Chapter 1
Megacorporations as Model Neoliberal Persons

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The recent 2007-2008 financial crisis has led to renewed concerns over corporate misconduct on Wall Street and also, more generally, over the unique threat that large corporations pose to democratic societies. These concerns were aired at the very outset of that recession, partly in response to the legislative measures that Congressional leaders promptly enacted: members of the taxpaying public voiced their frustration, in particular, at the necessity to bail out companies that were ostensibly “too big to fail,” all while smaller businesses and households saw their incomes steeply plummet. And they began to express doubts, like many of their American predecessors, whether concentrated business power is truly compatible with a self-governing people and with free institutions.

These initial misgivings have only continued to resurface in the intervening decade. They have been accompanied, moreover, by new worries over the use of corporately owned and operated technology to collect reams of personal data on millions (or even billions) of consumers, who feel increasingly reliant on digital mediums to communicate and transact with one another. In this respect, the growing technological prowess of powerful corporations has only amplified long-standing worries

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1 It is interesting that the big “winner” of the 2008 recession, as a journalist for Times glibly noted a few years later, has been none other than “the largest U.S. Corporations” that were “able to take advantage of reduced labor costs and low interest rates to boost their productivity at the same time that they [were] strengthening their balance sheets” (Michael Sivy, “The Big Winner of the Great Recession Is ...,” Time, January 19, 2012, http://business.time.com/2012/01/18/the-big-winner-of-the-great-recession-is/).

over the influence these entities *already* exercise on government, in addition to their stranglehold on the economy and, through that, the wider culture. It is no wonder that a 2016 Gallup poll found a substantial majority of the U.S. population, no less than 63 percent, report being “dissatisfied with the size and influenced of major corporations,” a jump of 15 percent in as many years. Members of the public naturally want major corporations “to have less power than they do” at the very moment when they feel most dependent on them across a range of social spheres, including economic and political.

While a general consensus exists, however, on the undesirability of unrestrained corporate power, considerable uncertainty remains over what we as democratic citizens ought to do about it. Arguments continue to rage over whether increased regulations are the answer, or whether a stronger and more robust antitrust regime, combined with better campaign finance reform, will instead do the trick. In the same Gallup poll cited above, for example, a mere 25 percent of voters thought corporate regulation should be increased, while another 20 percent thought it should be decreased. Meanwhile, as many as 32 percent expressed satisfaction with our current regulatory state and so presumably believe a solution rests elsewhere—or they doubt any solution exists at all. Thus, citizens who share a growing alarm over the corporate giants operating in their midst continue to disagree over what, if anything, will effectively halt them in their tracks.

At the heart of these disagreements lies a deeper confusion over how and why major corporations have acquired the power and influence they now enjoy. In this supposedly paradisiacal age

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6 Ibid.
of neoliberal economics, their very existence raises difficult questions that challenge the legitimacy of our entire market system. How does a society that prizes personal autonomy, for instance, reach a place where its members feel abjectly dependent on “mega” corporate entities? And how does neoliberal doctrine, with its strident defense of individual freedom, result in a world where individuals find themselves politically marginalized by financial titans? These questions highlight a profoundly unsettling paradox that has long plagued neoliberalism—a paradox pithily encapsulated in John D. Rockefeller’s assertion, carved in stone at his Rockefeller Center, that he firmly “believe[s] in the supreme worth of the individual.”

A reader of these lines today may well be forgiven for wondering whether, in crafting these gratifying words, Rockefeller had corporate individuals chiefly in mind.

Part of the reason we face uncertainty over how to battle corporate power, in other words, is precisely because we also harbor uncertainty over how this power came to be. The paradox just alluded to remains just that—a paradox without an obvious explanation, let alone a ready solution. And our suggested policy reforms, which dabble around the edges, necessarily suffer as a result. Thus, a pressing task before us is to determine why it is that neoliberal economics leads inexorably to corporatism: to treat this market contagion, we need to know something more about its mode of transmission.

This chapter begins this analytic task by examining how leading figures of neoliberalism have thought about, wrestled with, or simply ignored the commercialized powers that emerged on their watch. As such, this chapter does not provide a comprehensive account of neoliberalism writ large—a task already undertaken by a far more capable thinker—but focuses more narrowly on the intersection of neoliberal economics and corporate politics. Toward that end, it will examine relevant arguments and

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concerns advanced by neoliberal thinkers at the University of Chicago, from Friedrich Hayek to Milton Friedman, as well as those of “ordoliberal” economists in Germany. The ensuing chapter will then analyze the observed effects of these ideas as they came to be instantiated in free-market societies. While both chapters are theoretically driven, then, the task of this first chapter specifically is to identify those aspects of neoliberal discourse that, in potentia, help catalyze and also justify corporate power.

The first and central feature of neoliberalism that emerges from this analysis is a system-wide behavioral imperative that the market imposes (with increasing urgency) on all its members. As we will see in section one, a “spontaneous” order of the sort Hayek describes may purport to be value-neutral, but it actually prescribes through the force of necessity a highly individualistic and competitive code of conduct. It rewards all actors who, like good economic subjects, maximize their utility and pursue their own subjectively-defined aims in a “rationally” optimal manner. And it penalizes actors who, conversely, fail to fully actualize this economic ideal or, worse still, neglect to do so at all.

Other theorists have observed already how the homo economicus model has become not just ubiquitous in society but also “normative in every sphere.” This chapter adds to this critique by showing how this model is both a natural and expected outgrowth of a spontaneously organized system; and by showing how, more crucially, it also produces power asymmetries between corporate and human persons. Because corporations can more easily achieve this economic ideal, that is, they are also assured a position of power and influence over less proficient (human) competitors. And they ultimately become, as this chapter’s title suggests, exemplars for how neoliberal persons are supposed to behave.

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Homo economicus has pervaded Western societies for quite some time, of course, so it should come as no surprise that vast swaths of the American public have, throughout much of the 20th century, loudly denounced the very existence of corporate conglomerates and have called for governmental action to remedy the various economic injustices they faced. We will briefly survey these anti-corporatist sentiments in section two of this chapter, focusing special attention on the fact that liberal economists at Chicago and elsewhere were, in the 1930s and 40s, largely of one mind with the public. Section three then relates how a neoliberal consensus formed in the early 1950s that large corporations—or even monopolies and cartels—actually pose no real threat at all, provided that government intervention in the economy remains minimal. What underpins this striking claim is the very concept of market spontaneity with which we began our analysis. This concept, it will be shown, depoliticizes market outcomes and in that sense provides ideological cover for threatening corporate activity—which also goes a long way in explaining why powerful industries have, since the inception of Chicago school economics, offered substantial financial support to numerous neoliberal projects.

The fourth and final section of this chapter discusses how the ordoliberal economists, in a reactionary move, sought to replace a spontaneous model of the economy with a blatantly “constructivist” one in its stead. Importantly, their motivation for doing so stemmed from wider concerns about the influence that monopolistic businesses exert on democratically organized societies; their lived experiences as citizens of the Weimar Republic, the prelude to Hitler’s Nazi regime, convinced them that undisciplined markets generate economic power blocs which, in turn, wreak havoc on society and all but incite a strong authoritarian backlash. The only real solution to this pernicious cycle, they concluded, is to construct a new legal order in which market competition is further enshrined in existing

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10 The term “homo economicus” was actually first used by critics of John Stuart Mill in the late 18th century, as Joseph Persky explains in “Retrospectives: The Ethology of Homo Economicus,” *The Journal of Economic Perspectives*, vol 9 (2) (1995), 222
laws and institutions: in other words, the best way to promote and secure individual freedom, understood in its narrow market sense, is to keep anti-competitive forces at bay.

In actual practice, an ordoliberal regime differs but little, therefore, from the kind of marketized society that we today identify with neoliberalism. The ordoliberal economists were more than happy to retain homo economicus as their go-to behavioral model; if anything, they reified this model and transformed it into a normative principle of the first order. Their only point of difference with their neoliberal colleagues—and it was more a difference in emphasis—was over the appropriate warrant to invoke on behalf of a system which, constructed or not, requires of its members that they embrace competitive behavior over alternative modes of being. More specifically, the ordoliberals believed a market system surpasses all others not because it forms spontaneously, but rather because it grants vast freedoms to those who comprise it: competitive individuals are also free individuals.

Neoliberal economists at Chicago, of course, were every bit as eager to affirm the freedom-enhancing qualities of their competitive market system. Indeed, this was no more true than with Hayek himself, as evident early-on in his bestselling book *The Road to Serfdom*; the reason he argued so strenuously on behalf of his spontaneous model was precisely because it was, in his mind, opposed in principle to the collectivism exemplified by the Soviet regime. Thus, it seems fair to conclude that a neoliberal market system can avail itself of *multiple* warrants as needs require: even if we deny that it sprang into being through its own spontaneous mechanisms, we still owe it our respect and compliance, both ordo- and neoliberals would say, because it is ultimately what makes us prosperous and free.

An important upshot of this study, in short, is that a simple rejection of laissez-faire principles will not go far in deterring corporate power. For even a *constructed* market system, *a la* ordoliberalism, can serve corporate interests. This also means that we must abandon the pleasant fiction that a more activist regulatory regime will resolve this issue once and for all, or alternatively that *fewer* regulations, as Reaganomics suggests, will act as the panacea we all desire. After all, the main reason why corporate
power continues to run amok today, we learn, has less to do with the extent to which government intervenes and has more to do with why it intervenes—or else fails to intervene at all.

1. Spontaneous Orders and Collectivist Ends

Hayek is deservedly renowned for the idea that markets originate through a spontaneous process of evolution. According to this view, a market system achieves a modicum of order through its own internal mechanisms and is thus free of conscious design. It emerges on the backs of innumerable self-interested actions made irrespective of any comprehensive plan. One apparent problem with this argument, however, is that complex economies are also accompanied by a vast array of supplemental laws, statutes, and regulations. And this raises a troubling question that Hayek, and those who embrace his evolutionary narrative, must somehow answer: How can a market system evolve in a spontaneous fashion if the laws on which it depends are themselves products of human artifice? As a preemptive response to this question, Hayek drives a categorical wedge between what are, in his view, different types of laws. And he argues that the only laws truly compatible with voluntary exchange (and therewith human freedom) are those that bear the imprint of goal-independent spontaneity.

Hayek first introduces this argument in The Constitution of Liberty, where he carefully differentiates between legal rules, on one hand, and legal commands on the other.11 As he explains it in the tenth chapter of that work, a constitutional order is freedom-enhancing precisely to the extent it avoids issuing the latter—namely, detailed commands that all but compel particular people to perform particular actions. A liberal order thus differs from an authoritarian one insofar as it enacts generalizable rules that afford its members maximum freedom of action. According to Hayek, most of these rules emerge as informal norms of social conduct and are only later codified in the legal system. The fact that they meet with widespread compliance, in other words, “does not necessarily presuppose a person who

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has issued [them antecedently].”\textsuperscript{12} Rather, they initially garner the tacit acceptance of myriad individuals who utilize them to engage in productive interactions, and they achieve this through a protracted evolutionary process that occurs well before they are formally promulgated.\textsuperscript{13}

Part of what makes this argument superficially attractive is the way Hayek combines analytical and normative claims into one compelling whole. In market economies, the laws simply \textit{did} evolve from the ground floor up, he claims, and the unintended results now all but \textit{obliges} us to ensure that future laws do so as well. If we as liberal citizens are to retain our freedom—understood as the absence of constraints on our voluntary choices—then we must consign lawmaking to its properly market-oriented task. As Hayek sees it, in short, a straight line connects free individuals with free \textit{markets}, in which the arbitrary dictates of political authorities (to say nothing of supermajorities) are safely kept in abeyance.

In order for liberal citizens to live as they please, then, they must be free from the shackles of collective ends and outcomes. This ideological creed is at the root of Hayek’s descriptive claims. And it explains why he takes such pains to adorn his “spontaneous” order with a value-neutral mantle: for if this order has a collective end, then it, too, seemingly violates freedom of choice. Hayek thus stridently maintains, in an eclectic body of work spanning decades, that general laws do not (and indeed cannot) stipulate particular outcomes that individuals and groups are duty-bound to pursue. All actors are free to pursue whatever strikes their fancy; whether they find happiness and meaning as a result of their efforts depends entirely on their own predilections and idiosyncratic personality. In keeping with this argument, Hayek also claims that actors need not pursue a \textit{materialist} aim specifically. One benefit of a civilized society, rather, is that it provides individuals with abundant opportunities to seek whatsoever

\textsuperscript{12} Hayek, \textit{The Constitution of Liberty}, 149. Hayek terms the contrary view “constructive rationalism.”

they consider admirable and noble; that is, it affords them the “ability to pursue an infinitely wider range of ends than merely the satisfaction of [their] most pressing physical needs.”

Hayek goes on to qualify this claim, however, with the further observation that humanistic attainments are only worth pursuing en masse when they provide a competitive advantage over other groups and ways of life. Sometimes material capabilities are more crucial in maintaining this advantage, though not in every case: “Whether a group will prosper or be extinguished depends as much on the ethical code it obeys, or the ideals of beauty or well-being that guide it, as on the degree to which it has learned or not learned to satisfy its material needs.” This magnanimous statement, recorded early in *The Constitution of Liberty*, seems to leave room for a society of navel-gazing philosophers, artists, and savants, should these pursuits prove most attractive. But later in his career, Hayek suggests an innovation is only beneficial when it affords greater *strength and power* to those who implement it.

This essential point is integral to Hayek’s entire theory, and yet, it remains a subtle one in the various volumes of his later work, *Law, Legislation, and Liberty*, sometimes discussed quickly and almost as an afterthought, and other times buried in a simple footnote. Early in his first volume, for instance, he claims that social norms, rules of conduct, and laws themselves evolved the way they did simply “because the groups who practiced them were more successful and displaced others.” Their singular advantage had less to do with any inherent qualities they possessed and had more to do with the competitive edge they provided to the communities that implemented them. Good laws inevitably ensure that a community flourishes and prospers, swelling its numbers and granting it power and

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16 Hayek, *Law, Legislation, and Liberty*, vol. 1, 18
leverage over inferior groups. More importantly, they also disturb and unsettle rival communities. Or in other words, as Hayek puts it in the quote above, they displace alternative practices and ways of life.

In the long-term, therefore, only the fittest of practices, or those that somehow augment communal power and strength, will be able to survive the passage of time. Hayek is later more explicit on this point: “The groups which happen to have adopted rules conducive to a more effective order of actions will tend to prevail over other groups with a less effective order. The rules that will spread will be those... which make some groups stronger than others.” By implication, radically different practices and rules—in societies with wildly divergent views on human nature and the meaning of life—cannot coexist indefinitely side by side. One such set of practices will invariably displace those that are weaker, along with the increasingly fragile groups that doggedly adhere to them.

In a footnote that accompanies this passage, Hayek again clarifies that communal strength and power are not always a result of material factors. Nor does displacement of one group by another always necessitate brutal violence—though it may occasionally take this exact form. “As we frequently have to speak of ‘a group prevailing over others,’” he writes, “it should perhaps be stressed that this does not necessarily mean victory in a clash of forces, or even that the members of such a group will

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17 Revealingly, Hayek quotes in a footnote English Sociologist A. M. Carr-Saunders, who writes, “Those groups practising the most advantageous customs will have an advantage in the constant struggle between adjacent groups over those that practise less advantageous customs” (The Population Problem: A Study in Human Evolution (Oxford: Oxford University Press, 1922), 223, quoted in Ibid, footnote 15, 145-49). As examples of “advantageous customs,” Saunders curiously goes on to cite abortion, infanticide, and abstention from sexual intercourse.


19 See, for example, O. W. Markley et al., Changing Images of Man (Oxford: Pergamon Press, 1982).

20 This argument bears all the hallmark features of social Darwinism, and Hayek would be comfortable with this association, as evident in his citing thinkers like A. M. Carr-Saunders and Alexander Alland, Jr. On the other hand, Hayek takes umbrage with a certain strain of social Darwinism that mistakenly applies evolutionary insights to the selection of successful (or not) individuals, rather than, more appropriately, on the selection of successful (or not) institutions and bodies of law. (Ibid, 23). For a discussion, see Erik Angner, “The History of Hayek’s Theory of Cultural Evolution,” Studies in History and Philosophy of Biological and Biomedical Sciences 33, no. 4 (2002
displace the individual members of other groups. It is much more likely that the success of a group will attract members of others which thus become incorporated in the first.\(^{21}\) Part of what makes this passage interesting, though unintentionally so, is that Hayek treats physical violence as but one option among various others; a conflict of some variety or another remains a very real possibility. It is all but inevitable, furthermore, that inter-group competition will gradually produce a hierarchy of competence informed by social evolutionary principles, which will in turn engender power asymmetries both between and within existing populations. And the end result of all this, it seems clear, is a kind of meritocracy in which strength and power become the defining characteristics of the dominant classes.

A central purpose of a spontaneous order, in other words, is to facilitate social progress by ensuring that expeditious practices (e.g., market competition) displace the less efficient ways of being and doing that characterized cultures guided by a different organizing principle. Given this reality, the question is not whether a spontaneous order has a collective end, despite Hayek’s claims to the contrary, but rather how this end differs from those in radically different orders and what effect these differences may have on individual choices and actions. This means that one of Hayek’s central assertions can now be safely rejected: for all intents and purposes, a spontaneous order does in fact prescribe certain progressive outcomes (even if general in character) that constrain individual choices.\(^{22}\) Indeed, we will see next that individuals must in some sense be compelled to embrace a spontaneous order, and relatedly, they must tacitly consent to the distributional outcomes that result, no matter how pernicious they happen to be. And this latter point is crucial in understanding why it is, in this market-saturated world, that human persons now find themselves under the heel of corporate persons.

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\(^{22}\) Because Hayek focuses on adaptation and selection at the group rather than the individual level, he tends also to disregard the fact that different kinds of orders necessarily affect the kinds of individual able to thrive in them. Individuals may not face a survival imperative to the same extent faced by their wider community, but what occurs at the macro level, as communities compete with one another, will still have a discernible impact on their lives.
1.1 Freedom and Power in a Spontaneous Order

More liberal-minded readers of Hayek may well regard power asymmetries as an unfortunate yet necessary price to pay in order to retain our freedom of choice. In this view, as long as individuals and groups choose voluntarily to emulate a more successful model, they can hardly claim a victimhood status with any shred of credibility. Far from suffering violence or coercion, after all, they have willingly changed their previous ways of being and doing in order to obviate their perceived vulnerabilities. This point is an important one because much of Hayek’s argument depends upon it; the reason he distinguishes between commands and rules in the first place is to carve out a sizable sphere where individuals can make their own choices and pursue their own interests and ends unhampered by a centralized power. Even if many individuals and groups end up making virtually identical choices, they can at least rest assured that they have acted in response to their own will and not that of another.

Such is the impression, anyway, that Hayek cultivates in his readers. Only in elliptical passages along the way does he acknowledge that individual choice is and should remain a reflection of societal inputs. Individuals can proudly claim to act in their own self-interest—and so they may, in a fashion—but their interests usually parrot those of the wider culture and so reflect the prevailing ethos. Or as Hayek elsewhere puts it, human minds are but “the product of the social environment” in which they arise, more so than “something that has in turn acted upon and altered” the rest of society. 23

While individuals are therefore free to pursue their idiosyncratic aims, many of their choices will simply align with the moral calculus of the spontaneous system they inhabit—which is almost invariably oriented toward economic activity. On a practical level, this means their interests will closely mirror the goods and services available in the marketplace and will conform to the self-maximizing mentality of a

23 Hayek, Law, Legislation, and Liberty, vol. 1, 17. In a similar vein, Hayek argues in The Constitution of Liberty that “the growth of the human mind is part of the growth of civilization; it is the state of civilization at any given moment that determines the scope and the possibilities of human ends and values” (24).
world in which economistic values reign supreme. Hayek makes little effort to hide this fact from his readers, even going so far as to argue, in the third volume of his legal treatise, that individuals must embrace market-friendly (or competitive) practices if they are to prosper. The intellectual and material growth of society, he claims, depends in no small measure “on the views of a few gradually spreading, even to the disadvantage of those who are reluctant to accept them.”

Fortunately, it is rarely necessary to resort to outright force in order to secure this outcome—which is precisely why a clash of material forces is not always imperative. Instead, and in most cases, individuals are gradually enculturated into accepting these dominant practices and views, even if grudgingly at first, out of sheer necessity. They discover that they must act competitively to maintain their standing in society, and so they diligently inculcate in themselves “the spirit of enterprise.”

Hayek thus happily concludes, “Competition is as much a method for breeding certain types of mind as anything else.” The twofold implication of this profound admission is, first, that individuals born without a competitive bone in their body will quickly feel the need to develop one in a market-based order; they simply must do so if they even remotely desire to succeed and do well. And the second implication is that ego-centric competition is (and ought to be) the chief moral calculus of market actors, the operating manual they use, if only subconsciously, to guide their every decision. In a spontaneous order, virtually everyone will act in recognition of the fact that their material and social well-being depends on their ability to out-compete their peers in an economic rat-race, and their interests and preferences will reflect this basic insight: they will “direct [their] efforts not only towards

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25 This was Hayek’s view. Later, we will see that the ordoliberals who influenced (and were influenced by) him saw the need for a more active and interventionist state to secure this same outcome. In their view, enculturation does not work via imitative practices alone: it also requires a certain kind of legal system and certain kinds of laws.


27 Ibid, 76.
immediate results but also towards the future increase of [their] capacity of rendering services to others” at the highest rate possible, seeking “acquisition for the purpose of improving the capacity for future acquisition.” That constitutes their highest end in a market-based order, the *summum bonum* of their collective existence.

In one sense individuals are at liberty to compete, then, but in another they are also *required of necessity* to do so. They retain their innate capacity to choose, but their choices are limited by marketplace contingencies. The mere fact that they can adjust their aims *voluntarily*, moreover, for fear of the consequences, makes them free in nothing but the most narrow, Hobbesian sense of the term. Indeed, it is little wonder that Hayek, waffling on this point, sees the need to introduce a *republican* notion of freedom as a replacement for the negative conception that underwrites much of his rhetoric. The reason he makes this equivocation is doubtless in recognition of the fact that impersonal constraints on human action are easier to defend when juxtaposed against the arbitrary dictates of political elites.

Thus, on one hand Hayek praises free markets for facilitating free choice and increasing the range of options from which individuals can choose, but on the other hand, he argues that practical necessity all but compels us into accepting the marketplace as our dominant locus of expression and interchange. As he initially expresses it in *The Road to Serfdom*, every one of us as liberal citizens must submit “to the impersonal forces of the market” if we are to help in building “something that is greater than any one of us can comprehend.” When he first penned these words, Hayek must have believed

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30 Eric MacGilvray makes this point in *The Invention of Market Freedom* (Cambridge, Cambridge University Press, 2011), 169-170. My own conclusions here are largely derived from his initial mapping of this conceptual terrain.

this powerful appeal would be enough to ensure the acquiescence of the bulk of his audience, but for everyone else, who perhaps detect a variant of collectivism in play, he reiterates the importance of considering the other options on the table: “The only alternative to submission to the impersonal and seemingly irrational forces of the market,” he writes, “is submission to an equally uncontrollable and therefore arbitrary power of other men.”

Either we bend our knees to the market or we bend them to other men, but bend our knees we must. In this respect, Hayek would agree with Rousseau that we must ultimately be forced to be free—or at the very least, we must be forced to choose a system in which we will subsequently acquire future options, circumscribed by the market, from which to choose.

Social outliers exist in every culture and nation, of course, and a market-based society is hardly an exception to this rule. We should resist the temptation to view general trends as ironclad rules. A number of liberal citizens still self-consciously forswear the predominant ethos of the marketplace, or in some cases they never fully absorb it. Nor is enculturation a perfect process: it cannot create homo economicus automatons, much as some economists might wish that it did.

This qualification notwithstanding, however, it is important to recognize that aberrant individuals still face (almost without fail) a steep cost for their mental and emotional insubordination, as do those less-than-perfect competitors who fail to sufficiently absorb the spirit and precepts of the dominant culture. It is not that every individual must pursue nakedly self-interested, instrumentalist, market-driven aims. It is rather that the rules of the game reward such conduct over alternative behavioral choices.

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32 Hayek, *The Road to Serfdom*, 212.

33 Addressing this precise point, Harvard economist Stephen Marglin astutely observes, “Since long before Adam Smith, economists have been breaking down the resistance of [naysayers] to the logic of the market. Under the onslaught of the economics profession, either [a naysayer] is convinced or she is marginalized. The centuries it has taken to do so even in the most market-friendly society on earth is a measure of how deep the resistance to the logic of the market runs” (“How the Economy is Constructed: On Scarcity and Desire,” *Social Inequality: Values, Growth, and the State*, ed. by Andres Solimano (Ann Arbor: University of Michigan Press, 2000), 33).
Hayek could hardly be more explicit on this point. The best way to conceptualize a market system, he argues, is “as a game which we may now call the game of catallaxy. It is a wealth-creating game... that leads to an increase of the stream of goods and of the prospects of all participants to satisfy their needs, but which retains the character of a game in the sense in which the term is defined by the Oxford English Dictionary: ‘a contest played according to rules and decided by superior skill, strength or good fortune.’”\(^{34}\) As long as this wealth-creating game rewards specific decision-making modes and styles—which a market system undoubtedly does—its players will naturally modify their actions and even their core interests to achieve better results. When the game demands certain behavioral dispositions, in other words, would-be successful players will take note. That is all but inevitable. Thus, given this reality, it is simply disingenuous of Hayek to suggest that every idiosyncratic aim or interest is harmonious with the imperatives of the wider social system. Not every human activity contributes to \textit{productivity}, as economists define this latter term. And in actual point of fact, a market system can only regenerate as needed when its constituent members make sustained efforts to contribute, each in their own unique way, to its ongoing development and growth.

Granted, various rogue actors may choose to forego a more strenuous or productive life. But they are hardly detrimental and may even be beneficial to a market system as long as their consumptive behavior contributes to economic growth by spurring others to meet their every whim—assuming, of course, that their hedonistic choices never become so infectious that a critical mass of the population decides to abandon dreary work in their pursuit.\(^{35}\) Thus, a market system provides wide latitude in what


\(^{35}\) Crucially, a market-based order demands that its members relentlessly pursue both production and consumption, forcing them to live a kind of double life. As one prominent sociologist put it, the result is “an extraordinary contradiction within the social structure itself. On the one hand, the business corporation wants an individual to work hard, pursue a career, accept delayed gratification--to be, in the crude sense, an organization man. And yet, in its products and its advertisements, the corporation promotes pleasure, instant joy, relaxing and letting go.” (Daniel Bell, \textit{The Cultural Contradictions of Capitalism} (New York: Basic Books, 1978), 71-72).
individuals may and may not do—precisely as Hayek claims—but it still demands of the majority a certain mode of being. It makes allowances for isolated actions, but it still implicitly prescribes, through the force of necessity, certain *types* of actions and behavior most compatible with its catallactic aims.

To recap the argument thus far, a spontaneous order does in fact have a collective end or outcome toward which it is moving, and it is not freely chosen (in any meaningful sense of the term) by every member of society. Rather, it is imposed on its most wary members through subtle mechanisms like fear of social exclusion, material poverty, and so forth. A spontaneous order may not ordinarily prescribe particular actions, then, but it does prescribe certain *types* of actions. It limits the range of acceptable behavior to fit, as nearly as possible, the productive ideal it implicitly holds, and it requires of individuals that they act differently than they might if they occupied a vastly contrary order. It thus requires of individuals, as Hayek elsewhere remarks, that they learn and adopt “regularities of conduct conducive to [its overall] maintenance.”\[^{36}\] Just as crucially, however, a spontaneous order also sets in motion a wealth-generating “game” that rewards some “players” more than it does others: as in every competition, some participants will inevitably climb to the top of the social heap and assume more power than they might otherwise enjoy. And as a result, they will quickly become the posterchildren of success and virtue, the archetypal model that every person is encouraged to emulate.

When we consider these actors, we may be tempted to think of the rugged individualist or the “square” business professional who, through some combination of industry and good fortune, quickly scales the economic totem pole. Such individuals undoubtedly exist; some are naturally more skilled at amassing huge fortunes or are more gifted at manipulating economic interactions to maximize their earnings. We would be remiss to focus only on the plutocratic elite, however, while ignoring the commercial instruments they use to acquire much of their wealth. In the United States and other

advanced economies, human persons are not the sole viable actors that occupy the marketplace. A vast number of economic transactions also occur on behalf of corporate (or increasingly “mega” corporate) entities expressly formed to generate as high a profit as possible. Indeed, we can speak of the putative excesses of corporate executives—those loathsome officers at Enron, for instance—only because we live and move in an economic system in which corporations abound and even predominate.

Importantly, in the wealth-producing game that Hayek promotes, corporate actors or “persons” possess an obvious yet crucial advantage over their biologically constrained counterparts. Whereas human persons are often fickle and untrustworthy, routinely ignoring economic considerations as they make their everyday decisions, corporations more consistently actualize the utilitarian, wealth-maximization ideal that economists insist is necessary to satisfy the market’s growth-mandate. One likely reason why corporations control the commanding heights of Western economies, therefore, is because their actions conform with near precision to the behavioral profile envisioned of neoliberal actors. As a class of beings, they embody the *homo economicus* model in ways that few individuals could even hope to replicate. In this latter respect—and so in ways that matter most—they exemplify what modern persons are supposed to be and how they are supposed to behave in a market-based order.

Consider again Hayek’s claim that the “security” of a spontaneous order depends on whether and to what extent its participants adopt certain behavioral patterns: in his own words, on whether they “have acquired regularities of conduct conducive to the maintenance of the order.” Given the market-

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37 My use of the words “fickle and untrustworthy” is here intended to reflect the standpoint of the myriad social scientists who perennially bemoan the supposedly “irrational” behavior of human actors.


39 Hayek, *Law, Legislation and Liberty*, vol. 1, 39. The presumable reason its elements have acquired these regularities, Hayek adds, is because “those who did act in certain ways had within the resulting order a better
based system that now predominates the Western world—which is what a spontaneous order peculiarly is—we can further stipulate the precise “regularities of conduct” that its various members must acquire. We now know, for example, that a fundamental sine qua non of this current system, as present-day economists readily acknowledge, is its capacity for rapid self-expansion. From a practical standpoint, it simply must advance itself at an ever-escalating pace to prevent stagflation; in the ceaseless stream of economic life, any failure to make forward progress risks triggering a horribly regressive depression. This means a market-based order will tend to reward actors who (or that) embrace change with open arms, all while it views everything old and time-worn with a more jaundiced eye. And it will indirectly penalize those whose first instinct is to preserve rather than supplant their received inheritance—those whose overriding concern is not to obtain something new but to protect what they already possess.

In absolute terms, the number of individuals who hold this antiquarian view is no small one. A substantial minority of the population will always fail to embrace change and growth to the degree they supposedly should, or to the degree that is most materially rewarding. And none but the most psychopathic of individuals will yoke their every decision to an economic calculous. By contrast, tens of thousands of corporations will flawlessly embody this behavioral ideal, in accord with the market’s chance of survival than those who did not.” Hayek thus proves himself more than willing (at this juncture of his argument, at least) to extend a social Darwinian frame to individuals, in addition to larger populations and groups.


41 Hayek himself has mixed feelings about the value of tradition and custom. While he expresses gratitude to tradition for its originating and evolutionary power (Law, Legislation and Liberty, vol. 1, 11), he also argues that a spontaneous order has to move well beyond tradition. His stated aim, in fact, is no other than “to make a suggestion for a radical departure from established tradition” (Ibid, 4). Indeed, this is one of the principal reasons why Hayek eschews conservatism in “Why I Am Not a Conservative” (The Constitution of Liberty, 399).

growth imperative. Indeed, they were constructed for that precise purpose. Human actors are no longer the de facto victors, therefore, in the wealth-creation game that structures their lives. That title now rightly belongs to (mega)corporations, along with a fraction of members who stand at their helm.

As Hayek makes all too clear, a spontaneous order is one where individuals are encouraged to adopt distinctively economic values, a system in which they feel constant pressure to move and act, if only imperfectly, like little corporate entities in their own right. It is little wonder that millions of us today, as digital members of Facebook, LinkedIn, and myriad other social networks, feel this same pressure as we construct an entrepreneurial identity for ourselves, or as we self-consciously strive, through a bevy of strategic moves, to increase our overall “human capital.” What these developments signal, as sociologist Melvin Tumin recognized presciently in the mid-1960s, is a contagion of “business principles and themes” to every sphere of life. Of course, it goes without saying that businesses can master these principles with an effortlessness that their members can only envy. Only a tiny segment of the population will systematically apply the key economic doctrine of “maximal self-interest,” for instance, if only because it conflicts so dramatically with virtues that are still deemed vital elsewhere.

None of this is to say that a business mentality (of sorts) has no place in civil society, nor is it to suggest that we as individuals have nothing to learn from mainstream economists. The problem is rather that corporations and their modus operandi have gradually assumed a hegemonic role in society. In the marketized order that Hayek and other neoliberals promote, they can more credibly claim to be sound and rational persons than can any other class of persons. Regardless of which suite of rights they possess at any given moment, they stand before us as model citizens, incarnating the standard that


every one of us must follow. In the wealth-creation game in which we all participate, moreover, they predictably outperform the rest of us (their all too human competitors) and are thus rewarded perilous levels of power. And this power, in turn, becomes yet another tool in their already extensive arsenal, a means to enhance their functional advantages and, if they wish it, to trample on the freedoms of others.

Hayek not only exaggerates how free his spontaneous order is, therefore, but he also downplays its built-in propensity to spawn new “powers and principalities” that subsequently occupy the “high places” in society, to borrow a biblical metaphor. Many of the staunchest critics of capitalism have likewise overlooked this fact. Much ink has been spilled over the market’s capacity to create vast inequalities in wealth, but much less has been said about its potential to generate a significant power asymmetry between two different types of market actors—namely, between human and corporate persons. In a way, this oversight is a testimony to the influence that neoliberal economists have since exerted on the public imagination: as we will see, concerns over corporate power were actually ubiquitous in the U.S. before the leading lights at Chicago so effectively allayed them.

2). A Recurring View: Corporations as “Frankenstein Monsters”

By the late 1940s, around the time that Hayek’s Road to Serfdom hit mainstream presses, it had become a truism among the American public that powerful corporations pose a major menace to democratic government. The public had become painfully acquainted with this reality decades earlier, in fact, as evident in the emergence of the populist and labor movements, respectively, as well as in the passing, in 1914, of the Federal Trade Commission Act and the Clayton Act, which reinforced the earlier Sherman Antitrust Act.46 In the post-Reagan world in which we now live, it can sometimes be difficult to imagine or appreciate the extent to which corporate power once raised the ire of American citizens and

46 One irony here is that the Sherman Act seems to have spurred the great “merger movement” in the early 20th century, which in turn induced mass popular discontent and helped create a powerful, grassroots labor movement. Not every historian agrees, though, that the Sherman Act was truly to blame. See George Bittlingmayer, “Did Antitrust Policy Cause the Great Merger Wave?” The Journal of Law & Economics vol. 28, no. 1(1985), 77-118.
seemed, for many of them, a much graver threat to their freedoms than was the centralized state itself. Strange as it may sound to modern ears, however, the most pressing fear voiced by members of these grassroots movements was of being subjugated—through various forms of debt peonage, economic dependency, and financial coercion—to massive conglomerate businesses.⁴⁷

Prominent politicians quickly took note and adjusted their rhetoric accordingly. Perhaps most famous in this regard was a provocative speech delivered in 1912 by Theodore Roosevelt, who Ironically rode into office at the turn of the century with the support of large corporate backers.⁴⁸ His dubious past notwithstanding, Roosevelt soberly instructed his listeners that “there can be no effective control of corporations while their political activity remains.”⁴⁹ With statements like this swirling in the political zeitgeist, it should come as no surprise that corporations like AT&T and General Motors promptly launched major public relations crusades to smooth the rough edges of their popular image—crusades that effectively undermined much of their progressive-minded opposition.⁵⁰ Despite these initially successful efforts, however, corporate conglomerates once again attracted staunch opposition in the 1930s. This was only natural. Mass deprivation during the Great Depression seemed, if anything, attributable to corporate greed and misconduct, a view expressed at the highest levels of government: Supreme Court Justice Louis Brandeis, like a firebrand minister in a national pulpit, even went so far as to describe corporations as “Frankenstein monsters” at work feverishly transforming democratic


government into a feudal order. Although this claim was admittedly provocative, Brandeis was merely giving voice to a much older perspective, resonant with the American Founders themselves, that views all forms of power (both economic and political) as inimical to a free society.

Until the Reagan administration and even beyond, these sentiments refused to go away entirely. In the 1970s, for instance, economist John Kenneth Galbraith warned the public that large corporations held “extensive influence over [their] prices and major costs”; possessed absolute control over major “sources of capital”; used sophisticated propaganda to urge “progressively increased consumption” of their products; and finally, had “a compelling position in the modern state.” This message found a receptive audience among lay readers, earning Galbraith a plausible claim as “America's most famous economist.” His efforts to confront this issue head-on clearly resonated with a vast swath of the American public less than a decade, no less, before the Reagan-Thatcher revolution occurred.

Hayek had good cause, therefore, to address the issue of corporate power in his bestselling *Road to Serfdom*, which, after all, warns lay audiences specifically of their impending enslavement to collectivist forces. Indeed, this issue must have been difficult for him to sideline given the concerns aired in public by politicians like Brandeis, as well as later by prominent intellectuals like Galbraith. And in

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52 An emblematic example is Thomas Jefferson’s warning of “moneyed incorporations under the guise and cloak of their favored branches of manufactures, commerce and navigation, riding and ruling over the plundered ploughman and beggared yeomanry” (“Consolidation!: Letter to William Branch Giles,” December 26, 1825, in *Jefferson: Writings* (New York: The Library of America, 1984), 1511). Jefferson, of course, was staunchly opposed to large concentrations of economic power, and he repeatedly called for an anti-monopoly clause in the U.S. Constitution.

53 Galbraith, “Power and the Useful Economist,” 5.


55 It speaks to the importance of this issue in Hayek’s day that he felt compelled to address it personally only a few short years after the publishing of his *Road to Serfdom* in his address “‘Free’ Enterprise and Competitive Order,” in *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948), 107–118.
fact, many of Hayek’s liberal colleagues at the University of Chicago did at first consider it to be of paramount importance, and they placed it front and center in their collaborative research efforts.

As economic historian Robert Van Horn relates, the University of Chicago in the 1930s and 40s housed a group of young upstart economists—a group that “included Henry Simons, Aaron Director, Milton Friedman, and George Stigler—who opposed concentrations of economic power on the basis of classical liberal doctrine.” Of all the members of this group, Simons gave voice to this perspective most forcefully when he claimed that “the great enemy of democracy is monopoly in all its forms: gigantic corporations, trade associations and other agencies for price control, trade-unions—or, in general, organization and concentration of power within functional classes.” It is clear by this statement, forceful as it is, that Simons was primarily concerned with the smooth functioning of the market, put in jeopardy by corporate manipulation via price-fixing. But unlike other Austrian economists of his day, his primary unit of analysis—the collective entity he identifies as threatening the stability of the free world—officially hails from the private rather than the public sector. At this early date, then, not every Chicago economist was ignoring market-based forms of power, and some of them, at least, were willing to portray behemoth corporations as nothing less than inveterate enemies of popular government.

Early free-marketers like Simons readily grasped the danger in corporations powerful enough to turn the tide of government in their favor. And they worried that businesses in their own day were beginning to reach frightening proportions, a problem demanding swift remedial action. Canadian economist Jacob Viner, for example, who served as mentor to Simons, argued that “the mere size of


58 Simms was not afraid, however, to appeal to more general values like freedom and quality as well. (Van Horn, “Chicago’s Shifting Attitude,” 1530-31).
business units tends almost inevitably to result in attempts to escape the impact of competition,” which then has a depressive effect on the economy.\(^5^9\) Predictably, the focus of Viner’s critique here was on economic growth, and he targeted those policies designed to benefit a few industries at the expense of others. Unlike many of his successors, however, Viner did not attribute this market shortcoming to government intervention alone. Just as worrisome were the vast powers that large corporations hold. Indeed, corporate size and power, he claimed, constitutes “the most important economic issue of our day” because “bigness... is the essential element in the faulty working... of our economic system.”\(^6^0\)

Taking his cue from Viner, Simons was every bit as demonstrative in his denouncements of corporate gigantism, and he likewise called for active government measures of various kinds to bring monopolistic businesses to heel.\(^6^1\) As Van Horn explains:

Simons called for an “outright dismantling of... gigantic corporations” and “persistent prosecution” of producers who organized to restrict output or maintain price. He championed “unqualified repudiation of the so-called ‘rule of reason’” which he claimed granted absurd powers to corporations. He warned of the dangers of private mergers that resulted in monopoly power, “regardless of how reasonably that power may appear to be exercised,” and recommended that vertical integration be permitted only when it did not harm the maintenance of effective competition. Simons demanded

\(^5^9\) Jacob Viner Papers, Letter from Jacob Viner to Laird Bell, Box 3, Folder 33 (Nov. 16, 1937), quoted in Horn, “Chicago Shifting Attitude,” 1528. Italics in original.

\(^6^0\) Ibid.

\(^6^1\) As a reward for his strong stance on this issue, Simons faced accusations that he had become a card carrying socialist, but it was Hayek, ironically enough, that stepped in to defend his work. According to Hayek, Simon’s 1948 *Economic Policy for a Free Society*, while clearly unorthodox, was “one of the most important contributions made in recent times to our problem” and “just the kind of work which is required to get discussion started on the fundamental issues.” Hayek went on to say, “Even those who violently disagree with some of its suggestions should welcome it as a contribution which clearly and courageously raises the central problems of our time” (*The Road to Serfdom with The Intellectuals and Socialism* (London: The Institute of Economic Affairs, 2005), 124, footnote 4.)
vigorous antitrust enforcement, maintaining that an antitrust violation ought to be considered “a major crime” and “prosecuted unremittingly” by the Federal Trade Commission, whose power, according to Simons, needed to be increased. In sum, according to Simons, “there must be a complete 'new deal' with respect to the private corporation... [The] corporation is simply running away with our economic (and political) system.”

Simon’s anti-corporate stance proved to be highly influential on the early work of George Stigler and Allen Wallis while they were still graduate students at the University of Chicago. And it likewise earned the initial approval and praise of both Aaron Director and Milton Friedman because it was, in their view, consistent with the tenor and spirit of classical liberalism. Indeed, these latter economists considered it eminently liberal, at that early date, to employ various legal instruments to protect individuals not only from an overweening, tyrannical state but also from oppressive monopolies.

It was Director, in particular, who repeatedly beat the anti-corporate drum throughout the late 1940s and early 1950s, calling for legal and economic reforms while addressing his peers at the very organization that Hayek effectively spearheaded. At the first meeting of the Mont Pelerin Society (MPS) in 1947, Director expressed his concerns about the growth and power of corporate monopolies, and he

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62 Horn, “Chicago Shifting Attitude,” 1531.

63 Ibid, 1533.

64 Ibid, 1533-34.

65 Milton Friedman has since moved far from this position, but his liberal rhetoric can still be made to serve an anti-corporatist agenda. In one early essay, for instance, he argues that liberal meaning “puts major emphasis on the freedom of individuals to control their own destinies,” an ideal that demands of the government that it “protect individuals from coercion from other individuals or groups.” Friedman does not explain what he means by “groups” here, nor does he define the term “coercion.” But he does implicitly acknowledge that businesses sometimes fit the bill: “An exchange is ‘voluntary’ only when essentially equivalent alternatives exist... Monopoly means the absence of alternatives and thus is incompatible with strictly voluntary exchange. (“Liberalism, Old Style,” 1957, in Milton Friedman on Freedom (Stanford: Hoover Institution Press, 2017), 1, 8).
argued that the principles of laissez faire economics were not enough to hold them at bay. In his opinion, liberalism would need to adapt to changing sociological circumstances. While the right and proper aim of their liberal predecessors had been to curtail a centralizing, power-hungry state, liberal thinkers and politicians in his own day, he claimed, would have to move well beyond this minimalist stance. They faced the more challenging task, rather, of “redefin[ing] the role of the state” altogether.66

Director thus recommended that the MPS focus its efforts “on the fundamental question of how the legal framework ought to be altered in order to make competition work effectively—that is, how to design a ‘competitive order.’”67 The laws needed to be changed or revised, the existing antitrust regime needed to be strengthened, and “radical corporate reform” needed to occur to inhibit excessively large concentrations of power in the marketplace.

Before this staunchly free-market audience, Director went on to advocate “limiting the size of corporations, eliminating interlocking directorates, forbidding harmful mergers, circumscribing the scope of corporate activities, and more.”68 As if all this were not enough, Director would later reiterate the importance of legal limitations on corporate size and power in an outline he drafted for the Free Market Study (FMS)—a second research organization that Hayek initiated, with funding from the right-leaning Volker Foundation, to reform existing laws and policies along classically liberal lines. Director’s call to action did not go unheeded: “Although the FMS could have pursued numerous research avenues, after the first couple of meetings, it quickly narrowed its focus to issues concerning monopoly and

66 Horn, “Chicago Shifting Attitude,” 1535.

67 Ibid, 1535-36.

68 Here is how Director expressed it in his own words: “The unlimited power of corporations must be removed. Excessive size can be challenged through the prohibition of corporate ownership of other corporations, through the elimination of interlocking directorates, through a limitation of the scope of activity of corporations, through increased control of enterprise by property owners and perhaps too through a direct limitation of the size of corporate enterprise” (Records of the 1947 Mont Pèlerin meeting, Liberaal Archives, Ghent, Belgium), 80, quoted in Van Horn, “Reinventing Monopoly,” 212).
corporations—i.e., concentrations of business power.” In the context of this study, moreover, it was no other than Milton Friedman who recommended, if only tentatively, “the separation of ownership from control” in a corporate setting to help “break up large corporations and lessen industrial monopolies.” Evidently, at that particular moment in time, members of the Chicago School of Economics instinctively viewed large businesses with suspicion, and they searched far and wide for a readymade legal remedy.

Much has changed since the middle of the 20th century. Today we associate the Chicago School with a pro-business, anti-regulatory position that stands diametrically opposed to what its early members apparently entertained with all seriousness. Clearly, a seismic shift in thought has occurred. Understanding why this is so, however, and the reasons for it, help illuminate why corporate giants are so at home in today’s neoliberal world and why they can so easily retain their political power.

3). Chicago School Economics and the Politics of Corporate Power

No sooner did Hayek’s research teams begin to study corporate monopolies than they came to the conclusion that nothing of consequence hinged on the issue. Indeed, anti-corporate sentiment quickly began to evaporate among FMS participants as a result of a new empirical finding that the number of monopolistic businesses, as of the late 1940s, had not increased since the turn of the century. Based on this one study, the nominal head of the FMS, Aaron Director, notably reversed

69 Horn, “Chicago Shifting Attitude,” 1538.

70 Ibid, 1540. Similarly, during this same period, FMS member Edward Levi worked in collaboration with Wendell Berge and James Martin to produce an article at the Chicago Round Table calling for new measures to protect the American way of life from corporate monopolies. (Horn, “Reinventing Monopoly, 213-14.)

71 Another example would be Edward Hirsch Levi, also a member of the FMS, who claimed in a 1947 article that antitrust laws were ineffective and in disarray. The resulting confusion, he went on to argue, “permitted two great merger movements-each of which ended in a depression. We are now in the middle of a third great merger movement. It is doubtful if a free and competitive society can be maintained if the direction of concentration is to continue” (The Antitrust Laws and Monopoly, University of Chicago Law Review 153 (1947), 183.

72 See Warren G. Nutter, The Extent of Enterprise Monopoly in the United States, 1899-1939 (Chicago: University of Chicago Press, 1951) A follow-up to this lone study came in 1954, which purports to show that monopoly does not “affect aggregative welfare very seriously through its effect on resource allocation” -- though the study does
course and began to argue that corporate power was really no great concern.\textsuperscript{73} This new study proved to his satisfaction that free market capitalism is more than equipped to resolve this issue on its own, barring excessive state intervention: competitive forces will gradually undercut any advantages, legal or otherwise, enjoyed by even the largest corporations. Armed with this insight, the FMS began to overturn its previous proposals, including its suggested ban on vertical mergers.\textsuperscript{74} And the conversion of these stalwart free-market economists was now all but complete, with Viner a lone exception on the fringes.\textsuperscript{75}

It is interesting that the FMS focused strictly on the economic aspects of this issue when, in the mind of the public, corporate interference in democratic institutions was an issue equally salient, if not more so. The early history of the 20th century had validated the worry that large corporations have both the capacity and will to encroach on the political realm, dissolving the symbolic boundary separating the public and private spheres. With this historical record as backdrop, Hayek himself felt compelled to acknowledge the existence of this perennial problem, but he notably argued, consistent with the reasoning of his colleagues, that government intervention rather than market forces are always to blame for it. And he went on to suggest that the spontaneous system he defended and advocated for is precisely what is needed to prevent it from continually reoccurring. Only when the government interferes too readily in the marketplace, yielding to the rapacious demands of an uninformed majority, will private power in the marketplace come to dominate elected officials. For these demands “can only be met by taking the powers of decision out of the hands of democratic assemblies and entrusting them

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\item acknowledge that they may nonetheless have a pronounced and pernicious effect “on income distribution” (Arnold C. Harberger, “Monopoly and Resource Allocation” \textit{The American Economic Review} 44, no. 2 (1954), 87).
\item Horn, “Chicago Shifting Attitude,” 1540.
\item Ibid, 1542.
\item As late as 1959, Viner argued that his colleagues were repeating the error of their 19th century forbearers, who were themselves “divided as to the wisdom of this repeal of the ancient restrictions on ‘big business’” (“The Intellectual History of Laissez Faire,” \textit{The Journal of Law and Economics} vol. 3(5) (1960), 66. It is safe to presume that Simons would have likewise refused to compromise on this issue, but he regrettably died in 1947.
\end{itemize}
to the established coalitions of organized interests and their hired experts." As a consequence of this, the electorate unwittingly finds itself “at the mercy of new vested interests” that have effectively hijacked the government to secure their own ends, a task made all the easier by the particularizing regulations already in place. Thus, in their demand for more government intervention, members of the public only end up further empowering the very oligarchical elite that they intend to undermine.

This argument of Hayek’s would later enjoy further theoretical development at the hands of several renowned economists walking closely in his steps. Economic luminaries like George Stigler and Milton Friedman, for instance, have taken great pains to detail the negative effects of unbridled regulation of the economy. Many of their arguments have filtered down to the reading public in the United States and, with the ascendancy of Reaganomics, have gained traction among members of the conservative movement, in particular. Indeed, conservative politicians now make a habit of arguing that government interventions in the economy stifle innovation by increasing the costs of doing business. To the extent that happens, they argue, well-established firms face less competitive pressure from newer start-ups, resulting in a more top-heavy or monopolistic economy over the long-term. By implication, the “leading protector of the exploited class [of consumers] is the businessman's competitors,” not

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77 Ibid.

78 According to economic historian Ingrid Rima, the dominant position among Chicago economists in the 1930s and 40s, expressed by the likes of Henry Simons and Frank Knight, was that the public must take ownership of “natural monopolies such as railroads and power industries” ([Development of Economic Analysis, Sixth Edition](London: Routledge, 2001), 535). Later, however, “when Stigler, Friedman, Coase, and others reexamined the economic effects of regulation and proposed a new solution to the natural monopoly problem,” their new consensus “was that private monopoly can result in a competitive level of profits without regulation” and “that private monopoly is superior to government regulation.” (Ibid, 535-36n37) In other words, monopolies are fine and dandy so long as new start-ups can still feasibly compete with them. And with fewer regulations, monopolistic enterprises are more likely to face this competition than they would be otherwise.
regulation itself. And such competition can only take place when the government remains on the sidelines, an observer of the economy rather than an active participant in it.

A second development of Hayek’s argument explores the characteristic tendency of powerful corporations to “capture” regulations in order to redirect them toward self-serving purposes. As Stigler famously argued, the central purpose of regulations is in fact no other than to benefit large industries at the expense of smaller competitors: in the vast majority of cases, “regulation is acquired by [an] industry and is designed and operated primarily for its benefit,” not for “the public at large or some large subclass of the public.” In actual practice, in other words, large firms increasingly rely on government intervention to obtain subsidies, to control the entry of new rivals, to limit complementary goods and services, and to procure favorable price-fixing terms. They can only procure these “goods,” however, as long as the government continues to tinker with and intervene in the wider economy, thereby choosing the de facto winners and losers of the market game.

As we might expect, then, the principal concern that neoliberal economists address, following Hayek’s lead, remains a characteristically laissez-faire one. They worry that politicians and bureaucrats will (wittingly or not) obstruct more efficient market mechanisms, creating the very problems they purport to rectify. The focal point of this argument, notice, is on what government specifically does and not on corporate activity per se. On the whole, neoliberals are happy to ignore the fact that large industries still retain the capacity to manipulate political decisions, regardless of what laws are already in place. This is simply a hard, cold reality, they argue, that we must learn to live with as best we can:

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80 Ibid.

moneyed interests have always sought to influence the government to serve their ends, and they will almost certainly attempt to do so in the future. A more pressing task, therefore, is to prevent the government from implementing laws and regulations that are visibly *exploitable*, which then entices market actors to pursue privileges that would not otherwise be available for the taking.\(^8^2\) In this sense, regulations are indistinguishable from other political handouts insofar as they encourage parasitical behavior on the part of special interest groups wielding disproportionate influence on the government.

In short, government interference in the economy fails to protect consumers from alleged market failures, and it sometimes helps produce and stimulate the very power it intends to counteract. Ludwig von Mises puts it this way: “Policies aiming at the restriction of competition... grant privileges to certain groups of producers by protecting against the competition of more efficient competitors. In many instances these policies have brought about conditions required for the emergence of monopoly prices. In many other instances... capitalists, entrepreneurs, farmers and workers [were prevented] from entering those branches of industry in which they would have rendered the most valuable services to their fellow citizens.”\(^8^3\) Efforts to limit corporate power via the government, in other words, prove ineffectual at best and positively harmful at worst. And they result in a less efficient and productive economy over the long-term. As long as the government refrains from issuing special grants and tariffs, however, and as long as it keeps regulations to an absolutely minimal level, market actors will have little to no incentive to impinge on the political process.

\(^8^2\) Some economists go so far as to argue that corporations could not have become as powerful as they have were it not for government regulation. Stigler, for instance, claims that “most important enduring monopolies or near monopolies in the United States rest on government policies. The government’s support is responsible for fixing agricultural prices above competitive levels, for the exclusive ownership of cable television operating systems in most markets, for the exclusive franchises of public utilities and radio and TV channels, for the single postal service—the list goes on and on” (“Monopoly,” *The Concise Encyclopedia of Economics*, accessed September 25, 2018, [http://www.econlib.org/library/Enc/Monopoly.html](http://www.econlib.org/library/Enc/Monopoly.html)).

Missing from this argument, however, is any explanation as to why powerful corporations would refrain from pioneering laws and regulations in order to benefit from them at a future date, particularly if they have, through professional lobbyists and other means, the political clout necessary to do so. Why assume, in this chicken and egg scenario, that the direction of causality always flows in a top-down direction, from the public to the private sphere? Not every neoliberal economist has been able to maintain this fable with perfect consistency: even James M. Buchanan, the Chicago-trained architect of public choice theory, acknowledged that corporate rent-seeking is as much a cause as an effect of governmental growth. “Much of the growth of the transfer sector of government,” he writes dolefully, “can best be explained by the behavior of political agents who compete in currying constituency support through promises of discriminatory transfers.”\(^84\) In a similarly revealing fashion, Milton Friedman confessed dismay at the fact that “producers who profess most strongly their belief in free markets have fostered and helped produce government takeover, government regulation, government control.”\(^85\) That is to say, corporate monopolies are apparently the cause of regulation as much as their effect and are often the reason why government overreach is occurring in the first place.

Acknowledgment is one thing, of course, but acceptance is quite another. And the implicit assumption of neoliberalism, evidence be damned, remains what it has been since the 1950s—that the causal arrow points in one direction only, from the government to the market, and that spontaneous orders always face their gravest threats from the constructivist impulses of hubristic politicians.\(^86\)

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\(^85\) Milton Friedman o ulovi proizvođača u povećanju regulacija,” [https://www.youtube.com/watch?v=BnX5ta2gOzY](https://www.youtube.com/watch?v=BnX5ta2gOzY). Accessed October 8, 2018. Nothing about this data point is especially surprising if it is also true, as suggested recently by Austrian economist Steven Horwitz, that “no one hates capitalism more than capitalists” themselves. (“Capitalists, Capitalism, and the Siren’s Song of Stability,” [http://austrianeconomists.typepad.com/weblog/2008/09/capitalists-cap.html](http://austrianeconomists.typepad.com/weblog/2008/09/capitalists-cap.html). Accessed March, 2018.)

\(^86\) Economic historians Robert Van Horn and Philip Mirowski argue that, for neoliberals at Chicago and beyond, there “was a repression of overt considerations of power” such that “corporations, in particular, were inevitably characterized as passive responders to outside forces. In economics, the only market actor accused of misusing
Indeed, this is precisely the kind of predigested message that neoliberal economists at Chicago and beyond, as members of the movement that Hayek effectively launched, have always been most eager to convey to the broader public. By all appearances, the contrary position has been far too inconvenient to explore with due rigor; ideology must seemingly take precedence over uncomfortable facts.

For much the same reason, neoliberal heavyweights like Mises, Hayek, and Stigler have all but ignored the wider social and political implications of this issue, desperately avoiding mention of anything that clearly falls within the purview of government. It is significant that Mises, for example, in the passage quoted above—itself contained in what many today consider his Magnum Opus—expresses irritation at little else but the possibility of “monopoly prices” impeding consumer welfare.\(^7\) Nowhere does he worry that rising levels of corporate power may cause a similar uptick in negative externalities, resulting in poorer health and a more sullied environment. Nor does he agonize over the prospect of workers becoming hostage to wages well below the living standard, or of consumers becoming increasingly dependent on products with built-in obsolescence. Nowhere on his radar, furthermore, is any premonition that corporate consolidation may enable extravagant risk-taking, resulting in a world in which citizens on Main Street are forced to bail out irresponsible actors on Wall Street. In his starkly simplistic account, rather, market-based power manifests itself in one primary fashion: monopolistic price-fixing.\(^8\) Few other repercussions are worth serious time or consideration.

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power was the trade union, which was uniformly treated as illegitimate, whereas any other instance of market power, as in the case of monopoly or oligopoly, was either treated as harmless and temporary or attributed to some nefarious state policy” (“The Rise of the Chicago School of Economics” in The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective (Cambridge, MA: Harvard University Press, 2009), 163. See also F. A. Hayek, “Liberalism” in New Studies in Philosophy, Politics, Economics and the History of Ideas (London: Routledge & Kegan, 1978), 146; and Milton Friedman, “Neoliberalism and Its Prospects,” February 17, 1951, in Collected Works of Milton Friedman Project records, Hoover Institution, [https://miltonfriedman.hoover.org/objects/57816], 3.

\(^7\) Mises, “Competition,” 278-79.

\(^8\) Admittedly, in the early 1950s at the University of Chicago, the Antitrust Project did exert time and effort studying exclusionary practices, which often entail price-fixing but also include vertical integration, where corporations acquire control over a supply chain, as well as tying arrangements, where corporations pressure buyers into acquiring all, rather than a mere few, products in a larger product line. However, the stated intent of
Granted, the essential aim of economists has always been to study the economy, not the supposed social and political effects of commercial activity in general. On the other hand, intellectual specialization has never been the peculiar virtue (or defect) of the Chicago School of Economics, which found its home in that institution’s law school specifically: its members have never been particularly bashful about speaking to political issues, or any social issue, for that matter, that lends itself to a rational choice approach. For them, the question has never been whether they will engage in politics but rather how they choose to engage: everything is fair game as long as it proves amenable to economistic analysis. What this means in practice is that market-based power is effectively reduced to a monopoly problem only; all its other dimensions are minimized and sidelined lest, in the end, they find themselves subjected to intensive normative scrutiny. With this reductive mindset firmly in place, it is no wonder that Chicago economists have consistently ridiculed the view that corporate giants pose a threat to liberal societies—and where this fact is all but undeniable, they have insisted that culpability rests on elected officials who, as is sadly typical of their type, nourish an unhealthy appetite for intervention.

It is easy to see why industry leaders would find this message so attractive and why they would take active measures to disseminate it to a wider audience. It is also understandable, more specifically, why they would promote the ideas of Chicago School adherents from the very outset, and why they continue to promote them, at high expense, in the present-day as well. Indeed, a perennial feature of Chicago School research projects, including both the original MPS and FMS study groups, has been its impressive corporate backers. The story of how this came to be sheds some much-needed light on the

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these studies was to demonstrate that the market can remediate any ill effects all on its own. See, for instance, Aaron Director and Edward Levi, “Trade Regulation,” Northwestern University Law Review 51 (1956): 281–296.

89 Unsurprisingly, the Chicago School of Economics has largely pioneered efforts to bring, in the words of Ingrid Rima, “an impressive range of problems within the purview of the economist,” including the “economics of education, of crime, marriage contracts, birth rates, and the behavior of voters” (Development of Economic Analysis, Sixth Edition (London: Routledge, 2001), 526-27.
relationship between neoliberal economics and corporatism—a relationship that makes no sense at all if we simply assume, like good neoliberals, that industries only benefit when the government intervenes.

3.1 Corporate Backing of Neoliberal Economics

This story starts most appropriately with Hayek himself, who began to attract corporate attention while still a rising star as a public academic. Before Hayek left the London School of Economics for a teaching position in Chicago, and while his *Road to Serfdom* was still making waves as a bestseller in the United States, he caught the eye of business tycoon and political activist Harold Luhnow. As the president of the Volker Fund, Luhnow was on the lookout for a popular writer to promote free-market principles to a much wider audience. Having once alighted on Hayek, his search came to a close and he quickly offered his support.\(^90\) However, once he became the main financial force behind a variety of budding neoliberal projects, he was hardly content to take a passive role. He quickly rejected, for instance, Hayek’s initial plan to establish a loosely organized coalition of liberal academics because he feared it would prove difficult to direct and control over the long-term. What he most wanted from Hayek, rather, was educational materials capable of influencing the American masses—literature that promoted liberal ideals and, in that way, the material interests of American industries as well.\(^91\)

Not content to let his investment go sour, Luhnow further stipulated, as Van Horn explains, that “men conforming to the Volker Fund’s political philosophy would oversee the progress of the Free Market Study project, even from its outset,” and Hayek, for his part, “had no option but to agree.”\(^92\) The control that Luhnow exerted over the project was so extensive, in fact, that few universities would willingly agree to it; the Chicago law school, far from being the best location for the project, was the only

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\(^{91}\) Ibid, 150

real option on offer.\textsuperscript{93} A strong case can thus be made that the Volker Fund essentially dictated research priorities throughout the duration of the project: “Luhnow and the Volker officers were not mere pecuniary accessories to the rise of the Chicago School” but “were hands-on players, determined and persistent in making every dollar count, supervising doctrine as well as organization.”\textsuperscript{94}

Naturally, Luhnow and the funding agency he headed rejected the anti-corporatist perspective of Simons and Viner in favor of one focused more narrowly on boosting economic productivity. Their nominal goal throughout was one that Hayek himself held dear—namely, to prevent socialist doctrines from fully taking root in the United States. In a more practical sense, however, the special interest groups that Luhnow represented, an imposing “configuration of powerful corporations,” were particularly “intent on guaranteeing the freedom of corporations to conduct affairs as they wished.”\textsuperscript{95} And to retain their funding, “participants in the Free Market Study, and even eventually Hayek, would just have to learn to adjust to the emergent characteristic doctrines of neoliberalism.”\textsuperscript{96} Because similar control was exerted over the MPS, moreover, this latter group likewise felt pressure to conform to the wishes of its corporate backers.\textsuperscript{97} During this same period, members in both organizations began to

\textsuperscript{93} Horn and Mirowski relate, “while Hayek depicted the Law School as the intellectually ideal location in correspondence, it was in fact the only serious prospective location for the American Road Show; other universities tended to balk at the level of control that Volker sought to exert as a condition of funding” (Ibid, 151).

\textsuperscript{94} Ibid, 157. Bruce Caldwell, an admirer of Hayek, takes umbrage with Horn and Mirowski’s claims in “The Chicago School, Hayek, and Neoliberalism” in \textit{Building Chicago Economics: New Perspectives on the History of America’s Most Powerful Economics Program}, ed. by Robert Horn et al. (Cambridge: Cambridge University Press, 2011), 317-324. Whatever the extent of Luhnow’s control over the project, however, this much is clear: Interest groups behind the Volker Fund took an active interest in FMS research; they strove to influence the ideological tenets of its members; and they believed that the findings of this group, once policed, would work to their benefit.

\textsuperscript{95} Horn and Mirowski, “The Rise of the Chicago School of Economics,” 158.

\textsuperscript{96} Horn and Mirowski, “The Rise of the Chicago School of Economics,” 158.

\textsuperscript{97} Van Horn elsewhere states that “the Volker Fund went so far as to threaten to eject Director from his leadership role in the FMS because the Volker Fund refused accept certain tenets of classical liberalism, namely those espoused by the deceased Chicago economist Henry Simons” (“Reinventing Monopoly,” 208-09).
deviate from a strictly libertarian ethos and affirm the large state, business-friendly perspective that now characterizes the neoliberal project. All the while, they postured as being “bravely pitted against entrenched elites” as if “they were not themselves mouthpieces for certain powerful interests.”

Hayek himself continued to present himself as a staunch defender of individual liberty throughout the entirety of his career. And he would forever maintain that his spontaneous system provides the most effective inoculation against all would-be tyrants. By contrast, the interventionist policies of his opponents, he insisted, continue to nudge the public down the road to serfdom. For only a regulatory-heavy environment can possible satisfy or empower “the established coalitions of organized interests and their hired experts” that ceaselessly strive to control government and economy.

We can only wonder whether Hayek felt any misgivings when he recapitulated this argument in the early 1970s. After all, the research groups he initiated decades earlier were largely funded by and under the influence of the very organized interests that, he acknowledged implicitly, want nothing more than to misappropriate the legal system to serve their interests. For evidence of this ongoing financial relationship, we need look no further, for example, than Stigler’s Center for the Study of the Economy and the State (CSES), an organization which, although it opposes most government regulations to this day, has persistently received monetary support from the likes of Proctor and Gamble and Amoco Corporation, among other notable companies. More recently, the newly formed Becker Friedman Institute, initially named the Milton Friedman Institute, proudly trumpets the generous support it has received from private sector donors. As if that were not enough, these well-funded research ventures,

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which have largely taken place in academia, have been accompanied by “an explosion of efforts to recast American’s understanding of business and economics and to rehabilitate the public image of corporations” through, among other means, an impressively staffed lobbying and think tank industry.\textsuperscript{102}

All this begs the question: why would private corporations choose to fund academic studies, think tanks, and foundations that contravene their own interests? If government regulation is the sole enabler of monopolistic practices, then why would companies like Procter and Gamble, which recently instituted a price-fixing cartel in Europe,\textsuperscript{103} lend their support to research groups that vilify political interference in the marketplace? Either these companies are acting in utterly contradictory ways or they have another agenda in mind; they are either grossly incompetent or, what is more likely, they have come to the conclusion that a pro-market, pro-competition line, even if it is anti-regulation, will redound to their benefit, especially if they can do no wrong in the eyes of the public and the government can do no right. With so much money at stake, the latter of these two options seems altogether more probable.

What we learn from the history of the Chicago School is that powerful corporations endeavor to “capture” not just state bureaucracies but also non-governmental research and advocacy groups.\textsuperscript{104}

Nothing about this should come as a major surprise. It seems only natural that industry leaders would

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\textsuperscript{102} Adam Winkler, \textit{We the Corporations: How American Businesses Won Their Civil Rights} (New York: W. W. Norton & Company, 2018), 302.


\textsuperscript{104} Chicago economists were more than capable of coming to a pro-corporatist position on their own, of course, without the financial inducements provided by Luhnow and company. While the \textit{timing} of this intellectual shift is admittedly suggestive, it does not prove, without a shadow of doubt, that the Chicago School of Law and Economics merely housed an influential group of hired academic hacks willing to change their position at the drop of a hat for a few shekels of silver. Nor should we take such a claim lightly: as Bruce Caldwell notes in his defense of Hayek, such an “accusation is probably the most serious one that anyone can make about an intellectual” (“The Chicago School, Hayek, and Neoliberalism,” 322) Still, it would be equally remiss of us to ignore the fact that the Volker Fund, and the various interest groups it represented, very much \textit{wanted} this intellectual shift to occur and did everything in its power to bring it about. In all likelihood, however, we will never be able to answer with certainty whether the actions of the Volker Fund or the independent thinking of economists like Director and Friedman is most responsible for the crucial renunciation of the anti-corporatist positions of Simons and Viner.
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see definite advantages in a legal system that (1) prioritizes productivity and competition over other salient ends and (2) effectively allows them to meddle in politics—in pursuit of concessionary graft and subsidies, preferential regulations, and so forth—without bearing any culpability for doing so. Corporate actors undoubtedly see advantages, moreover, in promoting a wealth-creation game they are uniquely equipped to play, a game that, because widely regarded as “spontaneous,” is also shielded from much political scrutiny. Indeed, one would be hard-pressed to imagine a position more beneficial to established industries than this one: it promotes a system specially designed to serve their needs, as the ordoliberal economists, Hayek’s eminent colleagues in Germany, more readily if also dimly recognized.

4). Ordoliberalism and the Constitution of Corporate Power

We have identified two features of neoliberal economics that work to the benefit of large corporations. The first is its gradual transformation of society into a catallactic game played by winners and losers who, to greater and lesser degrees, compete for larger shares of an ever expanding market; and the second is its depiction of this system as entirely “spontaneous” and thus beyond the purview of government. It was this second idea specifically that attracted the vocal opposition of the ordoliberals. Indeed, members of this burgeoning economic movement made it their animating purpose, no less, to enlighten a post-bellum Germany of the legal instruments at its disposal—all the various means by which German politicians and bureaucrats might construct a new and improved social order free from the ravages of corporatism. Central to this project was the ordoliberal claim that the economy, far from evolving of its own power, is a work of deliberate human construction, a system that often needs to be reconstructed to remedy its past defects. For the ordoliberals, the stakes involved could hardly be higher: nothing less than the fate of the free world hinged on the success of these reparative efforts.

This project is best understood in its historical context, however: partly because the ordoliberal school began as an intellectual opposition movement to Hitler’s Nazi regime, it forever harbored a vastly exaggerated sense of its own importance. Situated at the University of Freiburg, it was launched by
Walter Eucken and Franz Bohn and would later include other renowned economists like Leonhard Miksch, Wilhelm Röpke, and Alfred Müller-Armack, all of whom advocated, at the close of World War II, an impressive suite of market-friendly policies in West Germany. Equally important for our purposes here, the movement was also on friendly terms with Hayek, who was offered a short research stint at Freiberg near the end of his career. It was a movement closely aligned with the Chicago School of Economics, in other words, with a similar philosophical underpinning and mostly parallel goals.¹⁰⁵

One area where this movement diverged sharply from its American corollary, though, was in its view of corporate power. Whereas the Chicago School promptly abandoned its early anti-corporatist commitments, as we saw above, the ordoliberal economists in Germany forever kept this issue front and center. They had nothing but disdain for the wishful hypothesis that economic power blocs would somehow dissolve of their own accord, and they rejected the notion that this problem could ultimately be swept away, out of sight and mind, under one spacious laissez-faire rug. Rather, they believed legal and institutional reforms were necessary to resolve it; government legislatures, courts, and agencies would have to engage with all guns blazing to have any chance of vanquishing corporate leviathans. More specifically, government officials would have to enact (with the advice of ordoliberal intellectuals, of course) a sweeping constitutional overhaul of the entire economy, ensuring that the laws promote and even compel competitive practices—the ultimate kryptonite that eats away at monopolies.

With this end in mind, the ordoliberals initially viewed both Simons and Viner, in addition to Director himself, as common allies in their struggle against corporate domination. And they could always approvingly cite Hayek’s early admission, at a Mont Pelerin gathering in 1947, that “the size of

¹⁰⁵ On the other hand, Chicago economists rarely cited the work of ordoliberals, and vice versa. Whatever personal and ideological affinities they shared, they largely conducted their work in separate intellectual silos. This was also the case for Hayek himself: See Manfred E. Streit and Michael Wohlgemuth, “The Market Economy and the State Hayekian and Ordoliberal Conceptions,” in The Theory of Capitalism in the German Economic Tradition, ed. by Peter Koslowski (New York: Springer, 2000), 227-228.
enterprise has become an advantage beyond the point where it is justified by technological facts”—which means “it may on occasion be the duty of government to protect the individual against organized groups.” The ordoliberals did not arrive at their anti-corporatist position, however, through the influence of Hayek or other Chicago economists. Rather, their deep mistrust of powerful industries was largely a result of their experience decades earlier as citizens of the Weimar Republic. During that tumultuous period, various powerful industries sought to mitigate risk through legislative acts specifically designed to stymie and eliminate competitors. Based on these events, the ordoliberals concluded that corporate power had contributed to the rise of Nazism and was partly responsible for what later occurred; in their estimation, “the problem had been the inability of the legal system to prevent the creation and misuse of private economic power.” And it was this conviction that kept them focused on an issue that their colleagues in Chicago all too quickly and eagerly abandoned.

The main reason why the ordoliberals rejected the very notion of market spontaneity, then, was precisely because some market societies (like the Weimar Republic) had been abject failures. Not all of them had proven capable of preserving, in the long-term at least, the economic freedoms of their

106 Hayek, “‘Free’ Enterprise and Competitive Order,” 116. Even more shockingly, Hayek goes on to suggest that “there may be valid arguments for so designing corporation law as to impede the indefinite growth of individual corporations” (116). This appears to be the only time or place where Hayek pinpoints corporate size and power as something worrisome in and of itself—as a problem that may require government measures to resolve it. At the same time, Hayek immediately qualified this thought with the stipulation that, however these laws are changed, the government must not interfere in the economy: “The ways in which this could be done,” he said, “without setting up any rigid limits or giving the government undesirable powers of direct interference is one of the most interesting problems which we might discuss” (Ibid). Hayek was thus more than happy to let this issue rest.


108 Van Horn argues that in early 1947, both “groups had relatively similar attitudes toward monopoly and corporations,” and they both “lauded and respected the work of the renowned classical liberal Henry Simons” (“Reinventing Monopoly,” 206-07). And yet, this issue may still have been a source of tension, if a sublimated one, at the very outset: according to Wilhelm Röpke, Eucken quarreled with Mises over the purported dangers of corporate monopolies at the first meeting of the Mont Pelerin Society. (Viktor J. Vanberg, The Constitution of Markets: Essays in Political Economy (London: Routledge, 2001), 18.)
members. And yet, if each and every one of them was a natural (and so also inevitable) reflection of spontaneous activity, as Hayek strenuously claimed, then everything that emerged within them must, by the force of inescapable logic, be equally as natural and inevitable. Unsurprisingly, the ordoliberals were thoroughly unwilling to accept this conclusion; they rejected the notion that monopolistic capital, in particular, was an unavoidable expression of a capitalistic system, as Joseph Schumpeter had famously argued. Instead, they claimed, monopolies are historically contingent products, the “result of a failed political strategy and inadequate forms of institutionalization.” And because they are contingent, they are also fundamentally redeemable: we need not adopt a spirit of fatalism about them.

The central insight of the ordoliberals, in short, was that economic power is insurmountable only so long as we continue to swallow the myth that nothing much political can be done about it. The first constructive step we ought to take, then, is to perceive the market for what it really is—as nothing more or less than a product of the laws and institutions that comprise it. In order to implement lasting reform, that is, we must rightly identify the market as a work of our own construction and thus as something that we as its authors can subsequently reconstruct as circumstances dictate.

It goes without saying that we also require, as we undertake this task, guiding principles to keep us from drifting aimlessly from one meaningless reform to another. We need to know on what basis to alter existing laws and institutions. In recognition of this fact, the ordoliberals took great pains to ensure that liberal principles formed, at least nominally, the center around which their reforms turned. Indeed, they were crucially reticent to divorce stock in trade economic goals (like market efficiency and growth) from their wider socio-political context. As far as they were concerned, theirs was hardly a profession for introspective scientists but was one that demanded courageous effort in the public sphere; economic endeavors, they thought, can never be entirely apolitical, nor are they ever devoid of

normative content. As a consequence, they believed their “actual goal” should be nothing less than “the protection of individual economic freedom of action through the restraint of undue economic power.”

The ordoliberals thus shared with Hayek a conviction that their economic theories were to play a crucial role in a centuries-long struggle against authoritarian abuse. Granted, the despot they hoped to combat was somewhat distinctive—equally economic and political—but their central insight was essentially consonant with that of Hayek. But this, of course, raises a question as to what freedoms they thought they were protecting: Did they intend to combat corporate abuses in all forms, or did they limit their concerns to contractual interference and price manipulation? On this score, ordoliberal economists were mostly divided, even if unconsciously so. Some of them restricted their critique of private industry to the evident “bad actors” from an economic standpoint: to stereotypical monopolies and cartels. Yet others of them, including Röpke most prominently, believed “the concentration of economic resources was an evil unto itself,” and they “sought an economy composed, to the extent possible, of small and medium-sized firms.” In short, some ordoliberals pushed beyond the narrowly economistic view of the Chicago School, but they were far from unanimous in doing so. And like their neoliberal counterparts, they tended to focus on monopolistic practices to the exclusion of everything else.

Thus, one way to determine what ordoliberals implicitly meant by the term “freedom” is simply to identify who and what they considered to be its major threats. With a list of potential oppressors limited (in every practical sense) to (1) an overly intrusive government and (2) corporate monopolies, it

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111 Gerber, “Constitutionalizing the Economy,” 37. Importantly, in a legal order that prioritizes competition first and foremost (rather than, say, economic growth), small and medium-sized firms are, from a certain perspective, the very best actors in the marketplace. They embody competitive virtues without (yet) engaging in actions detrimental to future competition. In contrast, large firms may be stalwart players in the wealth-creating game that is the market, but they also inhibit long-term competitors from challenging their preeminent position. Thus, if ordoliberal economists were to stress competition over growth, then their preference for small businesses over gigantic ones then would make perfect sense. Many of these thinkers, however, combined the goals of competition and growth; they saw competition as useful and important primarily because it generates wealth.
becomes clear, as one critical scholar astutely puts it, that “the ordoliberals conceive[d] of individual freedom as the freedom of the entrepreneur to engage in competition to seek gratification by means of voluntary exchanges on free markets.”¹¹² In this sense, their position was virtually indistinguishable from the standard neoliberal line.

Much the same can be said of how ordoliberals viewed competition. As inveterate economists, they assumed as a matter of course that most market-related problems stem from anti-competitive practices. And to block these practices, they believed, economic relations must actually loom larger in civil society and become more integral to human relations broadly speaking. Hence, the goal of all legal policy, in view of this broader aim, must be “to multiply and expand entrepreneurial forms within the body social” so that competition eventually becomes the dominant mode of existence.¹¹³ Only then will solitary individuals be free to improve their material well-being unhindered by a big government and by equally massive corporations. If economic power threatens individual liberty in ways comparable to the state itself, then economic activity (and more of it) still remains the best solution. In the end, we must continue to rely on the market—its ethos and culture—to treat the diseases spawned by the market.

It is true that in a formal sense, the ordoliberals did not regard competition as the final telos or end of society. Rather, they consistently emphasized that the central purpose of their reformatory efforts was to emancipate individuals from their economic and political shackles. As they saw it, competition was but a means to that end or “an indirect and derived goal.”¹¹⁴ Despite their obvious professional biases, moreover, they continued to characterize their ideal society as one “based on the


equality of rights and on personal liberty,” not as one marked by a “soulless economic determinism.”

This was especially true of economists like Wilhelm Röpke, Alfred Müller-Armack, and Alexander Rüstow, among several others. Rüstow notably observed, for instance, that competition is “dependent upon ethical and social forces of coherence” to keep it in check—a sentiment that mirrors ideas coming out of the Frankfurt School. And yet, these statements notwithstanding, the practical result of ordoliberal policies (and often their stated intent as well) was to increase and inculcate competitive practices society wide: even Rüstow himself, it turns out, came to regard competition as “the sine qua non of a free and open society.” Or as yet another ordoliberal bluntly put it: “Competition forms the moral backbone of a free profit-based economy.”

An implicit ordoliberal assumption, in other words, was that freedom and competition always travel together such that one cannot exist without the other: “their political, humanist, and social justice claims” all rested on the premise “that economic competition would generate economic development,” and the mutually beneficial result would be a much freer society. Thus, they continued to pay lip service to liberal values, but their legal reforms were expressly designed to stimulate competitive values. Much as did Hayek, they accepted as faith that laws conducive to market productivity always serve to liberal values, but their legal reforms were expressly designed to stimulate competitive values.

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116 Quoted in Bonefeld, “Freedom and the Strong State” 7. See also Foucault, The Birth of Biopolitics, 298-306.

117 Bonefeld, “Freedom and the Strong State,” 9


120 The ordoliberals did have a high standard for what qualified as “competition,” even if they failed to explain how this “ideal” version of competition was sustainable or even achievable. As Gerber relates, ordoliberals like Walter Eucken insisted on perfect or “complete” competition... in which no firm in a market has power to coerce other firms in that market” (Ibid, 43). Careful readers will here notice, of course, that one hypothesized effect of competition—reduced corporate power—has now been smuggled in as a definitional feature of competition.
serve the cause of liberty, and they, too, continued to trumpet the virtues of the wealth-producing game that comprises the market. Where they differed with Hayk, as we noted above, was in how _active_ they thought the government must be to _police_ this game: they recognized that complex economic systems, far from arising in a political vacuum, are cultivated through a vast array of policy instruments.\(^\text{121}\)

In a practical sense, then, the ordoliberals had to walk a very fine line: their central goal was to secure market freedom, but they also firmly believed in the importance of a vigilant and active state—which itself poses a threat to these same freedoms, as any good liberal knows. The ordoliberals tried to square this circle, however, by insisting that the government refrain (whenever possible) from _directly_ interfering in _specific_ market transactions. While the purpose of all laws and regulations is to promote competition, they thought, it just so happens that an _overactive_ government is unequal to this task because, due to its regulatory excesses, it is liable (if anything) to _depress_ economic productivity. State officials have therefore no reason to meddle needlessly in the economy; in an ordoliberal system, the laws are for all intents and purposes “outside the discretion of those wielding governmental power.”\(^\text{122}\)

Or so the theory goes. In reality, the strictures of the marketplace both encumber the government _and also_ empower it. They encumber, first and more obviously, inasmuch as they inhibit the government from ever taking actions (no matter the reason) that disrupt the free reign of competitive market forces. Indeed, once an economic constitution is in place, the ordoliberals argued, “adherence to its dictates must be mandated,” and “any governmental action that does not conform... should be overturned by the courts.”\(^\text{123}\) One consequence of this, however, is that the government is given wide discretionary powers to _promote_ competition; policies that might once have been forbidden

\(^{121}\) Gerber, “”Constitutionalizing the Economy,” 44.

\(^{122}\) Ibid, 47.

\(^{123}\) Ibid, 76-77.
are now allowable as long as they plausibly serve this larger goal. In this second respect, then, the
government finds itself oddly empowered by the economizing logic imposed on it. Officially it faces
major restrictions on its power, but it can hardly be said to be inactive or uninvolved in the intricate
workings of the economy. Rather, it is legally required, no less, to apply the social scientific expertise of
trained economists, investment gurus, and other technocratic professionals as it manages and polices
the market. In other words, the government must take guidance from the very kinds of specialists and
experts that large corporations routinely employ and from whom they clearly benefit.

An ordoliberal regime is thus one in which the entire government has been effectively
“captured” by industry—a regime in which corporations have all the ideological cover they need to
further impose their dominant rationality on the rest of society. So why, we might ask, did the
ordoliberals (despite good reasons to the contrary) expect their reforms to empower the demos at the
expense of the economic powers that be? The answer to this question should by now come as no
surprise: they based their optimism on nothing more or less than the power of competition to undercut
and abolish entrenched hierarchies. In a well-policed market environment, they thought, corporate
goliaths will always and necessarily crumble under the weight of a thousand lesser competitors, each
vying for a chance to serve the public. But this can only happen when the government greases the
market’s wheels and ensures fair play. Indeed, most of the proposals the ordoliberals put forward,
which we will briefly consider below, were informed by this basic assumption.

4.1 Practical Ordoliberal Reforms

As acting advisors to German governing officials, the ordoliberals proposed both legal and
institutional reforms to squelch anti-competitive practices. They pioneered and helped implement, for
example, a robust set of competition laws that, most novel of all, employed an as if standard to
determine whether and when companies ought to be penalized. Under this standard, companies with a
“natural monopoly” or with a disproportionate amount of economic power were required to forever
“act as if they were subject to competition—i.e., as if they did not have monopoly power.”

In effect, these laws were intended to ban boycotts, price manipulation, loyalty rebates, and predatory pricing, in addition to other exclusionary or exploitative practices. The institutional corollary to this innovation was an autonomous, hard-hitting monopoly office that, in theory at least, would have the capacity to enforce competition laws without kowtowing to the same pressures (like bribes and extortion) that often plague legislative bodies. As long as this office could remain functionally separate from the rest of government, the argument went, powerful industries would find it all but impossible to capture or distort it to serve their own purposes.

Nothing about these reforms is radically different, though, from what liberal governments have always done in the face of market imbalances. As economic historian Karl Polanyi observes, “Consistent liberals from Lloyd George and Theodore Roosevelt to Thurman Arnold and Walter Lippmann” have always opposed the “freedom of businessmen to concert” together to secure their interests at the expense of consumers. That is to say, liberal thinkers and politicians have always been willing to “subordinate laissez-faire to the demand for a free competitive market,” enacting new anti-trust laws and a host of regulations with that end in mind. Whatever the particular merits of these policies—and

124 Gerber, “Constitutionalizing the Economy,” 52. Importantly, this reform runs directly into the epistemic problem that Hayek, in his early responses to proponents of socialism and in numerous works subsequently, was at such pains to emphasize: a centralized state agency can never know or properly assess when a state of “complete competition” has come about (if such a thing even exists). In the view of Hayek, therefore, “any attempt to make a firm act ‘as if’ competition existed is simply absurd, since a discovery procedure’s results cannot be anticipated and hence not dictated” (Streit and Wohlgemuth, “The Market Economy and the State,” 244).


126 Gerber, “Constitutionalizing the Economy,” 54-55.


128 Ibid.
they undoubtedly have some—it is now abundantly clear that they are also inadequate, in and of themselves, to terminate the corporate juggernauts that competitive markets invariably spawn.

We are only now beginning to learn, in other words, what should have been patently obvious all along—that no single group of economists or lawyers will ever be able to construct a market system in which perfect or “complete” competition, to borrow an ordoliberal term, characterizes every interaction. Indeed, the very attempt to do so, it seems, will only reinforce the mistaken notion that competition can somehow cure us of every social and political ill. And in the process, it will help further instantiate a world where corporate giants (and their *modus operandi*) dominate the social landscape.

Even in the halcyon days of the ordoliberal movement, when West German politicians still took guidance from economists at Freiberg and Cologne, intemperate zeal for market competition worked to the advantage of large industries. For example, the 1956 Law Against Restraints on Competition, which was nominally one of the earliest ordoliberal triumphs, made crucial allowances for “so-called ‘crisis cartels,’ standardization of agreements and a variety of other horizontal agreements” that contribute to corporate growth and power.129 The official justification for these provisions was “to reduce the potential negative impact of the law on the competitiveness of German businesses.”130 In other words, the very notion that competition must be promoted at all costs—in practice, an end unto itself—left a sizable crack in the door through which rushed a horde of vested business interests, which were now equipped with the normative vocabulary necessary to resist more far-reaching political reforms.

None of this is to deny the fact that ordoliberal competition law represents an improvement, in many respects, on the existing antitrust regime in the United States. Indeed, a case can be made that the German state retains “the most stringently applied competition law in the world.”131

129 Gerber, “”Constitutionalizing the Economy,” 65-66

130 Ibid, 65.

131 Ibid, 66.
admirers of the ordoliberals, however, acknowledge that their constitutional economy has fallen well short of its early promise. And its paltry results became readily apparent before many decades had even passed: by the end of the 20th century, few still “share[d] the ordoliberal confidence in the capacity of legislatures to create clear and dependent laws of any sort, much less a constitutional framework for the entire economy.”

It soon became abundantly clear, moreover, that legislators remain (as always) beholden to “one or another political or economic interest group,” no matter which policies have been put in place. Nor have competition laws done much to reduce the power wielded by private industries. Quite the contrary has occurred: repeated “mergers have swept over economies with significant antitrust regimes (e.g., The United States and Germany) with little noticeable restraint from competition laws,” and “economic power positions seem to be as significant a problem in such countries as in other countries with weaker antitrust regimes.”

As long as corporations retain their substantial powers, they can always continue to capture or meddle with government policy as needs arise. Nothing the ordoliberals proposed has done much to

132 Gerber, ““Constitutionalizing the Economy,” 75. This admission from Gerber is significant because he himself remains a great admirer of ordoliberalism.

133 Ibid.

134 Ibid, 78. Gerber, a distinguished professor of law the University of Chicago, goes on to suggest two potential responses to this criticism. He argues first that the continued prominence of “power positions does not necessarily mean that competition law has not contributed to protecting freedom” (Ibid). This response is only valid, however, as long as “freedom” here refers strictly to standard contractual relations, and as long as exclusionary practices are the only use of economic power that merit our concern (both of which are dubious assumptions). But secondly, Gerber argues “that competition law cannot be fully effective unless it functions as part of a comprehensive legal framework, receiving support from other policies designed to achieve the same objectives. Therefore, since competition laws currently tend to operate as discrete areas of law with poorly-defined relationships to the rest of the legal system, they cannot be as effective as they otherwise might be.” (Ibid) Yet again, however, this second objection assumes a more perfect system is achievable, and “complete” competition is nearly within grasp.

135 In their efforts to keep government laws and regulations from falling prey to corporate capture, the ordoliberals, much like everyone else, found themselves on the horns of a real dilemma: “Efforts to make the activities of interest groups more transparent, to set public hearings or the advice of experts against their pressure, and to reveal their financial support for politicians and parties would be hardly more than cosmetic operations on the body politic. Stronger measures like provisions of public law in order to restrict their activities would violate
alter that fundamental reality. And indeed, ordoliberal reforms have arguably done much to empower corporations in other ways, granting them a privileged position in society as formidable competitors acting unabashedly in their own self-interest, the winners of a wealth creation game they are singularly qualified to play. It is individuals, in contrast, that characteristically fail to actualize this ideal. It is little wonder that neo/ordoliberal governments invariably employ a variety of biopolitical techniques, as we will discuss more fully in chapter two, to ensure that individuals learn to embody, if imperfectly, the rational-choice model of behavior that the market demands. And it is ultimately corporations, or at least the largest of them, that benefit most from the use of such corrective techniques.

It is important to recognize, finally, that the successes and failures of the ordoliberals are not strictly their own; they also reflect prevailing conditions in what are nominally neoliberal societies. Ordoliberal models of governance, in fact, are now virtually synonymous with neoliberalism more generally: the “spontaneous” model that liberals like Hayek so brilliantly defended has gradually given way to a more realistic assessment of what market societies require to function, a shift that occurred in tandem with Chicago school advances in public choice theory and law and economics.136

In the political sphere, moreover, a bipartisan consensus has now more or less formed: while politicians on the Left and Right differ over how many regulations we ought to employ, or how stringent and how well enforced antitrust laws should be, neither of them harbors many doubts that economic competition and growth are paramount aims that, in practice if not in theory, supersede all others. If we are to remain (or become) free and equal citizens, we are repeatedly told, then we must continue to

the civil liberties of expression, association and assembly besides suppressing useful functions which some interest groups might actually serve” (Streit and Wohlgemuth, “The Market Economy and the State,” 254-55).

136 Of course, this very much depends on how we define an oft-used-but-rarely-defined term like “neoliberalism.” In making this claim, I am concurring with Van Horn and Mirowski that neoliberalism (as it is understood today) effectively discards any pretense that the economy evolves by itself from the ground up: “The starting point of neoliberalism is the admission, contrary to classical liberalism, that its political program will triumph only if it acknowledges that the conditions for its success must be constructed, and will not come about ‘naturally’ in the absence of concerted effort” (“The Rise of the Chicago School of Economics,” 161).
improve our economic performance and do our utmost as individual consumers and producers to forestall any future reversal of our material fortunes—all while our position relative to massive corporations, as roughly measured in size, power, and influence, continues to rapidly deteriorate.

5). Some Concluding Thoughts

In *A Brief History of Neoliberalism*, distinguished anthropologist David Harvey argues that neoliberalism has “succeeded remarkably well in restoring, or in some instances (as in Russia and China) creating, the power of an economic elite.”

The central claim of this chapter, building off this insight, is that neoliberal economic elites come in markedly different forms: distinctively corporate persons hold a definite advantage over the mass of isolated human persons with whom they compete. They provide, moreover, the necessary means and resources by which a select and vanishingly small number of plutocrats earn their wealth. The Rockefeller family would never have risen to prominence, for example, absent the success of their Standard Oil Company in the late 19th century—or absent, more recently, the success of the Chase Manhattan Corporation. Similarly, business magnate William H. Gates acquired his current wealth and prestige as the chairman, CEO, and largest shareholder of Microsoft Corporation. In both of these salient cases, corporate success was a crucial prerequisite to individual achievements.

The list of examples could be multiplied indefinitely, revealing a kind of iron law of social and economic mobility: plutocratic power necessarily follows from and depends upon (mega)corporate power. Corporations as such, in other words, are uniquely suited to neoliberal forms of governance. More specifically, we learn in this chapter that the neoliberal wealth-creation “game” favors and rewards the very kind of behavioral model that massive corporations systematically operationalize.

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137 Harvey, *A Brief History of Neoliberalism*, 19.

138 Even a “lone” financial investor like Warren Buffett has only been able to consolidate and expand his profits, it turns out, through his massive conglomerate Berkshire Hathaway, Inc.

139 Mid-sized firms (and those who head them) tend to be less “rational” from an economic perspective than are large corporations because they generally place a higher priority on the health and prosperity of their home
There is a rich irony in this, however: no sooner do corporations reap enormous bounties from this market game than they strive to disrupt it. The various titans of industry seemingly want nothing more than to inhibit new competitors from undermining their preeminent position. And that is why, as Chicago economists so perceptively observed, we see large industries capture regulations to stifle the growth potential of lesser enterprises. Clearly, their love of unfettered free markets only extends so far.

Thus, we might be tempted to believe that, following the ordo- and neoliberal schools of thought, the solution is to make the market more competitive than it presently is. There are at least three problems with this approach, however. First, it ignores the fact that powerful corporations still have the resources at hand to push the market in a different direction entirely; because it confronts this problem in a roundabout way, in other words, it courts failure from the very outset. Secondly, this approach naively assumes that a perfectly free and competitive market must be lurking just around the corner, ripe for the taking—whereas in reality, such a market has never (and can never) be realized in practice.\(^{140}\) Third and finally, it only aggravates the problem in other ways, creating the very kind of world in which megacorporations are most at home, and from which they will most profit.

In short, the standard regulatory approach leaves much to be desired. And the public, for its part, finds itself on the horns of a real dilemma. If it pushes for market deregulation—in the hopes that doing so will have a positive “trickle down” effect on the rest of the economy—it risks empowering corporate persons vis-a-vis their all too human counterparts. If it instead advocates for more stringent regulations, however, it risks empowering large corporations at the expense of smaller and less community. See, for instance, Royce Hanson, et al., “Corporate Citizenship and Urban Problem Solving: The Changing Civic Role of Business Leaders in American Cities,” *Journal of Urban Affairs*, vol 32 (1) (2010), 1-23.

\(^{140}\) It was notably Alfred E Kahn, the economist who helped spearhead the deregulation movements during the administrations of Ronald Reagan and Margaret Thatcher, who acknowledged that that “all competition is imperfect,” and “to the extent it is intolerably imperfect, the only accept alternative is regulation. And for the inescapable imperfections of regulation, the only available remedy is to try to make it work better.” (*The Economics of Deregulation: Principles and Institutions, vol. 1* (New York: John Wiley & Sons, Inc., 1970), 329.
powerful firms. Either way, megacorporations stand to benefit. They thus stand before us as consummate or model neoliberal persons in at least two respects: not merely because they epitomize the economic/behavioral ideal that the market demands, as discussed above, but also because they alone can avail themselves of the full suite of policy options that neoliberalism has yet to offer.

Whatever future reforms are put in place, therefore, have little chance of success, it seems safe to say, so long as they remain within a neoliberal orbit; in order to be efficacious, they need to confront corporate power head-on—to reduce their capturability—and they need to be willing to challenge the economistic biases that inform and underwrite our current neoliberal order. Future chapters will argue that a properly constitutional approach (rightly understood) meets this exact criteria.