

[3] Diana S. Reddy, *"There is No Such Thing As An Illegal Strike": Reconceptualizing the Strike In Law and Political Economy*, 130 YALE L.J. F. 421 (2021).

[4] Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFF. L. REV. 281 (2020).

[5] Bearer-Friend et al., *Taxation and Law and Political Economy*, 83 OHIO ST. L.J. 471 (2022).

[6] Olatunde C.A. Johnson, Symposium, *"Social Engineering": Notes on the Law and Political Economy of Integration*, 40 CARDOZO L. REV. 1149 (2019).

These are small numbers in absolute terms – but they represent the vanguard of a movement organized to promote its ideas and the work of scholars associated with them. The growing influence of the field is perhaps best seen in individual fields. For instance, LPE-affiliated scholars have published several antitrust-related articles in recent years, including several in the Yale Law Journal.[7] A superficial review of the papers, and topics covered in them that are of interest to the LPE project – from antitrust to labor law, tax policy, and housing regulation – make clear an interest in topics, if not methods, shared between the LPE project and law & economics (L&E) scholars.

This paper does two things. It begins with a critical discussion of the Law and Political Economy Project. This discussion casts the LPE project as reactionary to, and misrepresentative of, Law & Economics. But the purpose of this paper is not to criticize for the sake of criticism. To the contrary, the second part of the paper argues that the LPE and L&E schools are better read together than apart. They are animated by many of the same questions, and nearly every paper that self-identifies as part of the LPE initiative is on a topic of interest to L&E scholars. While they are certainly in many ways antagonistic, their perspectives are better understood in dialogue with each other than as dismissive of each other.

The LPE Project is interesting in that it has a clear ur-text: Britton-Purdy, Grewal, Kapczynski, & Rahman's *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*.[8] This, in turn, builds upon an earlier "manifesto" for the LPE Project.[9] It also has a clear epexegesis in the editors' introduction to the first volume of the Journal of Law and Political Economy.[10]

In their "manifesto" and subsequent article, Britton-Purdy, Grewal, and Kapczynski – the founders of the LPE project – lay out their view that we are in "a time of crisis," characterized by rising inequality, racialized and gendered injustice, ecological disaster, and eroded democracy. They continue that "Law is central to how these crises were created, and will be central to any reckoning with them" and propose "a new orientation to legal scholarship that helps illuminate how law and legal scholarship facilitated these shifts, and formulates insights and proposals to help combat them."[11] Their central argument is that over the course of the 20th Century the law –

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[7] *See, e.g.*, Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021); Ramsi Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270 (2018).

[8] Jedediah Britton-Purdy et al., *Building a Law-And-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

[9] Jedediah Britton-Purdy et al., *Law and Political Economy: Toward a Manifesto*, LPE PROJECT BLOG (Nov. 6, 2017), https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto [hereinafter *LPE Manifesto*].

[10] Angela Harris & James Varellas, *Introduction: Law and Political Economy in a Time of Accelerating Crises*, 1 J.L. & POL. ECON. 1, 1–2 (2020).

[11] *LPE Manifesto, supra* note 9.

largely driven by law & economics – created an artificial divide between questions of economy and questions of politics.[12] This division correlates roughly into the delineation between private law (dealing with economic matters, to the exclusion of political ones) and public law (dealing with political matters, to the exclusion of economic considerations). Their central thesis is that addressing the various crises that they say characterize our current moment requires a reunification of the economic and political domains. As they describe it, "At the core of this reconstruction is a renewed commitment to questions of political economy," which "investigates the relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences."[13]

Both these authors and Harris & Varellas situate LPE in relation to, and as a successor to, traditions of legal realism. Britton-Purdy, Grewal, Kapczynski & Rahman frame many of the questions prompted by LPE in terms of legal realism and critical legal theories.[14] Harris & Varellas expressly call LPE a "reinvention" of Critical Legal Studies, saying that it "might be deemed critical legal studies for the age of neoliberalism."[15]

This paper proceeds in three parts. Part I describes LPE's claims and deconstructs what its founders refer to as, "the Twentieth-Century Synthesis." This "synthesis" refers to what the authors identify as, "two interrelated moves" that together came to define American legal scholarship and pedagogy in the latter 20th Century: a focus on efficiency in private law matters, and an insulation of distributional and other private economic impacts from public law matters.

Part II offers a critical assessment of that synthesis. This assessment is generally negative: the LPE characterization of both sides of its purported synthesis is founded in fundamental misunderstandings of history, argument, and theory. At the same time, Part III also acknowledges an uncomfortable truth: while LPE synthesis offers an account of law & economics that is wholly unrecognizable to most L&E scholars, it is also unquestionably an account of law & economics that is widely held by most lawyers, academics, and law students.

Part III marks a transition in the discussion, from criticism to construction. It starts by taking a moment to reflect on the relationship between competing schools of legal thought. Both L&E and LPE (and its ancestors in the Critical Legal Studies camp) have a regrettable history of contempt towards one another, which would profitably be replaced with a better understanding of one another. As things stand, many proponents of each are fairly and lamentably criticized as ideologues. Part III then turns to the LPE Project's curious invocation of "Political Economy." It accepts the

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12 *Id.* ("Much of legal scholarship and practice in recent decades has held politics and economics apart, abstracting away from, or actively denying, their interdependence").

13 Britton-Purdy et al., *supra* note 8, at 1792.

14 *Id.* at 1793.

15 Harris & Varellas, *supra* note 10, at 8.

LPE founders' invitation to return to "the older and more foundational usage [of political economy] familiar to nineteenth-century audiences."[16] This concluding section offers a synthesis of my own, looking at the work of three central scholars in any serious study of political economy – Adam Smith, Elinor Ostrom, and Derrick Bell – to argue that the more important "synthesis" to be found in any law and political economy movement is one that embraces the questions and methods of both. This is the "political economy" of Adam Smith, and his radical appeals to liberal and enlightenment values. Taking LPE as a successor to the legal realists and critical legal theorists, I conclude by arguing that there is a valuable synthesis to be had between LPE and L&E, as seen through a lens of public choice.

I. THE LAW & POLITICAL ECONOMY PROJECT'S "SYNTHESIS"

The discussion below presents a description of the LPE Project, drawing from the founders of the LPE Project's work launching and articulating the views and goals of the project. It starts in Part I.A by describing the project broadly. Parts I.B and I.C then present the project's characterization of private and public law, respectively, which together form what the founders describe as "the twentieth-century synthesis"[17] that defines how law is taught and practiced in the United States. Part I.D then discusses the normative goals articulated for the LPE Project.

In all cases, the discussion in this part of this paper attempts to be merely descriptive, explaining the arguments made by the LPE Project founders in their own terms. I critique this these views in Part II.

A. *LPE and the Public-Private Law "Synthesis" that Excludes Consideration of "Political Economy"*

The public origins of the LPE project are documented in a series of blog posts from November 2017, on the LPE Project blog. The inaugural day of this blog includes four posts by the LPE Project's founders, with the following titles: *Law and Political Economy: Toward a Manifesto*;[18] *Why Law and Political Economy?*;[19] *Law & Neoliberalism*;[20] and *Why*

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16 Britton-Purdy et al., *supra* note 8, at 1792.

17 *Id.* at 1790.

18 *LPE Manifesto*, *supra* note 9.

19 Jedediah Britton-Purdy & David Singh Grewal, *Why Law and Political Economy?*, LPE PROJECT BLOG (Nov. 6, 2017), https://lpeproject.org/blog/why-law-and-political-economy [hereinafter *Why Law and Political Economy?*].

20 Jedediah Britton-Purdy & David Singh Grewal, *Law & Neoliberalism*, LPE PROJECT BLOG (Nov. 6, 2017), https://lpeproject.org/blog/law-neoliberalism.

"Intellectual Property" Law?.[21] Collectively, they set the tone and subject matter of the project, discussing Thomas Piketty,[22] framing the need to rethink the law in the wake of the 2008 market collapse,[23] positing the role of the law in the rise of global inequality,[24] and discussing the role of "efficiency talk" in all of this.[25]

The most important of these blog posts is, unsurprisingly, the one that labels itself a step "toward a manifesto."[26] This post was the first one on the blog, is still highlighted on the LPE Project's web page,[27] and lays out the foundation for the LPE Project's founders' subsequent academic article, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*.[28]

This "manifesto" explains, for instance, that:

> The approach we call law and political economy is rooted in a commitment to a more egalitarian and democratic society. Scholars working in this vein are seeking to reconnect political conversations about the economic order with questions of dignity, belonging, or "recognition" and to challenge versions of "freedom" or "rights" that ignore or downplay social and economic power.[29]

More usefully, it explains LPE's focus on economic and political questions:

> Much of legal scholarship and practice in recent decades has held politics and economics apart, abstracting away from, or actively denying, their interdependence.
>
> Law schools and legal scholarship are divided along an implicit divide between "public" and "private" fields of law, which is constructed in significant part by the role that economics is thought to play in these respective fields. Many fields are thought of as being "about the economy" – contracts, torts, anti-trust, intellectual property, trade, consumer protection are examples. For the past several decades, scholarship in these fields has been dominated by law and economics approaches that have downplayed considerations of distribution and elevated questions of efficiency. This approach treats efficiency as a "neutral" value, yet construes the term in a manner that reproduces a constitutive priority for the privileged.
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> Public-law scholarship, in turn, has tended to make questions of economy foreign. To learn and practice constitutional law today, for example, is often to assert that constitutional values have no purchase on questions of economy or class: these, after all,

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21 Amy Kapczynski, *Why "Intellectual Property" Law?*, LPE PROJECT BLOG (Nov. 6, 2017), https://lpeproject.org/blog/why-intellectual-property-law [hereinafter *Why "Intellectual Property" Law?*].

22 *Why Law and Political Economy?*, *supra* note 19.

23 *Id.*

24 *Why "Intellectual Property" Law?*, *supra* note 21.

25 *Id.*

26 *LPE Manifesto*, *supra* note 9.

27 *Id.*

28 Britton-Purdy et al., *supra* note 8, at 1792.

29 *LPE Manifesto*, *supra* note 9.

> are the received lessons of Lochner and Carolene Products, of San Antonio and McRae. More generally, scholars in these public-law fields rarely devote themselves to the normative question of what kind of economic order might be necessary to make democracy real and vindicate constitutional principles such as equality.[30]

Both private and public law, in other words, are accused of having excised consideration of the sociopolitical impacts of their respective doctrines. And the effect of these fields' respective myopias taken together – what the authors refer to as "the twentieth-century synthesis"[31] – is alleged to be the law's complicity in what the authors call our "time of crisis":

> This is a time of crises. Inequality is accelerating, with gains concentrated at the top of the income and wealth distributions. This trend – interacting with deep racialized and gendered injustice – has had profound implications for our politics, and for the sense of agency, opportunity, and security of all but the narrowest sliver of the global elite. Technology has intensified the sense that we are both interconnected and divided, controlled and out of control. New ecological disasters unfold each day. The future of our planet is at stake: we are all at risk, yet unequally so. The rise of right-wing movements and autocrats around the world is threatening democratic institutions and political commitments to equality and openness. But new movements on the left are also emerging. They are challenging economic inequality, eroded democracy, the carceral state, and racism, sexism, and other forms of discrimination with a force that was unthinkable just a few years ago.[32]

The authors say that "Law is central to how these crises were created," and they draw from this their normative goal – and that of the LPE Project – that the law "be central to any reckoning with them."[33]

The authors develop these ideas further, most notably explaining their concept of "the twentieth-century synthesis" in *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*.[34] The rest of this Part draws from that paper to explain the LPE Project's self-described predicates and normative goals, as presented in that paper.

B. *The Private Law Side of the "Synthesis"*

The LPE Founders articulate their view of "the twentieth-century synthesis" in *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*.[35] The two parts of this synthesis are, on the one hand, the retreat of private law fields from consideration of the political effects of legal doctrine to focus instead solely on questions of efficiency,[36]

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30 *Id.*

31 Britton-Purdy et al., *supra* note 8, at 1790.

32 *LPE Manifesto*, *supra* note 9.

33 *Id.*

34 Britton-Purdy et al., *supra* note 8, at 1790.

35 *Id.*

36 *Id.* at 1797.

and on the other, the exclusion of economic consideration from public law to focus instead on neutral principals irrespective of class, economic, or other characteristics or effects.[37] Their paper discusses these two sides of the synthesis in its parts I.A and I.C. This same delineation of focus between private and public law is followed in this and the next section of this paper.

Part I.A focuses squarely on the effects of the rise of law & economics on the private law.[38] It argues that law & economics "defined law's goals and methods in ... what we might call 'market supremacy,' or the necessary subordination of the political to the economic."[39] It goes on to identify "[t]hree theories [that] are key to the market supremacy model of law and economics."[40] It first identifies the use of efficiency and wealth maximization to guide decision makers (e.g., judges and legislators).[41] It then pairs externalities and transaction costs together, as "bridg[ing] the core account of the market in neoclassical economics ... with the traditional institutional focus of the law."[42]

Taking these in turn: *Beyond the Twentieth-Century Synthesis* asserts that the law & economics view holds that "the law should be oriented to ensure the greatest aggregate 'wealth,'"[43] giving as an example that a rich man should be able to take bread from a starving poor man because the rich man, having more money, has a greater "willingness to pay" for that bread.[44] It notes that few defend this as a normative theory, but that "law and economics almost invariably reverts to wealth maximization as a criterion"[45] out of a need to reduce costs, benefits, and transfers to "a common denominator like money."[46]

The discussion continues, noting that "[e]levating efficiency as a value also marginalized questions of distribution."[47] They explain that "the Coase Theorem *as commonly understood*" erases questions of distributional and endowment effects.[48] With respect to both wealth maximization and efficiency, it notes dismissively that the problems with them are "many and

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37 *Id.* at 1806.

38 *Id.* at 1795 ("The first move of the Synthesis can be best understood by charting the rise in the 1970s and 1980s of modern law and economics . . .").

39 *Id.* at 1796.

40 *Id.*

41 *Id.*

42 *Id.* at 1798.

43 *Id.* at 1796.

44 *Id.* at 1797.

45 *Id.*

46 *Id.*

47 *Id.* at 1797.

48 *Id.* at 1797–98 (emphasis added).

by now quite well understood"[49] and that "sophisticated critiques ... revealed the many problems"[50] of efficiency arguments.

Turning to the paper's discussion of externalities and transaction costs. After defining the concepts in single sentences, it offers the following characterization:

> Various features of institutional life could thus be homogenized into one capacious concept that also helped to naturalize market exchange: as long as transaction costs were low, Coase implied, it could be assumed that entitlements would naturally flow to their "best" or "highest value" use through voluntary exchange. Where they were high, planners could reengineer entitlements to approximate the most efficient (i.e., hypothetical market) outcome. This assumption epitomizes law and economics: it simultaneously recognizes and embraces the fact that law makes markets, while demanding that the satisfaction of markets becomes the aim of politics.[51]

Building from this characterization, *Beyond the Twentieth-Century Synthesis* offers that law and economics "was inevitably itself a form of planning,"[52] and that "[t]he role of scholarship was to identify transaction costs and externalities ... and to recommend a shift in entitlements."[53] From this follows one of the more peculiar statements in the paper, which will be discussed in Part III, below, that:

> The agent of law reform imagined here [by law and economics] was not the people but the technician: the judge, economist, or bureaucrat who would calculate hypothetical consumer and producer surplus to order law and policy to serve the aims of wealth maximization.[54]

C. *The Public Law Side of the "Synthesis"*

Turning to the public law side of the LPE Project's twentieth-century synthesis, Part I.C of *Beyond the Twentieth-Century Synthesis* argues that "in areas regarded as 'essentially about' the liberty and equality of citizens, the last half-century has seen withdrawal from questions of economic distribution and structural coercion."[55] Unlike the private law-side of the synthesis, whose "genealogy is essentially one of economics-informed legal theory," "[i]n the public-law half of the Synthesis, the situation is very

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49 *Id.* at 1796–97.

50 *Id.* at 1798. Authors cite to Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion" Articles Are Wrong*, 13 GEO. MASON L. REV. 511, 519–523 (2004), and Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 Yale L.J. 2478, 2478–2483 (2014) to show other critiques.

51 *Id.* at 1799.

52 *Id.*

53 *Id.* at 1799–1800.

54 *Id.* at 1800.

55 *Id.* at 1806.

different"[56], one that took shape "around a particularly thin version of key liberal values: freedom, equality, and state neutrality" and "the decisions of increasingly conservative judges drove the change."[57]

As with the private law discussion, here, too, the LPE founders divide their discussion into three main subjects: "exil[ing] matters of class and material, structural inequality from the reach of constitutional law," expansion of First Amendment speech protections to include certain economic concepts, and an embrace of public choice.[58] The first two of these focus on the development of public law – primarily 14th and 1st Amendment jurisprudence – over the second half of the 20th century. The third is more driven by theory and principle.

The arguments rehash well-trodden territory, with which many agree and other disagree.[59] Starting with the 14th Amendment, the arguments track longstanding debates over the whether the amendment guarantees positive or negative rights. Across a range of categories during the 1960s and 1970s the Supreme Court declined to heighten legal protections, benefits, or rights to particular classes of citizens, specifically the poor, racial minorities, and women.[60] In other words, the Court embraced a negative rights view of the 14th Amendment, that it is protection from government discrimination, as opposed to a positive rights view under which the Government is to work to ensure equality of outcomes. The effect, in the LPE view, was that "[j]ust when the achievement of formal equality meant that the major threats to an egalitarian society lay in structural inequality, the Court approved policies that compounded inherited forms of inequality."[61] The authors lament the Court's embrace of "[a] conception of equality that ignored material deprivation and focused on improper intent," that "encased the most pressing sources of inequality from constitutional review, *even when they were reproduced and amplified by state action*, and went so far as to invalidate policies that sought to mitigate structural inequality by taking explicit account of characteristics such as race."[62]

Beyond the Twentieth-Century Synthesis offers a similar account of 1st Amendment jurisprudence, lamenting "the merging of First Amendment

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56 *Id.*

57 *Id.* at 1806–07.

58 *Id.* at 1807.

59 *See* RANDY E. BARNETT AND EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: IT'S LETTER AND SPIRIT (2021); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019). *Compare* Thurgood Marshall, *The Continuing Challenge of the 14th Amendment,* 1968 Wis. L. Rev. 979 (1968) (taking a positive view of the 14th Amendment) *with* Gene R. Nichol Jr., *Examination of Congressional Powers under §5 of the 14th Amendment*, 52 Notre Dame Law. 175 (1976) (taking a negative view of the 14th Amendment).

60 Britton-Purdy et al., *supra* note 8, at 1807-08.

61 *Id.* at 1808.

62 *Id.* at 1809.

speech with commerce."[63] The focus on increased protection of commercial speech and, hand in hand with that, the use of money in funding and paying for speech, is important for the LPE Project's synthesis. This is a means by which these opinions "exacerbate an increasingly oligarchic political economy" and "economic power from political disruption."[64] That is, where the Court's 14th Amendment jurisprudence prevents state actors from remedying inequality, the Court's 1st Amendment jurisprudence is said to allow private actors to ossify that inequality.

The third is more driven by theory and principle. The final plank in the LPE founders' explanation for the public-law side of the "synthesis" moves its focus from the Courts to the role of public choice in shaping academic and administrative attitudes towards public policy. It notes "a growing public-law skepticism toward political judgments about distribution and economic ordering, based on the conviction that these judgments are likely to enforce and entrench the kinds of 'capture' that James Buchanan's 'political economy' emphasized."[65] In the paper's telling, the growth of public-choice ideas led "influential academics to argue that the only appropriate response was a move to market-mediated technocracy, in the form of cost-benefit analysis."[66]

The collective result of these three phenomena — jurisprudential shifts in the 14th and 1st Amendments and the rise in public choice — was, according to the LPE account, a shift in the legal academy in the 1980s and 1990s. The means by which legal academics traditionally seek to exert influence — shaping the opinions and decisions of judges and policy makers — had closed themselves to efforts to directly influence political outcomes. "[D]ebates in mainstream legal scholarship [therefore] migrated to make questions of political economy hard to ask because they were seemingly already settled both theoretically and practically."[67]

D. *LPE's Normative Prescriptions*

Beyond the Twentieth-Century Synthesis offers a unique telling of the development of the law during the latter part of the twentieth century. The details of this telling will be critiqued in Part III. But what is the punchline? What are the LPE project's normative prescriptions?

This question stands as important on its own. But it is particularly important to the extent that LPE is a successor to the earlier critical legal

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63 *Id.*

64 *Id.* at 1810.

65 Britton-Purdy et al., *supra* note 8, at 1811 (citing Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2172–75 (2018)).

66 *Id.* at 1811–12 (citing Cass R. Sunstein, *The Cost-Benefit State* 4 (Coase-Sander Inst. for L. & Econ., Working Paper No. 39, 1996)).

67 *Id.* at 1812.

studies movement. One of the most trenchant critiques of critical legal students – along with many of its cognate critical fields – was its lack of compelling normative prescriptions for how the law ought to operate differently.[68]

The authors of the *Twentieth-Century Synthesis* share an understanding of the need to center LPE around a call to action – though this understanding does not emanate as a response to the question that challenged earlier critical movements. Rather, the authors frame LPE's normative commitments in a more urgent, if less analytically-grounded, need to respond to their perceived problems identified in the *Twentieth-Century Synthesis*. They write:

> We must replace the Twentieth-Century Synthesis with a different framework for legal thought. At the core of this reconstruction is a renewed commitment to questions of political economy. With others, we have thus begun to practice a scholarship of 'law and political economy' (LPE), rooted in a shared set of insights, concerns, and commitments.[69]

This is a rhetorically interesting move. Unlike earlier critical movements, LPE has chosen an affirmative name for itself. It is not merely about criticizing existing legal norms – or, though critical of the asserted twentieth century synthesis opposing it – its name is the mantle that it wears. The alternative it proposes is that of "law and political economy." *Beyond the Twentieth-Century Synthesis* offers the following explanation of what it means by "law and political economy":

> The term 'political economy' is historically variable and contested. We do not mean the 'political economy' analysis of institutions and policies as practiced in mainstream economics departments, which turns on the application of rational-choice models to government actors or institutions. Rather, we intend the older and more foundational usage familiar to nineteenth-century audiences, which persisted in traditions of 'radical' political economy until a few decades ago. *This* political economy investigates the relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences.[70]

Of course, if we want to speak of the "older and more foundational usage" of political economy "familiar to nineteenth-century audiences," we are talking of the political economy of Adam Smith. Smith's understanding of political economy will be discussed in Part IV.A. It seems unlikely that the LPE project intends its founding document as an appeal for greater study to *The Wealth of Nations* or *The Theory of Moral Sentiments* – though, as I argue in Part IV generally I expect there is much common ground to be found between critical theorists, LPE, and law & economic scholars. Perusing the results of a Google N-Grams search of "political economy" through the 19th

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68 *See, e.g.*, Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

69 Britton-Purdy et al., *supra* note 8, at 1791–92.

70 *Id.* at 1792.

century yields results such as David Ricardo, John Baptiste Say, and Stanley Jevons.[71] Of course, there were other more "radical" political economists in the 19th Century (certainly Karl Marx comes to mind). But mainstream political economists in the 19th century were the successors to Adam Smith and forebears to the modern "economics" that the LPE project scorns. It is curious to wear "political economy" as a mantle when the key idea the LPE means to invoke from its description of political derives from the adjective "'radical" prepended to it. Radical 19th century views may have power today – but no help comes from coopting a mainstream term as a talisman.

Perhaps more important, the passage quoted above does little to explain the *Twentieth-Century Synthesis* normative commitments, other perhaps than being 'radical' in its thought. The authors do suggest that it was important to "Legal Realists, in their battle against laissez-faire ideology," it "requires attentiveness to the ways in which economic and political power are inextricably intertwined with racialized and gendered inequity and subordination."[72]

The authors promise to "explore these questions in Part II" of the *Beyond the Twentieth-Century Synthesis*. But this exploration only raises more questions. Critique of the LPE characterization of the private-law and public-law sides of its "synthesis" is undertaken in Part III. The questions of interest to LPE, and to the extent they suggest a normative position that LPE takes in its analysis, LPE's normative position as presented in *Beyond the Twentieth-Century Synthesis* is characterized below.

In Part II.A, "From Efficiency to Power," *Beyond the Twentieth-Century Synthesis* asks: "What would it mean to take power once more as a central unit of analysis in law? In the broadest sense, when we teach a canonical case or encounter a legal problem, we might ask quite simply, who has power here, who should have power, and why?"[73] This question is presented in opposition to the assertion that

> The Twentieth-Century Synthesis held that such power was unimportant, either by redirecting attention from it or by denying that power was stratified or structured in ways that matter. By refocusing scholarship on questions structured by transaction costs and externalities, law-and-economics analysis placed questions of distribution and coercion outside the lamplight of methodology. It thus neglected the actual social world comprised of highly disparate resource allocations that are themselves products of background legal rules.[74]

My best understanding of this discussion as a normative prescription is that it is a rejection of ideas such as placing an initial assignment of liability

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[71] Usage of "Political Economy" from 1800 to 1900, GOOGLE NGRAM VIEWER, https://books.google.com/ngrams/graph?content=political+economy&year_start=1800&year_end=1900 & corpus=26&smoothing=3 (last visited Sep. 27, 2022).

[72] Britton-Purdy et al., *supra* note 8, at 1792.

[73] *Id.* at 1820.

[74] *Id.* at 1819.

on the least-cost avoider in torts cases and, instead assigning liability to whatever party is in the best position to bear the cost of an accident, regardless of their fault in causing the accident or ability to avoid it.

In Part II.B, "From Neutrality to Equality," *Beyond the Twentieth-Century Synthesis* asserts that the Twentieth-Century synthesis's focus on neutrality "has reinforced a very non-neutral drift toward elite control of government."[75] In response, it argues that we should "develop a normative theory of bargaining that centers a substantive ideal of freedom, rather than relying upon the formal idea of uncoerced agreement,"[76] that "moves from the setting of interpersonal bargaining to structural questions,"[77] and that has "a concrete focus on what kinds of equality we want law to generate."[78]

And in Part II.C, "From Antipolitics to Democracy," *Beyond the Twentieth-Century Synthesis* turns to public choice economics, arguing that "in the Twentieth-Century Synthesis, governance – even in its more progressive, reform-oriented aspects – came to be viewed as an antipolitical operation." This followed from public choice ideas, "which portrayed government as inherently prone to capture and corruption."[79] This is not an unfair characterization. As discussed in Part III.B, below, public choice economics raises trenchant descriptive criticisms of the fundamental operation of government that gives pause – and should give pause – to the idea that it can, in the general case, be used to support the public interest (or, indeed, that there even is a thing that can be identified as "the public interest").

Ultimately, I believe that LPE's real bone to pick is with public choice economics – and the most fundamental critique of LPE is based in its failure to engage with public choice economics. As noted in *Beyond the Twentieth-Century Synthesis,* "a comprehensive answer is beyond the scope" of the article. The authors do "identify a number of critical questions and already-emerging frontiers of debate"[80]: the importance of "strengthening existing institutions of electoral democracy"[81]; that the "law should shape the economy to support the institutions and capacities that uphold the equality and efficacy of democratic citizens"[82]; and that "scholarship should consider what moral images of social and political order are implied in a given legal patterning."[83]

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75 *Id.* at 1824.

76 *Id.*

77 *Id.* at 1825.

78 Usage of "Political Economy" from 1800 to 1900, *supra* note 71.

79 Britton-Purdy et al., *supra* note 8, at 1828.

80 *Id.* at 1829.

81 *Id.* Britton-Purdy explains this to mean "a direct challenge to the ways that antipolitics constrains even the most seamlessly majoritarian of politics", through "commitment to voting rights, overcoming gerrymandering, defending campaign-finance laws, and ultimately challenging the antimajoritarian features of the American constitutional scheme, notably the Electoral College and the Senate." *Id.*

82 *Id.* at 1830.

83 *Id.* at 1832.

These are all central themes in modern (and not-so-modern) public choice scholarship. The general thrust of LPE's normative prescription is: *the world is unjust and we should use government to do something about it.* But, as discussion in Part III.B, public choice explains, in descriptive, not normative, terms why using the government to do something about it is fraught. Public choice is not antipolitic, it is realpolitik. The LPE's conflation of public choice's descriptive analysis of politics as a normative prescription for a politics ultimately renders LPE's normative prescriptions as merely oppositional. They amount to a call to use the machinery of government to impose a preferred set of policies upon the world, without engaging with the risks of such an approach – namely that the policies imposed upon the world may be those preferred by someone else, someone antagonistic to one's own preferred policies.

In other words, LPE's normative call is that "lawyers of the world unite" – but this call forgets that the "first thing those with power do is kill all the lawyers."

II. A REBUKE OF LPE'S CLAIMED "SYNTHESIS"

I have tried above to offer a descriptive account of the LPE "synthesis" that describes its understanding of the status quo against which the field opposingly defines itself. This understanding is seriously flawed. It is incomplete and inaccurate in parts, at times borders on incoherent, and is fundamentally self-contradictory. The discussion below develops this critique of LPE and the "synthesis" upon which it is founded.

While this discussion is critical of LPE and its foundations, there is an uncomfortable truth that needs to be kept front-and-center: While the LPE synthesis's critiques do not stand informed scrutiny, they nonetheless represent widespread understandings. This is most true of how most legal thinkers understand law and economics and its priors: law and economics scholars would generally reject the characterization of law and economics as myopically focused on efficiency and wealthy maximization while having a callous disregard for distributional questions. To the contrary, in my own experience, most law and economics scholars care and think deeply about distributional questions – a topic taken up further in *infra* Part II.A.

Most legal thinkers, be they academics, judges, or policymakers, are not law and economics scholars – and to a very large extent the LPE account reflects the widespread understanding of the descriptive priors and normative goals that law and economics brings to bear on legal analysis. This presents a twofold danger to law and economics. First, it robs the field of its sophistication and ongoing value as a tool for meaningful legal analysis. It makes the field easy to dismiss, unattractive to up and coming researchers, and threatens the contributions that the field has made previously. And second, as we see with LPE, it gives energy to critical fields that would define themselves in opposition to a false but dislikable straw man.

A. *LPE Gets L&E Wrong*

The LPE account of law and economics, which it places at the heart of contemporary private law jurisprudence, is at once commonplace and bizarrely unrecognizable. It is commonplace in characterizing law and economics as focused on efficiency and wealth maximization while putting to the side distributional effects. I will return to what it gets wrong on this front in a moment. But we should focus first on where the LPE account of law and economics is unrecognizable bizarre. *Beyond the Twentieth-Century Synthesis* asserts that

> The agent of law reform imagined here [by law and economics] was not the people but the technician: the judge, economist, or bureaucrat who would calculate hypothetical consumer and producer surplus to order law and policy to serve the aims of wealth maximization.[84]

Anyone who has read Coase's *The Problem of Social Costs* will be simply dumbfounded by this assertion. In *The Problem of Social Cost*,[85] Coase's central subject was the implausibility of the Pigouvian model of using taxes and subsidies to address social costs such as externalities. The Pigouvian model truly was that of the technician: bureaucrats calculating the delta between private benefits and costs and social costs and benefits and using taxes or subsidies to bring private conduct into alignment with the socially optimal level of conduct.

Puzzling over this Pigouvian model of technocratic social design, Coase worries that it "would require a detailed knowledge of individual preferences and I am unable to imagine how the data needed for such a taxation system could be assembled."[86] The Pigouvian model, he concludes, suffers "from basic defects in the current approach to problems of welfare economics."[87] Chief among these defects is that there is no reason to believe that those attempting to calculate such a system of taxes and subsidies know the socially optimal level of any activity – without which, they cannot calculate the social costs of private activity that need to be internalized. Hence, of course, the title of Coase's paper, *The Problem of Social Cost.*

Coase's paper is the ur-text of law and economics. Its entire point is that the model of technicians calculating hypothetical consumer and producer surpluses is a fraught endeavor – and that rather that rely on that model, a better approach is to remove technicians from how we order private conduct and instead to rely on allocating burdens and designing institutions to minimize transaction costs.

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84 Britton-Purdy et al., *supra* note 8, at 1800.

85 R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

86 *Id.* at 42.

87 *Id.*

After Coase, perhaps the greatest popularizers of law and economics as a legal methodology are judges Richard Posner and Guido Calabresi (along with his then-student Doug Melamed). Looking at their contributions to the field bring us back to the first point that the LPE characterization gets wrong: its over-emphasis of efficiency as a normative goal.

Judge Posner is perhaps the single greatest figure in the development of law and economics as a field. His book *Economic Analysis of Law*[88] is a tour de force, applying principles of microeconomic analysis to nearly every area of the law. But in reading Posner's work, it is essential to distinguish between his positive and normative claims. This is perhaps confounding to some, because the claims are seemingly similar: descriptively, Posner argues that the common law, in fact, tends to be efficient; normatively, he argues that it ought to be efficient.

It is important to separate these claims for two reasons. First, the success of law and economics as a field, and the impact that it has had on the law, result principally from Posner's positive analysis. The majesty of Posner's *Economic Analysis of the Law* is that he forcefully demonstrates that most judges, in most cases, decide cases in ways that result in efficient outcomes (generally by placing burdens on the least cost avoider). Thus, and entirely independent of any effects that law and economics may have had on legal analysis, the best way for lawyers to practice law – to advise clients, predict judicial outcomes, and likely to influence those outcomes – is to approach legal questions from a microeconomic perspective.

This foundational aspect of law and economics is wholly absent from the LPE synthesis. Under the LPE telling, efficiency is the purpose, not the result, of economic analysis.

Of course, for many, law and economics also carries efficiency as its normative goal (and sometimes conflating the idea of efficiency with that of wealth maximization). Here it is notable that both Posner and Calabresi (who popularized the idea of allocating the burden of avoiding harm on the least cost avoider), among the most important advocates for efficiency as normative goal, are judges, responsible for deciding cases. The LPE critique would have us think of them as would-be technicians: Pigouvian bureaucrats calculating social costs and designing legal rules to maximize total welfare. Those familiar with their work, however, know that nothing could be further from the truth. Rather than Pigouvian, they are Coasean. One of the virtues of the Coasean approach is that it minimizes the role of the decisionmaker as technician. The question for the judge is *who is in the best place to have avoided this harm* – not *what are the private and social costs and benefits as between those involved in this incident and how do I decide this case in order to achieve a socially optimal division of those costs and benefits*.

A brief note is due here regarding the role of distribution in economic analysis of the law. The LPE critique notes, correctly, that law and economics

88 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014).

tends to discount considerations of distributive efficiency, focusing instead on maximizing allocative efficiency and relying on expressly distributive mechanisms such as taxes to address any distributional inequities.[89] In a survey of major law and economics textbooks, all but one devote substantial attention early on to these issues.[90] Interestingly, the same cannot be said for casebooks commonly used to teach private law subjects to first year law students – an issue that undoubtedly drives much misunderstanding about the normative values of law and economics held by faculty and students alike.

There is a deeper irony in the misunderstandings of law and economics presented in the LPE synthesis, which will carry us into the discussion of the LPE characterization of public law. LPE views law and economics and private law as shaped by law and economics as antidemocratic – a reformation of the law shaped not by the people but by technocratic judges, economists, and bureaucrats.[91] Not only is this characterization wrong – the driving value of law and economics rather being the exact opposite – but the very purpose of the LPE Project is to place legal academics squarely in the role of the accused technocrats.

B. *LPE Gets Political Economy and Public Choice Tragically Wrong.*

The LPE critique of public law – and of public choice, in particular – is circuitous, circular, and self-contradictory. If anything, it demonstrates the importance of public choice generally, and presents a compelling public choice critique of the LPE project.

As discussed in Part I.C, the *Twentieth-Century Synthesis* identifies three "moves" in its discussion of public law institutions. The first two focus on changing First and Fourteenth Amendment jurisprudence over the second half of the of the twentieth century, facilitated (in the LPE telling) by conservative judges that took disproportionate control over the federal judiciary in that period.[92] The third move was the "growing public-law skepticism toward political judgments about distribution and economic ordering" based in ideas originating from public choice scholars such as James Buchanan – ideas such as rent extraction, political capture, and interest group theory.[93]

It is helpful to start with public choice in considering this nexus of arguments. But what is "public choice" theory? Traditional economics

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89 Britton-Purdy et al., *supra* note 8, at 1798 ("[L]egal entitlements should always be designed to maximize efficiency, shunting issues of distribution elsewhere (commonly, to the tax code)").

90 MAXWELL STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009). Perhaps surprisingly, the one book that I found that does not address distributional issues expressly is Stearns & Zywicki – both of whom I know understand these concerns very well. I would posit that they do not address the issue squarely because it is so obvious an issue to them.

91 Britton-Purdy, *supra* note 8.

92 *Id.* at 1807.

93 *Id.* at 1809.

focuses on how private actors make economic decisions – that is, it is the study of "private choice." Public choice is the field of economics that studies how public institution, such as governments, regulators, and other bureaucratic entities, make decisions. Many public choice scholars, in fact, are thought of, or think of themselves, as belonging to the field of political economy.[94] Unlike law and economics, a field with which most scholars are familiar with at least by name, public choice economics is far less well known and has not been as well received by legal scholars – even if many of its ideas have been influential. As the noted in the *Twentieth-Century Synthesis*, "[m]any legal scholars objected to this turn" towards public choice ideas in the 1980s and 1990s – a confounding factor for LPE's assertion that this field played an assertedly formative role in any grand synthesis of twentieth-century legal thought.[95]

What are the core ideas of public choice economics? James Buchanan famously described the field as "politics without romance."[96] The field uses traditional tools of economics to understand how the individual actors that make up public institutions respond to incentives, and how those institutions themselves operate. This strips away the "romance" of politics – the naïve and idealistic understanding of government and the individuals that make up government institutions as purely beneficent, public-minded, actors unaffected by the incentives that affect private actors.

There are at least three core ideas strongly associated with public choice. This first is Arrow's "impossibility theorem," which challenges the very possibility of voting mechanisms as a tool for making collective decisions.[97] Arrow was not the first to show this result – that every voting system is subject to manipulation and that no voting system can guarantee democratically-representative outcomes – but he was the first to show it in a mathematically formalized proof. A second core idea of public choice is that legislatures are made up of individual actors, who respond to individual incentives. Those individuals work to maximize various functions that are separate from, and often conflict with the interests of, those whom they purportedly represent. For instance, public officials often work to maximize their resources, autonomy, or power – and to use those to maintain their public position, not for the benefit of the individuals who put them in that position.[98] And perhaps the best well known of public choice's core ideas is that of interest group theory – roughly the idea that smaller interest groups will generally be better able to lobby and "capture" the favor of government

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94 As the LPE founders awkwardly acknowledge in their reference to James Buchanan's "political economy," Nobel Laureate James Buchanan's work is considered among the foundation of public choice scholarship, though he framed his work as political economy.

95 Britton-Purdy et al., *supra* note 8, at 1812.

96 James M. Buchanan, *What is Public Choice Theory?* 32 IMPRIMIS 1, 5 (Mar. 2003).

97 KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 60 (Eric Maskin ed., Yale Univ. Press 2012).

98 James Q. Wilson, *The Rise of the Bureaucratic State*, 41 NAT'L INT. 77, 81 (Fall 1975).

actors than more diffuse groups, and especially than the most diffuse "interest group" of general voters.[99]

Collectively, these ideas challenge the very idea of a government and of regulation that work for the public interest. They suggest that there are no reliable mechanisms to measure the "public interest" in the first instance. They caution that government institutions will be made of up individuals who use those institutions for their own purposes – even if some individuals are drawn to government and public service out of a commitment to public service, those drawn to public institutions for private gain will tend to acquire greater resources and over time have greater electoral success. And public choice tells us that private interests will generally be able to petition and capture public institutions for their private gain.

As Buchanan says, this is not a romantic view of politics.[100] The power of public choice is that it explains in descriptive terms why this is also an inevitable truth of politics. It needs to be emphasized that this first stage in the development of public choice is a descriptive effort to understand how public institutions work – and it has widespread acceptance. But people like their romance and have an attachment to the idea of government. Public choice finds its critics in its normative prescriptions, which generally call for limitations on the scope of government. If capture and rent extraction are inherent to the public enterprise, the only way to protect against them is the limit to scope of the public enterprise. Either limit it to functions least susceptible to those abuses or keep government small enough that its operation will be difficult to shield from public scrutiny.

The balance of the public-law critique offered in the *Twentieth-Century Synthesis* vindicates the public choice view of politics and public law institutions. The basic argument offered by the authors of the *Twentieth-Century Synthesis* boils down to "conservatives captured public institutions to shape the law in ways that we don't like." This may be an uncharitable characterization – but it is an uncharitable characterization of an uncharitable characterization.[101] Truth be told, many L&E scholars are sympathetic to

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99 *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 53 (1971); Gary Becker, *Competition Among Pressure Groups*, 98 Q. J. OF ECON., 371, 385–394 (1983).

100 Buchanan, *supra* note 96, at 5.

101 For a thoughtful discussion of modern interlocutors' tendency to approach one another uncharitably in debates around public law, see Emad H. Atiq & Jud Mathews recent article, *The Uncertain Foundations of Public Law Theory*, CORNELL J. L. & PUB. POL'Y, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032904 (forthcoming) (noting "that successful truth-seeking enterprises, like the natural sciences, tend to withhold judgment on matters that are contested among good-faith reasoners; and, moreover, that there is considerable ambivalence among contemporary philosophers of law, who by all accounts are reasoning in good faith, towards the standard views in The rejection by the authors of the *Twentieth-Century Synthesis* of good-faith accounts of changing 1st & 14th Amendment views ignores the substantive disagreements that define these contingent debates. Significant numbers of Americans are more concerned about the power of government and preservation of their individual liberty than the power of the government to intervene in the lives of individuals to assert the

many of the issues that animate the LPE project, including many not the focus of the *Twentieth-Century Synthesis*. This proposition is explored further in Part III. It is not unusual for public choice scholars to lament the seemingly inescapable nihilism that public choice has for the political process. But that results from an understanding that the political process is likely not an effective way to achieve those goals, not from a lack of belief in the importance of those goals. Indeed, this seeming nihilism comes from an understanding that any effort to use the political process to achieve these goals would likely only make them worse as the political machinery is captured and turned to the benefit of narrow interests.

It is telling that the account of public law offered in *The Twentieth-Century Synthesis* seems to understand this challenge. In one of the more revealing passages that comes just after the account of changes in First Amendment jurisprudence over the second half of the twentieth century, the authors note that

> in keeping with the law-and-political-economy premise that state action and economic power are always mutually intertwined, it is key to appreciate that the result of these decisions is not to segregate state power from economic power but to exacerbate an increasingly oligarchic political economy in which private power is readily translated into influence over public decisions.[102]

The LPE project, in other words, appears to import the lessons of public choice into its very foundations, identifying the "idea" that "state action and economic power are always mutually intertwined" as a premise of LPE.[103] This is literally just a restatement of the public choice premise that public actors are influenced by private incentives. And the consequence identified by the authors, that "private power is readily translated into influence over public decisions" may as well be torn from the pages of a public choice paper.[104]

The lesson that LPE takes, however, is exactly the opposite of that taken by public choice scholars. Where public choice scholars see public institutions as dangerous tools readily captured by private interests, LPE sees them as opportunities that can be captured to serve their own interests. Perhaps they are right. Perhaps law devolves to mere power. Perhaps over the course of the twentieth century sources of conservative power were able to capture public institutions to impose their preferred policies on society.

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rights of others – this, indeed, is a fundamental source of disagreement within the American polity. As Atiq & Mathews argue, "If practical conclusions must be drawn on the basis of the contested proposition, then it must be with explicit recognition that the justification for one's practical choice is reasonably contestable. Doubt of this kind makes a difference to how scholars and judges should argue with one another," yet such an approach is seemingly overtly eschewed by the *Twentieth-Century Synthesis*. *Id.* at 55.

102 Britton-Purdy et al., *supra* note 8, at 1810–11.

103 *Id.* at 1810.

104 *Id.* at 1811.

And perhaps now the best approach for those who disagree with those policies is to wrest back power over those public institutions to use them to impose a different set of policies preferred by a different set of oligarchs.

I do not believe this is the right lesson to learn – I do not welcome the return to the pre-Hobbesian war of all against all and believe that there is a role for public institutions in providing a baseline of public service and moderating the discourse within and policies adopted by a society.[105] I will return to these ideas in Part III to argue that part of a better approach is to forego the war of all against all – or at least of LPE against L&E – and consider the possibility of a synthesis between these competing methodological camps.

III. A MORE SYMPATHETIC SYNTHESIS

The discussion so far has largely focused on the LPE Project's understanding of law and economics, both in the private law setting and in the public law setting in the form of public choice. It would not be overdramatic to say that a goal of the "Law and Political Economy" project is to erase "law and economics" from the law. The methodological constraints imposed by economic analysis and counter-indicated by its conclusions are anathema to LPE's own normative commitments.

But while the discussion above is critical of the LPE movement, my purpose in this paper is not only to criticize but also to offer a different synthesis, one between LPE and L&E. Putting its attacks on the role of law and economics to the side, one would be too hasty to dismiss LPE as a whole, and especially to dismiss the substantive concerns animating its adherents. Indeed, many of the concerns raised by its adherents are familiar to scholars of other stripes, including many law and economics scholars.

LPE's founders are open about their desire to erase economics from the law, sharing expressly their view that "We must replace the [law-and-economics based] Twentieth-Century Synthesis with a different framework for legal thought."[106] They continue, saying that "at the core of this reconstruction is a renewed commitment to questions of political economy."[107] In explaining what this means, they explain:

> The term "political economy" is historically variable and contested. We do not mean the "political economy" analysis of institutions and policies as practiced in mainstream economics departments, which turns on the application of rational-choice models to government actors or institutions. Rather, we intend the older and more foundational usage familiar to nineteenth-century audiences, which persisted in traditions of "radical" political economy until a few decades ago. This political economy investigates the

105 THOMAS HOBBES, LEVIATHAN 519 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).

106 Britton-Purdy et al., *supra* note 8, at 1791-92.

107 *Id.* at 1792.

> relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences.[108]

The discussion in this part turns that reconstruction around, arguing that any study of political economy is necessarily anchored in the values of economic thinking. To do so, it looks at three thinkers who assuredly must be considered political economists (unless the LPE movement means to erase or redefine both law & economics *and* political economy): Adam Smith, the original political economist; Elinor Ostrom, one of the leading political economists of the 20th century; and Derrick Bell. Not only are these three individuals unquestionably engaged in political economy, but their work inhabits a place of interest, both substantive and methodological, to both L&E and LPE.

A. *A Different Synthesis*

But I start by echoing a more recent appeal for synthesis between these fields, quoting an extended passage from a 2003 article by Professors Devon Carbado and Mitu Gulati.[109] In this passage, they discuss the relationship between law and economics and critical race theory – though it generalizes to critical legal studies and LPE.

Legal academics often perceive law and economics (L&E) and critical race theory (CRT) as oppositional discourses. Part of this has to do with the currency of the following caricatures:

> L&E is the methodological means by which conservative law professors advance their ideological interests. The approach is status-quo-oriented and indifferent (if not hostile) to the concerns of people of color and the poor. . . . The political effect of L&E is to entrench and obfuscate racial and class hierarchies.
>
> CRT is the methodological means by which radical faculty of color (and especially black faculty) advance their ideological interests. The approach is invested in finding discrimination and characterizes even the most progressive institutional practices as racist. . . . The political effect of CRT is preferential treatment and social welfare programs for people of color — particularly black people.
>
> It would be neither difficult nor interesting to disprove either caricature. Yet both have considerable intellectual and institutional purchase, so much so that they have helped to balkanize L&E and CRT scholarship. . . .
>
> Both sides are at fault. . . .

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108 *Id.*

109 Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003).

> A CRT/L&E engagement helps to cure some of the deficiencies in both fields. For example, CRT's notion of race as a social construction can help L&E scholars move to a dynamic conception of race, and L&E's focus on the incentive effects of legal and institutional (norm-based) constraints can help CRT scholars analyze the ways in which the pressures and constraints of the workplace shape both employer and employee behavior. In short, a CRT/L&E joint venture could advance our thinking about how, in the shadow of law, workplace structures and norms affect racial identity — and vice versa.
>
> The argument for a collaboration between economics and CRT (and feminist theory and gay and lesbian legal studies) was made with force in a 1996 essay by Ed Rubin. Rubin argued that the common critical approach to institutional analysis shared by L&E and CRT — both fields reject claims about the neutrality and objectivity of legal rules, albeit for different reasons — would, if combined, produce [] an exciting new methodology for legal inquiry [that could serve as a] unifying discourse in legal academia.[110]

I could not agree more with Carbado and Gulati. It is true that both L&E and LPE (as well as other critical fields) rarely understand and readily misrepresent each other. Yet both are complementary, as sources of questions and analysis. And both have uniquely sharp foci on institutions that make them powerful and relevant in ways that most other fields of legal analysis are not.

If either field is to demonstrate its legitimacy, it must move beyond base characterizations such as offered by LPE in *Beyond the Twentieth-Century Synthesis* and acknowledge the contributions of the other.[111] This is particularly the case given the extent to which the fields actually do concern themselves with similar topics. As discussed previously, both fields share substantial concern with how private interests capture public institutions.[112] This and other overlapping themes are explored further in the discussion below.

I would hasten to note here that while I reject LPE's characterization of L&E as "big C" Conservative – or, indeed, as having any necessary political valence – one must also acknowledge that many conservatives are drawn to law and economics largely because it does tend to confirm their political views. On the other hand, the fields' critics often reject the field and its methodologies for the converse reason: that they believe it is antagonistic to their political views. The materials below draw from the work of three scholars with whom I expect most political proponents of law and economics are not more than passingly familiar (and two of whom for which the same can likely be said of proponents of LPE). That is an unfortunate state of affairs for both camps.

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110 Carbado & Gulati, *supra* note 109, at 1757–58, 1761 (emphasis in original) (citing to Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Mircroanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996)).

111 *See* Atiq & Mathews, supra note 101 and accompanying text.

112 *Supra*, Parts I.C and II.B.

B. *Adam Smith*

The way in which LPE invokes "political economy" above should carry a sense of humor to many law and economics scholars. Characterizing their meaning as drawing from the "older and more foundational usage familiar to nineteenth-century audiences"[113] gives their usage an air of mystery, as though the secret books of political economy hold truths that would lead any adherent of the twentieth-century synthesis to rethink their fundamental beliefs. This is humorous, of course, because the founding father of "political economy" was Adam Smith, whose ideas are in no way foreign to the law and economics scholars from whose ideas the LPE so clearly seeks to distance itself.

The discussion below considers some of Smith's core ideas, as are relevant to the intersection of political economy and law and economics. And without doubt, many of Smith's concerns sound familiar to today's readers. Consider, nearly 250 years ago, in Book 5 of *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith explained that "Civil government, in so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all."[114] It seems, perhaps, that the twentieth-century synthesis, with its effects of fomenting and preserving class-based inequality, was alive and well in the eighteenth century, as well as in the centuries prior.

Of course, Smith, the political economist, was not an advocate for this state of affairs. To the contrary, in *Wealth of Nations*, Smith was describing what had been the case throughout human history, tracing the development of human society's transition from hunters and gathers to shepherds and then to agriculture – and he was arguing that human society was entering a new, fourth, age in which it needed to develop a more equal form of civil government.[115] Most notably, Smith (and his contemporaries) were arguing that a contemporary civil government had to embrace ideas of separation of powers and equality before the law.[116] It is instructive to look at Smith's rebuke of his century's own synthesis and how it relates to our current political economy.

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113 Britton-Purdy, *supra* note 8, at 1792.

114 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 207 (Edwin Cannan, ed., Methuen & Co. 1904) (1776) [hereinafter WEALTH OF NATIONS].

115 *See id.* at 214.

116 Smith states:

> But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power.

Id. at 214.

1. Smith on the Immorality of Slavery

It is useful to start with some discussion of Smith's views on slavery, which helps to situate Smith's work alongside contemporary critical discussions. Slavery was not a primary subject of Smith's written works; it was, however, a practice that that he comments on in most of them, consistently to express hit strong opposition to the practice. His opposition to slavery was rooted most directly in his moral philosophy, which viewed all people as fundamentally equal and explored morality in terms of one's ability to identify with and express sympathy for those who are different. In his view:

> [t]he difference of natural talents in different men is, in reality, much less than we are aware of . . . . The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature as from habit, custom, and education.[117]

He concludes this passage by arguing that it is "the vanity of the philosopher [that he] is willing to acknowledge scarce any resemblance" between himself and those in lesser occupations.[118]

Taking this view from the opposite direction, not only does Smith view slavery as unjust, but those who practice it as barbarically immoral. In his *Theory of Moral Sentiments*, Smith develops the ideas of the "impartial spectator" for evaluating the morality of conduct

> We conceive ourselves as acting in the presence of a person[, an impartial spectator], who has no particular relation, either to ourselves, or to those whose interests are affected by our conduct . . . . It is only by consulting him that we can see whatever relates to ourselves in its proper shape and dimensions.[119]

Upon this standard, Smith clearly views slavery as a barbaric practice and those who practice it as engaging in an unjust enterprise. As he explains,

> There is not a negro from the coast of Africa who does not, in this respect, possess a degree of magnanimity which the soul of his sordid master is too often scarce capable of conceiving. Fortune never exerted more cruelly her empire over mankind than when she subjected those nations of heroes to the refuse of the [jails] of Europe, to wretches [European slave owners] who possess the virtues neither of the countries which they [the enslaved] come from . . . .[120]

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117 *Id.* at 17.

118 *Id.* at 18.

119 Dugald Stewart, *Introduction* to ADAM SMITH, THEORY OF MORAL SENTIMENTS (Stewert ed., London, Henry G. Bohn 1853) (1759).

120 ADAM SMITH, THEORY OF MORAL SENTIMENTS 299–300 (Stewert ed., London, Henry G. Bohn 1853) (1759).

Indeed, it is notable that Smith's sympathies extend to America's indigenous people. He writes of Columbus and the Spanish backing of his voyages that "the council of Castile determined to take possession of countries of which the inhabitants were plainly incapable of defending themselves. The pious purpose of converting them to Christianity sanctified the injustice of the project."[121] He later broadened his critique to include the English colonies:

> Folly and injustice seem to have been the principles which presided over and directed the first project of establishing those colonies; the folly of hunting after gold and silver mines, and the injustice of coveting the possession of a country whose harmless natives, far from having ever injured the people of Europe, had received the first adventurers with every mark of kindness and hospitality.[122]

Despite his own views on slavery, Smith's moral critiques of the institution are a secondary focus in his work. Rather, his attacks on slavery are more often framed in the pragmatic language of his exploration of capitalism and commercial society: he argues that slavery is economically inefficient. This marks perhaps the greatest divide between LPE and both Smith's political economy and contemporary law and economics: Smith's pragmatic patience as compared to the impatience of LPE scholars; L&E's focus on the limitations of the political process as compared to LPE's willingness to wrest political control to channel the political process to bend it to their preferred outcomes.

Smith takes this approach largely because he views the abolition of slavery as unlikely. He notes that it has been common to most early societies, explaining that "Slavery takes place in all societies at their beginning, and proceeds from that tyrannic disposition which may almost be said to be natural to mankind . . . . It is indeed all-most impossible that is should ever be totally or generally abolished."[123] Practically, he can't imagine that the British monarchy or aristocracy would abolish it, noting that

> the persons who make all the laws in that country are persons who have slaves themselves. These will never make any laws mitigating their usage; whatever laws are made with regard to slaves are intended to strengthen the authority of the masters and reduce the slaves to a more absolute subjection.[124]

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121 WEALTH OF NATIONS, *supra* note 114, at 63.

122 *Id.* at 90.

123 ADAM SMITH, LECTURES ON JUSTICE, POLICE, REVENUE, AND ARMS 96 (Edwin Canaan ed., 1896) (1763).

124 ADAM SMITH, LECTURES ON JURISPRUDENCE 181 (R.L. Meek et al. eds., LibertyPress 1982) (1766) [hereinafter LECTURES ON JURISPRUDENCE]. *See also id.* at 187 ("To abolish slavery therefore would be to deprive the far greater part of the subjects, and the nobles in particular, of the chief and most valuable part of their substance. This they would never submit to, and a general insurrection would ensue.").

Nor, did he believe, that we could "imagine the temper of the Christian religion is necessarily contrary to slavery."[125]

Smith's arguments against slavery therefore took on a more instrumental character, addressed more to those who might own slaves in their individual enterprises than to those who might abolish the entire institution. His best-known argument is that slavery is economically inefficient. Thus, in *Wealth of Nations* he argues that workers who are allowed to own some of the fruits of their labor "have a plain interest that the whole produce should be as great as possible, in order that their own proportion may be so."[126] But "[a] slave, on the contrary, who can acquire nothing but his maintenance, consults his own ease by making the land produce as little as possible."[127] Similarly, in his *Lectures on Jurisprudence*, Smith adds that not only do slaves have less incentive to work hard than free men, but also that they have less incentive to develop new, more productive, technologies.[128]

Smith also offers a more complex pragmatic argument against slavery, which is unfortunately too involved to offer a brief treatment of here. In summary, however, he argues that two things will happen as a slave-owning nation grows in wealth. First, there will be growing inequality between the slaves and their owners. For Smith, this is a moral inequality: the owners will be further and further removed from the experience of their slaves. As a result, they will sympathize with them less and therefore treat them with greater cruelty. And second, as the nation grows increasingly wealthy, it will rely on an increasingly large population of slaves. This, Smith pragmatically cautions, carries with it the risk of inevitable uprising. It is also remarkable to note the extent to which Smith presents an account that is sympathetic to the Marxist dialectic of class.

2. A Note on the "Dismal Science"

Of course, Smith is best known as an economist — he is arguably the most significant figure in the study of economics — though given his interest in the legal institutions that make up a political economy, one might proclaim him as the first law and economics scholar. It is therefore unsurprising that he has some connection to the field known as the "dismal science." More surprising is that that moniker was given to the field because Smith and other like-minded economists were staunchly opposed to slavery.

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125 *Id.* at 191.

126 WEALTH OF NATIONS, *supra* note 114, at 365.

127 *Id.*

128 LECTURES ON JURISPRUDENCE, *supra* note 124, at 526 ("It is impossible that [commerce] can be so well carried on by slaves as by freemen, because they can have no motive to labour but the dread of punishment, and can never invent any machine for facilitating their business.").

The name "the dismal science" was given to economics in 1849 by Thomas Carlyle, a British historian perhaps best known for his "Great Man theory" – the view that "The history of the world is but the biography of great men."[129] One minor, but historically important, aspect of Carlyle's theory was that many people – including Blacks and most other historically enslaved people – were hereditarily inferior to other men.[130] It was therefore in their interest to be indentured (such as through slavery) to those most superior men for their own well-being.[131] Unsurprisingly, and relating this discussion back to earlier parts of this paper, Carlyle's views were influential in the early eugenics movement and popular among the American Progressives in the early 1900s.[132]

Contrary to Smith's skepticism that slavery could ever be abolished in England, it in fact was in 1833. This was in large part due to a movement among the generation of British moral and political philosophers most influenced by Smith and his contemporaries. (Though the terms on which slavery was ended echoed Smith's skepticism: to accomplish abolition, the British government had to pay off slave owners. In effect, the government bought every slave in the country to free them, paying British slave owners a sum so significant that the British government took out a loan that was not fully paid off until 2015.)

In 1849, Carlyle published a phenomenally racist satirical letter, *Occasional Discourse on the Negro Question*, in which he argued for the re-establishment of slavery. In this letter, Carlyle takes aim at, among other targets, "Exeter Hall" (the meeting place of a leading anti-slavery coalition) and economists. He writes:

> Truly, my philanthropic friends, Exeter Hall philanthropy is wonderful; and the social science -- not a "gay science," but a rueful – which finds the secret of this universe in "supply and demand," and reduces the duty of human governors to that of letting men alone, is also wonderful. Not a "gay science," I should say, like some we have heard of; no, a dreary, desolate and, indeed, quite abject and distressing one; what we might call, by way of eminence, the dismal science.[133]

The "social science" to which Carlyle refers, "which finds the secret of this universe in supply and demand," is economics.[134] And his criticism of it

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129 THOMAS CARLYLE, ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY 1 (Fraser ed., 1843).

130 THOMAS CARLYLE, OCCASIONAL DISCOURSE ON THE NEGRO QUESTION 533 (Fraser ed., 1849) (referring to the British as "worthier" than their West Indies slaves).

131 *Id.* at 534–35 (discussing how "European heroism" made savage lands "arable" and keep the natives in a "comfortably idle condition.").

132 *See* Jeffrey A. Tucker, *The Prehistory of the Alt-Right*, Fee Stories (Mar. 8, 2017), https://fee.org/articles/the-prehistory-of-the-alt-right ("Hitler's biographers agree that the words of Carlyle were the last he requested to be read to him before he died.").

133 CARLYLE, *supra* note 130, at 530.

134 *Id.* at 530-531.

is the Smithian prescription that an economy of free men, in which "human governors ... let[] men alone," is preferable to one in which those "human governors" keep men as slaves.[135]

3. Smith's views on civil government

Adam Smith's best-known work is *Wealth of Nations*, which is most often thought of as an ode to wealth, and "the bible of capitalism." In truth, it was no such thing. As Smith described the book later in his life, it was a "very violent attack ... upon the whole commercial system of Great Britain."[136] Recall that the entire title of the book was *An Inquiry into the Nature and Causes of the Wealth of Nations*. His purpose is to discern why the United Kingdom had become so prosperous a country in a historically short period of time when the rest of the world known to him had remained in a poor agrarian state.

Smith's answer to this question, famously, was that the advent of capitalism and the division of labor had led to the wealth of the nation. But in providing this answer he argued that the abuses of the crown and more general lack of justice in the British government, which were unfortunate hallmarks of earlier ages of society, were untenable in a capitalist society. In particularly, he argued for a separation of powers between the crown and judiciary.[137]

Smith's statement about the purpose of civil government that "in so far as it is instituted for the security of property, [it] is in reality instituted for the defense of the rich against the poor"[138] requires situating his statement within his understanding of the development of society.

In Smith's narrative, human society naturally progresses through several stages of development. Historically, we start as hunters and gathers, then progress to shepherds, and from there to agriculture.[139] Each of these stages has different needs for government and property. Notably, over this course of development, there is a transition from nomadic to tribal, and then to nation-state, conflict.[140] The prosperity of society in these stages of development, to the extent there is any, is very much tied to the ability of its leaders to wage war and provide for the needs of their followers. The governments, therefore, are tied to the wealth and strength of the leaders.[141] In the earlier stages of development, strong leaders effectively barter their strength at war for wealth from their followers. As those leaders transitioned

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135 *Id.* at 531.

136 *Adam Smith on Consumption as the Only End and Purpose of Production*, ONLINE LIBERTY FUND, https://oll.libertyfund.org/quote/adam-smith-consumption-only-purpose-production.

137 WEALTH OF NATIONS, *supra* note 114, at 210.

138 *Id.* at 207.

139 *Id.*

140 *Id.* at 205.

141 *Id.* at 207.

from chieftains to kings, accumulating wealth along the way, this bargain changed. Because all the wealth of the land was the king's, citizens were permitted to occupy in land in exchange for working it for the king. In Britain, this ultimately gave rise to the system of nobility described at the beginning of this paper, in which the nobility were effectively the King's deputies, given control over the King's territory in order the manage the peasants; and the peasants were allowed to occupy the land in exchange for working it for the nobility.

Smith's starting observation in *Wealth of Nations* is that Britain was entering a new, post-agrarian, stage: the stage of commerce.[142] He was writing in the early period of the Industrial Revolution, a period of rapid innovation and industrialization that was reshaping society. Only decades prior, there was little commerce in society – the most valuable exchange that most could make was to exchange their labor in the fields for a promise of protection by the King's sheriffs and army.[143] This began to change dramatically over the course of the eighteenth century as new technology rapidly allowed individuals to produce significantly more food through significantly less agricultural labor. Per capita GDP (a measure of the amount of wealth created by each person on the country) in Britain grew by less than 1 percent between 1700 and 1750 – that is, it effectively did not grow at all. It grew by 1.6 percent between 1750 and 1760. Between 1760 and 1770, it grew by an incredible 42 percent (that is *not* a typo), and again by 42 percent between 1770 and 1780.[144]

This dramatic growth in individual prosperity was happening around Smith in real time. It was a period during which the average person went from living on the cusp of starvation to what would then be thought of as middle class. This gave rise to an important change in society: most people went from having to spend all their time working in order to produce enough food to stay alive to having both some amount of free time and some amount of wealth they could spend on leisure. In such a society, citizens want for more than merely the protection of the King's army and sheriffs – indeed, they want more than King or government would ever be able to produce. This is what Smith meant by the transition from an agricultural state to a commercial one. In an agricultural society, the wealth of the nation is kept in its land and limited to the agricultural products that that land can produce. In a commercial society, the wealth is created by its people – indeed, it is its people – and is limited by their imagination and their ability to engage with one another.

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142 WEALTH OF NATIONS, *supra* note 114, at 161.

143 Guy I. Seidman et al., *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U.L.J. 393, 421 (2005).

144 Stephen Broadberry et al., *British Economic Growth, 1300–1850: Some Preliminary Estimates*, presented at at Economic History Society Annual Conference 2010 at the University of Durham, 26-28 Mar. 2010 (unpublished).

4. Smith's critique of civil government

Smith's critique of civil government as being "in reality instituted for the defense of the rich against the poor"[145] needs to be understood in the context of this transition to a commercial society. In every prior stage of human society, the government is naturally – not rightly or wrongly – structured to protect the property of the chief property-holder. In England, that meant in the interest of the crown or nobility. While nominally the common-law legal system would decide disputes as between the parties, in practice, it was always beholden to the King.

As Smith explains immediately following his statement about the historic purpose of civil government:

> The judicial authority of such a sovereign, however, far from being a cause of expence, was for a long time a source of revenue to him. The persons who applied to him for justice were always willing to pay for it, and a present never failed to accompany a petition. After the authority of the sovereign, too, was thoroughly established, the person found guilty, over and above the satisfaction which he was obliged to make to the party, was likewise forced to pay an amercement to the sovereign. He had given trouble, he had disturbed, he had broke the peace of his lord the king, and for those offences an amercement was thought due.[146]

Such a system was never tolerable to a political philosopher like Smith, who was writing in the spirit of Hobbes, Locke, and Montesquieu. Indeed, in the pages following this quote, Smith goes on to discuss various ways in which a judicial system could be financed, tracing how tying the self-interest of a court to its ability to raise revenue or its need to appease the whims of a ruling political class could systematically distort justice.[147]

This system was particularly intolerable to Smith as we transitioned from an agricultural society to a commercial society.[148] In an agricultural society, the vast majority of peasants, who made up the vast majority of the population, did not have much, if any property for the law to protect – and nobility would settle most disputes by more civilized (and less public) ways than turning to the courts. But in a commercial society, most people were rapidly acquiring property and accumulating wealth. The role of the judicial system was therefore increasingly important, and the interests that it needed to protect more representative of the peasant than the crown.

Smith concludes this portion of his discussion by arguing for a separation of power between the executive and judiciary, arguing that

> When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to what is vulgarly called polities. The persons entrusted

145 WEALTH OF NATIONS, *supra* note 114, at 207.

146 *Id.*

147 *See id.* at 210.

148 *Id.* at 161.

> with the great interests of the state [that is, the king] may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man. But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power.[149]

5. Smith's Political Economy of the Common Law

A separation of powers is essential for what Smith at one point called the "tolerable administration of justice."[150] But what is that law being enforced by this tolerable administration of justice? It is important here to note that Smith's primary concern was the judge-made common law, not the statutory law created by legislation. Indeed, Smith's argument for a separation of powers between the judiciary and executive was of course an idea borrowed from Montesquieu – but he omits the legislature from this need for separation.[151]

This is because Smith's primary concern was the protection of property, the laws governing which – in the thinking of Smith and his contemporaries – were largely within the purview of the judiciary to discover through the common law process. In this sense, he was largely influenced by his friend David Hume. In his work on justice and injustice, Hume spoke of "the three fundamental laws of nature, that of the stability of possession, of its transference by consent, and of the performance of promises,"[152] arguing that "It is on the strict observance of those three laws that the peace and security of human society entirely depend; nor is there any possibility of establishing a good correspondence among men, where these are neglected."[153] Broadly, these three "laws of nature" correspond to the three familiar core common law subjects: tort (stability of possession), property (transference by consent), and contact (performance of promises). Collectively, they are the core subjects of what contemporary legal scholars refer to as "private law."

In other words, Smith's political economy recognized the same private-law/public-law divide criticized by the LPE Founders as a "twentieth-century synthesis" – and for much the same reasons the twentieth-century L&E and public choice scholars have argued for that divide.

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149 *Id.* at 214.

150 *Adam Smith on the Need for Peace, Easy Taxes, and a Tolerable Administration of Justice*, ONLINE LIBERTY FUND, https://oll.libertyfund.org/quote/adam-smith-on-the-need-for-peace-easy-taxes-and-a-tolerable-administration-of-justice-1755 (last visited Oct. 24, 2022).

151 WEALTH OF NATIONS, *supra* note 114, at 213.

152 DAVID HUME, A TREATISE OF HUMAN NATURE book 3, pt. 2, § 6 (1740), Hume Texts Online, https://davidhume.org/texts/t/3/2/6#:~:text=Hume%20Texts%20Online%20SEC%20T.%20VI.%20Some%20farther,by%20consent%2C%20and%20of%20the%20performance%20of%20promises.

153 *Id.*

C. *Elinor Ostrom*

The next case study is Elinor Ostrom. Among other things, Ostrom was a Nobel laureate, one of the leading figures in New Institutional Economics, a past president of the Public Choice Society, and winner of the Frank E. Seidman Distinguished Award for Political Economy.

Ostrom was a highly celebrated twentieth-century political economist. One might therefore expect her to epitomize the opposite of "the older and more foundational usage [of political economy] familiar to nineteenth-century audiences"[154] that the LPE project means to invoke. But this seems unlikely. Her work and values – like Adam Smith's – seem surprisingly in line with the goals of the LPE project.

Ostrom spoke about both when she won the Nobel Prize:

> [After a few years in my position as an Assistant Professor at Indiana University,] I was able to offer a year-long graduate seminar in 1969–1970 on the theories related to urban government and the measurement of public goods and services. ... The fall semester gave us an opportunity to review the extensive literature on urban governance and service delivery. There were two dominant approaches—metropolitan reform and public economy. As we began to unpack the theory underlying these approaches, we found both posited that the size of governmental units in a metropolitan area affected the output, efficiency, distribution of costs to beneficiaries, citizen participation, and responsibility of public officials, but the direction of the posited relationship differed.
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> ...
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> Advocates of the metropolitan reform approach assumed that size of governmental units would always be positive for all types of goods and services. Scholars using a political economy approach assumed that size of governmental units would be positive or negative depending on the type of public good or service. ...
>
> We did have a "case" nearby that made our effort to understand these diverse approaches highly relevant. ...[T]here were three independent, small police departments serving neighborhoods immediately adjacent to socioeconomically very similar neighborhoods being served by the much larger Indianapolis City Police Department. That gave us a natural experiment. Our study measured the performance of policing in these six urban neighborhoods using survey research and building on recent rigorous methodological studies.
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> ...
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> Our study generated some surprising findings—at least to those scholars who presumed that larger urban governments would always produce superior public services. In contrast to their neighbors served by the Indianapolis City Police Department, households in the three communities served by their own smaller police departments faced a lower victimization rate, were more likely to call upon the police if they were victimized, received higher levels of policy follow-up, and evaluated the performance of their police department more positively.

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154 *LPE Manifesto*, *supra* note 9.

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In the fall of 1970, I worked with an outstanding group of black students to conduct a study in two poor, independent black communities that we matched to three similar communities being served by the Chicago Police Department. At the time of our study, the two small communities had just a few police officers. Their wages were low and their official cars were frequently out of service because their budgets were so limited. The Chicago Police Department had a force of >12,500 men who were paid relatively high wages. We estimated that expenditures for police service in the three Chicago neighborhoods were 14 times the amounts spent on policing in the small communities. But despite the huge difference in spending, we found that in general the citizens living in the small cities received the same or higher levels of services compared to the residents in Chicago. Although victimization rates were similar, citizens living in the small independent communities were less likely to stay home due to fear of crime, and they agreed with statements that their local police treated all citizens equally according to the law, looked out for the needs of the average citizen, and did not take bribes. The findings from these initial studies were consistent with the political economy theory.

...

We then conducted a much larger field study in the St. Louis metropolitan area, which was served by two large departments ... . We found a strong and significant positive relationship between size of police department and per capita costs of police services in a neighborhood as well as the percentage of households that had been victimized. Negative relationships existed between size of department and the percentage of households that were assisted who indicated that police response was rapid, rated the job of the police as outstanding, or evaluated their police to be honest.

Replications of our empirical work were undertaken in Grand Rapids, Michigan, and in the Nashville–Davidson County area of Tennessee. In this full set of studies, no one found a single case where a large centralized police department was consistently able to outperform smaller departments serving similar neighborhoods across multiple indicators.

Thus, we provided very strong support for the posited relationships of the political economy approach. For policing, increasing the size of governmental units consistently had a negative impact on the level of output generated as well as on efficiency of service provision. Why?

In our efforts to understand why smaller police departments so consistently outperformed their better trained and better financed larger neighbors, we developed the concept of "coproduction" of public services. This involves a mixing of the productive efforts of consumer/citizens and of their official producers. It is feasible for governments to produce highways and other physical infrastructure without the active involvement of citizens, but we observed citizens and their officials working together more effectively in the small- to medium-sized communities we studied, and this collaboration has important effects on policing. In the smaller communities, citizens take a more active role in monitoring their neighborhoods, notifying the police rapidly when suspicious activities occur or when victimized. Systematically observing officers on duty in their patrol cars demonstrated that officers in the smaller departments also had greater knowledge about the areas they served. Thus, not only were there diseconomies of scale in the formal production of services in urban areas—as posited by the political economy approach—but human services could not be effectively produced by official agencies

> alone. Citizens are an important coproducer. If they are treated as unimportant and irrelevant, they reduce their efforts substantially.[155]

In this excerpt, Ostrom describes two things. First, she describes her research into the effects of police department size on the quality of that department. Her research found that the quality of a department's policing was inversely proportional to that department's size. This result was contrary to the most common understanding then, (as is largely still true today) that larger, more sophisticated, better resourced police departments would be better police departments.

Second, she offered a way to account for this mismatch, a theory that she calls "coproduction."[156] The basic idea of coproduction, applied in this context, is that "policing" isn't a good or service that is simply procured or provided by the government.[157] You don't go to the store to buy "some policing." Rather, good policing is something that is produced jointly by the community in need of the policing service and the police offering that service. The further removed the police are from the on-the-ground experience, needs, and concerns of a local community, the less ably the police will be able to serve that community. And, though Ostrom doesn't say this, the more removed the police are from a local community, the more they will service the needs and expectations of some other, remote community.

Building on this work, Ostrom went on to study how communities and institutions can govern themselves. A basic theme that runs throughout her work is that communities are generally able to develop rules to govern themselves and that those rules often outperform more formal rules. Thus, farmers are likely to develop customs for how to manage shared pastures that are more effective than if a legislature enacts rules; users of water from an irrigation system are able to develop rules that ensure all users have access to water from the system, without the need for governmental involvement; and outside of extreme circumstances local, community policing is more effective than more typical, government-designed, approaches policing and criminal justice.

As with Smith's critique of civil government and the political economy of the common law, Ostrom's work draws attention to the tension between public law institutions and private individuals. Perhaps even more than Smith, Ostrom finds potential efficiencies in private ordering, especially compared to the inefficiencies of public ordering. What Ostrom's work, in

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155 Elinor Ostrom, *A Long Polycentric Journey*, 13 Annu. Rev. Polit. Sci., 1-23 (2010).

156 Elinor Ostrom, *Crossing the Great Divide: Coproduction, Synergy, and Development*, 24 WORLD DEV. 1073 (1996).

157 *Id.* at 1079 ("After studying police services in metropolitan areas, however, we had not found a single instance where a large, centralized police department was able to provide better direct service, more equitably delivered, or at a lower cost to neighborhoods inside the central city when these were carefully matched to similar neighborhoods located in surrounding jurisdictions. . . . We were dealing with a public-private industry rather than with the bureaucratic apparatus of a single government.").

effect, says is that we don't need a system of formal, governmentally created and backed rules in order for communities to govern themselves. And, in fact, informal (or non-governmental) rules that a community develops to govern itself will generally outperform the more formal rules that a government-based process would have created.

This, once again, echoes the "twentieth-century synthesis" that LPE would have us reject. But it finds support for this synthesis in terms quite different than those that LPE identifies. Indeed, Ostrom's work more often echoes views and causes that are more likely to hold political valence with proponents of LPE than the conservative proponents of L&E that the LPE movement criticizes. From police reform to environmental regulation, Ostrom's work was ground-breaking and remains relevant. Yet its own foundation is complementary to, and would not survive LPE's uncritical rejection of, the "twentieth-century synthesis."

D. Derrick Bell

The final case study that I consider is Derrick Bell. Professor Bell is not an economist or a law and economics scholar. He is probably best known as one of the founding voices of Critical Race Theory and for his book *Faces at the Bottom of the Well*. But I, as a law and economics scholar, nonetheless find his work compelling and see echoes of it in law and economics. Indeed, as argued below, contemporaneous work in law and economics was exploring similar themes and reaching similar conclusions as his work, albeit not in the context of race. This similarity is perhaps most notable in his idea of interest convergence, which bears notable resemblance to the "Baptists and bootleggers" idea in public choice.[158]

In Derrick Bell's *Faces at the Bottom of the Well*, Bell questions "whether [advances in civil rights] established realistic goals or only token symbols that merely placated blacks and helped white Americans alleviate the shame and guilt of a hateful, oppressive past."[159]

According to Bell, gains made in civil rights for blacks in the 1950s and 1960s were offset by "the courts and the political, social, and economic structure."[160] He blames this on the lasting legacy of racism in the country that continued to his day (and, likewise, continues to our day).[161] Bell says that the jurists and others in the legal community, for their part, "rationalize

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158 *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (introducing the concept of interest convergence).

159 Stephanie Goodman, *Faces at the Bottom of the Well: The Permanence of Racism*, 28 HARV. C.R.-C.L. L. REV. 244, 245 (1993) (reviewing Derrick A. Bell, Jr, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992)).

160 *Id.* at 244.

161 *Id.* at 245–46 (". . . a society in which racism is permanent and whites can find justification for the subordination of and discrimination against blacks").

[discriminatory] laws through formal doctrine, though they fail to remedy the reality of discrimination below the surface."[162]

His study of race led Bell to the idea of interest convergence, which states that advancement in blacks' rights only happens when it is simultaneously advantageous for whites.[163] For example, Bell asserts that the iconic *Brown v. Board of Education* decision in 1954 was not made to achieve racial equality, but rather as a propaganda effort during the Cold War.[164]

Most law and economics scholars – and public choice scholars in particular – will recognize this concept immediately. It is a specific example of the "bootleggers and Baptists" idea popularized by Bruce Yandle.[165] Both Bell and Yandle, writing in the early 1980s, identified this "strange bedfellows" aspect to public policy:[166] enacting policy often requires "strange bedfellows" coalitions, and in such coalitions, the interests of the minority group are often secondary to those of the majority group. In Yandle's example, Prohibition was brought about by the convergence in interests between teetotaling Baptists, who opposed alcohol on moralistic grounds, and bootleggers, who knew making alcohol illegal would create a vibrant black market in which they would be key players.[167]

Upon learning of interest convergence, I expect most law and economic scholars – especially those educated in public choice – would recognize the concept as intuitively correct, interesting, and of a kind with mainstream economic thought. Yet I also expect that most law and economics scholars have not heard of interest convergence, especially because it comes from the L&E-antagonistic field of critical race theory. But there ought to be no antagonism here.

There is a tragic realism in Bell's writings – one that, again, echoes themes from public choice. Bell argues that to combat interest convergence, blacks should have "Racial Realism" and realize that their subordination is permanent.[168] Bell believes that, rather than a form of despair, this will free blacks to think of new racial strategies that can bring fulfillment and triumph.[169] For example, in *Faces at the Bottom of the Well*, Bell discusses a hypothetical Racial Preference Licensing Act, in which Congress allows

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162 *Id.* at 249.

163 Derrick A. Bell Jr., *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257, 267 (1970).

164 Derrick A. Bell, Jr., *Reconstruction's Racial Realities*, 23 RUTGERS L.J. 261, 266 (1992).

165 Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, 7 REGULATION 12, 13 (1983).

166 Bell published Brown v. Board of Education *and the Interest-Convergence Dilemma*, *supra* note 158, in 1980.

167 *See* Yandle, *supra* note 165, at 13.

168 Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373–74 (1992); *see also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 [hereinafter BELL, FACES] ("Black people will never gain full equality in this country.").

169 Bell, *supra* note 168, at 373–74.

business owners to discriminate against black patrons as long as they pay a tax that supports Black schools, housing, businesses, and the like.[170] This works, according to Bell, not to achieve racial equality, but to "declare[] racial justice in the marketplace by balancing the rights of African-Americans to fair treatment with the needs of whites to 'prefer' certain customers, employees, and contractees."[171] In other words, Bell is making an economic argument for racial equality: a business can make the choice to discriminate, but at a high financial cost to them. The market may better mitigate discrimination because business owners may stop discrimination to avoid paying the tax. "Racial Realism" has been criticized for not providing a clear way to reform civil rights strategies.[172]

Here Bell's style of thinking clearly resembles that of law and economics scholars – he is literally calling for a market mechanism for allocating racist attitudes and collecting Pigouvian taxes to compensate for those attitudes.

But there is a more subtle and important aspect to Bell's tragic realism. As discussed in Part III.B, students of public choice often lament its descriptive nihilism of the political process. As a field, public choice is notable for documenting the myriad pathologies of the political process – the ways in which it is captured by special interests and fails to protect the interests of the majority of any polity – without prescribing solutions to these problems. Its strongest prescription is to limit the threat of these pathologies by limiting the scope of power of government. Just as critical legal theorists were criticized for failing to offer solutions to the myriad criticisms they leveraged against legal institutions, it is not entirely unfair to criticize public choice scholars for not offering solutions for the criticisms they leverage against government.

I say "not entirely unfair" because it is, in some ways, an unfair comparison. Public choice scholars offer a descriptive account of how the political process works and offer a responsive prescription: limit the extent to which we entrust important decisions to this flawed institution and rely instead on other public institutions that are more insulated from capture by special interests. LPE scholars take the opposite approach, arguing that government's frailties present an opportunity to wrest its power for those scholars' own normative goals. Here, Bell's perspective seems more in line with that of the public choice scholars. He does not give in to the nihilism of despair. His "racial realism" does not aspire to wrest control of the system or to change it. Rather, it recognizes the permanence and limitations of the system and uses those limitations to address the permanence as best as possible.

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170 BELL, FACES, *supra* note 168, at 47–48 (1992).

171 Karen L. Ross, *Combatting Racism: Would Repealing Title VII Bring Equality to All?*, 21 SETON HALL LEGIS. J. 141, 162–63 (1997) (citing to BELL, FACES, *supra* note 168, at 47).

172 *See* Willie Abrams, *A Reply to Derrick Bell's Racial Realism*, 24 CONN. L. REV. 517, 517–18 (1992).

One cannot argue in good faith that either Bell's normative prescription or those of public choice scholars are satisfactory. They are not. But that is the nature of realism. It would be better to live in a world without discrimination, in which government works fairly and equally for all – a world without transaction costs. But the response that the LPE project offers to this dissatisfaction is even less satisfactory. The perspectives of Bell, public choice scholars, and law and economics scholars are, above all else, based in realism. To reject them in favor of a misguided sense of political economy that calls for capturing the means of legal production and turning the machines of government to work to the ends of a preferred class is nothing more than to reject the modern state – law and all – and to return society to a pre-Hobbesian war of all against all.

CONCLUSION

The Law and Political Economy project makes bold claims, both in its characterization of the nature of contemporary law and in its own normative prescriptions responding to that characterization. This article has considered both this characterization and prescriptions and found them lacking. This is tragic. LPE has already demonstrated that it has real power as a movement and, consequentially, has real potential to do damage to the legal institutions best positioned to address the very real concerns animating much of the LPE agenda – and to emphasize this point, there are substantive, real, important societal concerns animating the LPE agenda. The even greater tragedy, however, is the extent to which LPE defines itself oppositionally to the legal mainstream – and especially to economic analysis. The more important synthesis, I argue, is between mainstream legal analysis, notably law & economics, and public choice economics, and LPE. These fields can learn from each other and would be stronger were they to do so.

The characterization of contemporary law is presented as a grand "synthesis" of private- and public-law institutions that developed over the latter half of the twentieth century, focusing primarily on the effects of law and economics (on the private side) and public choice economics (on the public side) in shaping contemporary understandings of the law. On both the private- and public-law side of the ledger, these developments are presented as normatively suspect and in need of a "radical" normative response. But the proponents of the *Twentieth-Century Synthesis* fail to engage substantively with the purely descriptive reasons that law & economics and public choice economics were so powerful in shaping the course of the law. Indeed, the authors' presentation makes basic mistakes on both accounts that suggest, at best, a lack of understanding of the law & economics critique of earlier legal institutions and an absolute failure to engage with the substantive critiques of public choice economics.

This latter point is especially notable because the *Beyond the Twentieth-Century Synthesis* presents a truly fascinating study in public choice. On one

side of the coin, many of the public-law critiques raised by the authors are quite apt. The rise of the conservative legal movement and its effectiveness in capturing various public institutions is a straight-up public choice story. And on the other side of the coin, some of the ideas the authors promise to explore (even if they get only a very superficial treatment in *Beyond the Twentieth-Century Synthesis*) could be pulled straight from a public-choice textbook or contemporary public choice scholarship. How and whether we can structure democratic institutions to be insulated from capture and sensitive to concentrations of power are central questions of public choice economics.

But rather than embrace and learn from public choice economics as a cognate field, LPE instead chooses to castigate it as a source of contemporary concerns and, ignoring its lessons, to lean forcefully into institutional capture as a source of power. The general thrust of LPE's normative prescription is: *the world is unjust, and we should use government to do something about it.* This amounts to a call to use the machinery of government to impose a preferred set of policies upon the world without engaging with the risks of such an approach – namely that the policies imposed upon the world may be those preferred by someone else, someone antagonistic to one's own preferred policies.

In other words, LPE's normative call is that "lawyers of the world unite" – but this call forgets both that not all lawyers of the world agree on all things, and that "first thing those with power do is kill all the lawyers."

The irony of LPE is that political economists, from Adam Smith (arguably the founder of political economy as a field) through today, have long shared many of the concerns to which the LPE project draws attention. Today these thinkers are often thought of as aligned with fields like law & economics and public choice – and rightly so. But their concerns highlight the overlap between LPE and the fields that it castigates. Indeed, not only do these fields share many of the same concerns, but also many of the same methods and conclusions. Rather than demonize, mischaracterize, and ostracize mainstream legal analysis, LPE would be better served to work in dialogue with them – and those fields would benefit from better understanding and taking the concerns of LPE seriously.