BOOK REVIEW

THE LAWS OF CAPITALISM

CAPITAL IN THE TWENTY-FIRST CENTURY. By Thomas Piketty. Cambridge, Mass.: The Belknap Press of Harvard University Press. 2014. Pp. 685. $39.95.

Reviewed by David Singh Grewal[*]

I. CAPITALISM TODAY

The past year has seen the surprising ascent of French economist Thomas Piketty to "rock star" status.[1] The reading public's appetite for his economic treatise seems motivated by a growing unease about economic inequality and an anxiety that the "Great Recession," which followed the financial crisis of 2008, defines a new economic normal. The seemingly plutocratic response to the crisis has become the focus of angry attacks by protesters on both left and right,[2] but their criticisms have had little practical effect, even while subsequent events have confirmed their fears. In 2010, the United States Supreme Court sealed the union of corporate money and politics in *Citizens United v. FEC*,[3] which subsequent judgments have further entrenched.[4] Meanwhile, the response to the crisis in Europe has suggested that Brussels now operates as an arm of finance capital and that monetary union is more likely to prove the undertaker of European social democracy than its savior.[5]

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[*] Associate Professor, Yale Law School. The author thanks Ruth Abbey, Bruce Ackerman, Cliff Ando, Rick Brooks, Angus Burgin, Daniela Cammack, Paul Cammack, Stefan Eich, Owen Fiss, Bryan Garsten, Arthur Goldhammer, Jacob Hacker, Robert Hockett, Paul Kahn, Amy Kapczynski, Jeremy Kessler, Alvin Klevorick, Jonathan Macey, Daniel Markovits, Pratap Mehta, Robert Post, Jedediah Purdy, Sanjay Reddy, Roberta Romano, George Scialabba, Tim Shenk, Reva Siegel, Peter Spiegler, Adam Tooze, Richard Tuck, Patrick Weil, and John Witt for discussions on these and related issues. He is also grateful for the advice and assistance of the editors of the *Harvard Law Review* and for the excellent research assistance of Cory Adkins. He owes special thanks to Kate Harris, Daniel Herz-Roiphe, and Lev Menand, who read through Piketty's work in an independent study group in the spring of 2014. The author also wishes to thank Thomas Piketty for his generosity in reading the review before its publication and Samuel Moyn for agreeing to participate in an exchange on these issues. None of these persons is responsible for the errors that remain.

[1] Jennifer Schuessler, *Economist Receives Rock Star Treatment*, N.Y. TIMES, Apr. 19, 2014, at C1.

[2] For an inside account of the crisis and its management, see RON SUSKIND, CONFIDENCE MEN (2011).

[3] 130 S. Ct. 876 (2010).

[4] *See* McCutcheon v. FEC, 134 S. Ct. 1434 (2014); *see also infra* notes 116–19.

[5] *See, e.g.*, Wolfgang Streeck, *Markets and Peoples*, NEW LEFT REV., Jan.–Feb. 2012, at 61; Susan Watkins, *Vanity and Venality*, LONDON REV. BOOKS, Aug. 29, 2013, at 17.

Piketty first came to prominence with his collaborator Professor Emmanuel Saez during the mid-2000s when they published several carefully researched studies of income inequality in the United States.[6] Their finding that since the mid-1970s the "one percent" in the United States had received an ever-growing share of the national income was seized on by academics and commentators — and later provided the basis for the political slogans of the Occupy movement. Piketty also published analyses of historical trends in income and wealth inequality across most developed countries, a project undertaken with several prominent international collaborators, including the distinguished British economist Professor Anthony Atkinson.[7]

Piketty's most recent volume, published in French in 2013, and in English in 2014 as *Capital in the Twenty-First Century* — a knowing nod to Karl Marx — is a sprawling, ambitious text that builds on this earlier work while rendering it accessible to a wider audience.[8] Its argument, backed by impressive empirical data, may be summed up in three words: capitalism generates inequality. This in some ways old-fashioned claim has been received with great enthusiasm (and controversy) in the United States and elsewhere and has managed the rare feat of generating widespread discussion in both popular and academic circles. It has garnered reviews, sometimes several, in every important newspaper; received detailed coverage from all major economics journalists and commentators; and been scrutinized by mainstream academic economists, such as Professors Robert Solow, Larry Summers, and Paul Krugman[9] — who called it "the most important economics book of the year — and maybe of the decade"[10] — as well as more

[6] Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q. J. ECON. 1 (2003); Thomas Piketty & Emmaneul Saez, *The Evolution of Top Incomes: A Historical and International Perspective* (Nat'l Bureau of Econ. Research, Working Paper No. 11955, 2006).

[7] The data are collected and updated at *The World Top Incomes Database* website. *See* Facundo Alvaredo et al., THE WORLD TOP INCOMES DATABASE, http://topincomes.g-mond.parisschoolofeconomics.eu (last visited Oct. 26, 2014) [http://perma.cc/QP7V-AFLG]. Academic papers include Facundo Alvaredo et al., *The Top 1 Percent in International and Historical Perspective* (Nat'l Bureau of Econ. Research, Working Paper No. 19075, 2013) [hereinafter Alvaredo et al., *The Top 1 Percent*]; Anthony B. Atkinson et al., *Top Incomes in the Long Run of History* (Nat'l Bureau of Econ. Research, Working Paper No. 15408, 2009); and Thomas Piketty, *Top Income Shares in the Long Run: An Overview*, 3 J. EUR. ECON. ASS'N 382 (2005).

[8] THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014). For the original French edition, see THOMAS PIKETTY, LE CAPITAL AU XXIE SIÈCLE (2013).

[9] *See* Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS, May 8, 2014, at 15; Robert M. Solow, *The Rich-Get-Richer Dynamic*, NEW REPUBLIC, May 12, 2014, at 50; Lawrence H. Summers, *The Inequality Puzzle*, DEMOCRACY, Spring 2014, at 91.

[10] Paul Krugman, *Wealth over Work*, N.Y. TIMES, Mar. 24, 2014, at A21.

heterodox scholars, who have greeted the work with a mixture of respect, disappointment, and relief.[11]

Capital in the Twenty-First Century has thus prompted discussion of inequality, financial regulation, and political economy across an unusually wide spectrum, and for this alone the work deserves the praise it has received. Not every book can bring academic economists, businesspeople, students, central bankers, politicians, policymakers, and social activists into a conversation about the future of capitalism. Nor need one ask the last time a 700-page book written by a French socialist received a chapter-by-chapter reading in *The Economist*.[12]

This broad appeal is not only the result of fortuitous timing and a careful argument, however. It also reflects the fact that both the subject itself and Piketty's handling of it invite interdisciplinary interest.[13] In what follows, I will bring that aspect to the fore, especially as it interests a legal-academic audience. Piketty's major claim — that capitalist societies exhibit a persistent trend of increasing inequality — should come as a prompt to examine the underlying legal and institutional foundations of capitalist economic relations. And his empirical analysis should provide an opening for an interdisciplinary discussion to be conducted among scholars working in fields such as philosophy, politics, history, sociology, and law.

I begin in Part II by introducing Piketty's analysis of long-run economic trends, particularly in wealth and income inequality. Part III develops an internal critique concerning the role of normative evaluation in the construction of the index numbers on which his empirical analysis depends. Across these two Parts, I introduce Piketty's main findings and suggest how his conclusions indicate deeper issues that his data do not independently resolve, including the normative import of the increasing inequality he catalogs and the underlying determinants of the rate of return on capital, which is at the heart of his argument. Accordingly, in Part IV, I consider capitalism understood as a legal ordering. Here I develop an account of the "laws" of capitalism, understood not as statistical regularities obtaining in a given socioeco-

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[11] *See, e.g.*, James K. Galbraith, Kapital *for the Twenty-First Century?*, DISSENT, Spring 2014, at 77; Dean Baker, *Economic Policy in a Post-Piketty World*, HUFFINGTON POST (Apr. 21, 2014, 6:24 PM), http://www.huffingtonpost.com/dean-baker/economic-policy-in-a-post_b_5187840.html [http://perma.cc/L5UW-J5YY]; Doug Henwood, *The Top of the World*, BOOKFORUM (Apr.–May 2014), http://www.bookforum.com/inprint/021_01/12987 [http://perma.cc/VQG7-HWVY]; Geoffroy de Lagasnerie, *Le manifeste inégalitaire de Thomas Piketty*, LIBÉRATION (Oct. 17, 2013, 6:06 PM), http://www.liberation.fr/economie/2013/10/17/le-manifeste-inegalitaire-de-thomas-piketty_940345 [http://perma.cc/V326-8YZZ] (offering a critical French reaction).

[12] *See* Ryan Avent, *Reading "Capital": Introduction*, THE ECONOMIST: FREE EXCHANGE (Feb. 27, 2014, 1:51 PM), http://www.economist.com/blogs/freeexchange/2014/02/book-clubs [http://perma.cc/7F8X-E8NU].

[13] Piketty himself notes the work's interdisciplinary potential, though his own focus is necessarily limited (pp. 32–33).

nomic regime, but as the legal structuring that undergirds it — in other words, the laws of capitalism understood *as laws*. Finally, in Part V, I critically assess Piketty's proposals for taming twenty-first-century capitalism through a new transnational regulatory regime.

II. THREE HUNDRED YEARS OF CAPITALISM

Capital in the Twenty-First Century is a study of economic inequality in numerous societies over the last three centuries, with a particular focus on the postwar twentieth century. Using income tax and probate records, Piketty documents a dramatic increase of inequality in wealth and income over the last few decades in the major Western European states, the United States, Canada, Japan, and Australia, with similar trends in developing countries. Countervailing tendencies obtained in the mid–twentieth century, but there are numerous parallels between current tendencies and those of earlier times, particularly the Gilded Age of the late nineteenth and early twentieth centuries. Piketty's singular contribution is his data: he offers the most comprehensive empirical study to date of a number of important economic trends, drawing on the largest data set yet available.[14]

A. Correcting Kuznets

Capital in the Twenty-First Century is a study of *modern* inequality — of differences in income and wealth among people of equal juridical status. That market societies produce prodigious inequality of this kind was taken for granted by the classical political economists. Adam Smith's *Wealth of Nations*, for instance, opened with a comparison of the rich and poor in Europe set against the inequality of primitive society.[15] It was never doubted that the new reliance on the market would generate new kinds of inequality. Market advocates simply argued that even the smallest share of what was produced through the modern division of labor would compensate for the loss of a largely hypothetical natural equality.[16] More subtly, where natural equality had already been undermined by human conventions of a different kind, as with slavery and other formal hierarchies, these advocates

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[14] See Alvaredo et al., *The Top 1 Percent*, *supra* note 7; Atkinson et al., *supra* note 7; and Piketty, *supra* note 7 for the articles that first made use of these data. The data are now publically available at *The World Top Incomes Database*, *supra* note 7.

[15] 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 23–24 (R.H. Campbell & A.S. Skinner eds., Liberty Classics 1981) (1776). Early works in what would later be called "economics" are perhaps best understood as moral theories developed to account for the inequalities resulting from the new "commercial society." On this point, see Istvan Hont & Michael Ignatieff, *Needs and Justice in the* Wealth of Nations, *in* WEALTH AND VIRTUE 1, 13–44 (Istvan Hont & Michael Ignatieff eds., 1983).

[16] *See* Hont & Ignatieff, *supra* note 15, at 3–6, 23–25.

hoped that increasing reliance on the market would generate juridical equality, since market exchange was thought to be predicated upon, and reinforcing of, particular forms of mutual regard among contracting agents.[17] But while the transition to juridical equality and market reciprocity may have helped dissolve vestigial feudal relations, particularly in the countryside, it left the problem of "modern" inequality unsolved. In response, later critics such as John Stuart Mill and Marx argued that productive organization and the distribution of wealth had to be understood as ultimately political issues, and they advocated more equitable social and economic arrangements within societies already transformed by modern commerce.[18]

Piketty's book returns us to these classical debates on capitalism and inequality. However, it is neither Smith nor Marx but the twentieth-century economist Simon Kuznets who serves as his main foil. Kuznets won a Nobel Prize in 1971 for his study of U.S. economic growth and national income between 1913 and 1948. His study arguably revealed a trend in capitalism toward initially increasing but later decreasing inequality — the inverted U-shaped relationship now dubbed the "Kuznets Curve" (pp. 13–15). Piketty sees his own research as broadening "the spatial and temporal limits of Kuznets's innovative and pioneering work" (p. 16).[19] Bringing in more countries and a longer time horizon — strictly speaking three centuries, though adequate data are generally available only for the twentieth — leads Piketty to revise Kuznets's argument in two ways. First, the spatial broadening to include most major developed countries reveals that similar dynamics occur more widely, albeit with some variation owing to differences of national policy.[20] Second, Piketty's temporal broaden-

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[17] See Emma Rothschild, *Adam Smith and Conservative Economics*, 45 ECON. HIST. REV. 74 (1992) for an account of Smith's renown in his own time as a social radical, and the posthumous change in his reputation.

[18] See, for example, JOHN STUART MILL, *Chapters on Socialism*, *in* ESSAYS ON ECONOMICS AND SOCIETY 703 (J.M. Robson ed., 1967); and for a key transformation in his thought (which dovetailed with his late-life support for unionism), see John Stuart Mill, *Thornton on Labour and Its Claims Part I*, 29 FORT. REV. 505 (1869); and John Stuart Mill, *Thornton on Labor and Its Claims Part II*, 29 FORT. REV. 680 (1869). Marx's comments on these matters are scattered across different works. For a careful study of the emancipatory and egalitarian aspirations in Marx's thought, see ALLEN W. WOOD, THE FREE DEVELOPMENT OF EACH 252–73 (2014).

[19] For Kuznets's original work, see SIMON KUZNETS, SHARES OF UPPER INCOME GROUPS IN INCOME AND SAVINGS (1953). For work questioning Kuznets's findings, see Sudhir Anand & S.M.R. Kanbur, *The Kuznets Process and the Inequality-Development Relationship*, 40 J. DEV. ECON. 25 (1993); A.B. Atkinson, *Bringing Income Distribution in from the Cold*, 107 ECON. J. 297 (1997); and Pedro Conceição & James K. Galbraith, *Toward a New Kuznets Hypothesis*, *in* INEQUALITY AND INDUSTRIAL CHANGE 139 (James K. Galbraith & Maureen Berner eds., 2001).

[20] On the argument that these national policy variations constitute different "varieties" of capitalism, see Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* VARIETIES OF CAPITALISM 1 (Peter A. Hall & David Soskice eds., 2001).

ing shows that Kuznets was charting a historical anomaly. Inequality may have decreased in the United States in the middle of the twentieth century, but it returned. Indeed, it has increased throughout what we may call the post-postwar period of the 1970s and 1980s, which began with the breakdown of the Bretton Woods system, the Organization of the Petroleum Exporting Countries (OPEC) oil crisis, and the American military withdrawal from Indochina; encompassed stagnating growth, rising inflation, and labor unrest in the North Atlantic world; and was capped by conservative electoral victories in the United States and most European countries and the collapse of ambitious schemes of national economic planning, such as that of Mitterrand's France in the early 1980s.[21] To look back and name the immediate postwar decades the *trente glorieuses* — as French demographer Professor Jean Fourastié did as early as 1979[22] — is to identify them as an anomaly.[23] Nonetheless, Kuznets's study remains widely influential.[24]

Part of the attraction of the "Kuznets Curve" is its suggestion, at least in its popularized version, that further economic growth will automatically correct the problems that growth itself brings — and without having to elaborate the causal mechanisms that bring about such self-correction. In Kuznets's original study, the problem was income inequality, and Kuznets was appropriately circumspect about the limits of his model and the generality of his conclusions.[25] Others have subsequently argued, however, that the same inverted U-shaped relationship suggesting a "self-correcting market mechanism" obtains in many

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[21] For two contemporaneous analyses of Mitterrand's program and its reversal, see Mark Kesselman, *Lyrical Illusions or a Socialism of Governance: Whither French Socialism?*, *in* SOCIALIST REGISTER 233–48 (Ralph Miliband et al. eds., 1986); and George Ross & Jane Jenson, *The Tragedy of the French Left*, NEW LEFT REV., Sept.–Oct. 1988, at 5. For retrospective assessments, see PHILIP SHORT, MITTERRAND 361–76 (2013), which describes Mitterrand's early economic agenda and its collapse; and Arthur Goldhammer & George Ross, *Reluctantly Center-Left? The French Case*, *in* WHAT'S LEFT OF THE LEFT 141 (James Cronin et al. eds., 2011), which discusses the entry of France into the EEC and the constraints of the Maastricht Treaty and subsequent French Socialist politics.

[22] *See* JEAN FOURASTIÉ, LES TRENTE GLORIEUSES (1979).

[23] For an analysis of the postwar experience in the United States, see THE GOLDEN AGE OF CAPITALISM (Stephen A. Marglin & Juliet B. Schor eds., 1990).

[24] For criticisms of it before Piketty, see Anand & Kanbur, *supra* note 19; and Atkinson, *supra* note 19.

[25] Piketty contrasts Kuznets's circumspection in his 1953 book, *see* KUZNETS, *supra* note 19, with the more popular rendering he gave in a later presidential address to the American Economic Association, *see* Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1, 1–28 (1955), (pp. 13–14).

other areas: environmental degradation,[26] health outcomes,[27] and educational opportunities,[28] for example. Given the right time-series data for the right set of countries, one could presumably show no long-run trade-off between growth and cultural preservation, labor rights, democracy, or other social goals that might seem to require countermanding the market.

Piketty's comprehensive reassessment of Kuznets's data has unsettled the confidence that the market will "self-correct" in terms of inequality and highlighted instead the exceptional nature of the postwar period. Current levels of inequality more closely resemble those of the late nineteenth and early twentieth centuries, when unequal asset ownership proved hugely determinative (if not completely dispositive) of an individual's life chances (pp. 237–42, 260–65). Under this "patrimonial capitalism," as he calls it, class stratification — and its political corollary, the oligarchic control of the state — was an overwhelming economic, cultural, and social reality. Piketty's finding that modern economic data reflect this earlier pattern suggests that the same social, cultural, and political effects may soon be upon us, if they are not already.

B. Capitalism and Inequality

Much of the explanation for the "Piketty phenomenon" must be that his empirical analyses confirm in the register of the statistical a reality we already intuit. In that register, the seemingly particular is revealed as general; the apparently contingent is shown to form a coherent history that is both long-running and cross-continental. This empirical ratification flatly contradicts earlier narratives concerning the relationship between capitalism, equality, and democracy that have long been taken for granted by the many people of North America and Europe who got ahead in the postwar period but whose children and grandchildren look increasingly unlikely to be able to do the same.[29]

What are the data? Piketty's central findings reveal a basic pattern, with some national variation, of increasing inequality of both

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[26] *See* James Andreoni & Arik Levinson, *The Simple Analytics of the Environmental Kuznets Curve*, 80 J. PUB. ECON. 269 (2001); Theodore Panayotou, *Demystifying the Environmental Kuznets Curve: Turning a Black Box into a Policy Tool*, 2 ENV'T & DEV. ECON. 465 (1997). For a critical analysis, see David I. Stern, *The Rise and Fall of the Environmental Kuznets Curve*, 32 WORLD DEV. 1419 (2004).

[27] For evidence of a "Kuznets curve" on self-reported health (but not other measures), see Joan Costa-Font et al., *A 'Health Kuznets' Curve? Cross-Country and Longitudinal Evidence* (CESifo, Working Paper No. 4446, 2013).

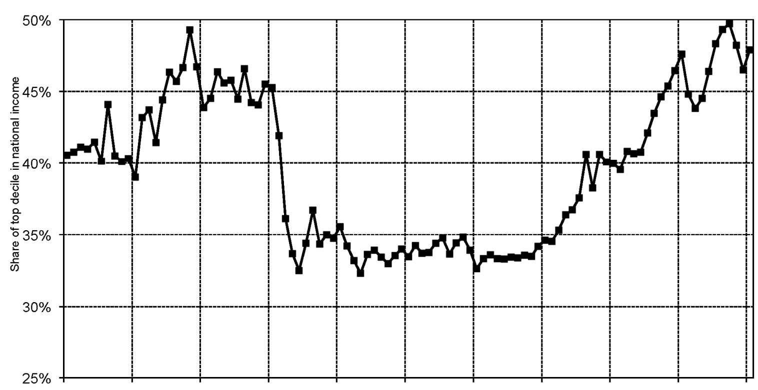
[28] Vinod Thomas et al., *Measuring Education Inequality: Gini Coefficients of Education* 18–19 (World Bank Inst., Policy Research Working Paper No. 2525, 2001).

[29] See PIKETTY, *supra* note 8, at 250–62 for a discussion of asset ownership across a range of societies, including the United States.

wealth and income over the last four decades, with corresponding increases in the value of privately owned (as against public) capital and in the share of total national income going to capital rather than labor. While Piketty's major findings can be expressed succinctly, it took an enormous effort in data collection and analysis to produce them.

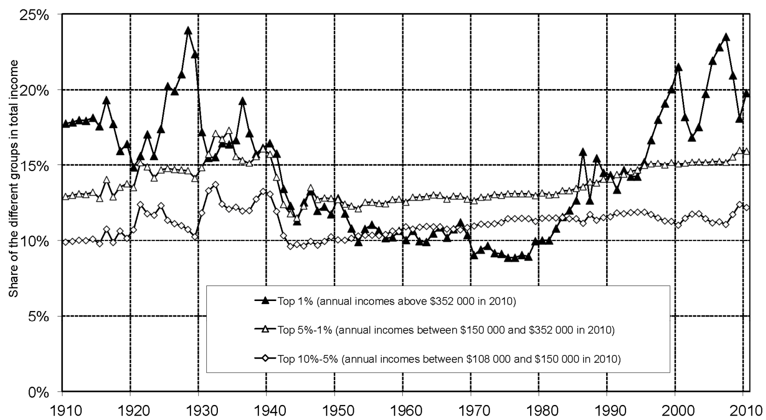
To take income first, one of Piketty's most striking graphs (p. 24 fig. I.1) shows income inequality in the United States from 1910 to 2010, considered as the share of total national income taken by the top decile (the top 10%). The line forms a broad U-shaped curve with decreasing inequality in the mid-century and a return to earlier levels of inequality from the late 1970s to the present. Decomposing the top decile shows the outsized influence of the top 1% in skewing the U.S. distribution (p. 292 fig. 8.6). This trend is replicated across the major Anglophone countries (Britain, Australia, and Canada), though U.S. levels of inequality have been markedly higher in recent decades (p. 316 fig. 9.2). By contrast, income inequality across the major continental European countries, and in Japan, has increased much more gradually since the 1970s or 1980s, with the share taken by the top percentile of incomes broadly flat since the mid-century (p. 317 fig. 9.3). The data from the major developing countries are both more erratic and less complete but generally reveal rising inequality from roughly the 1980s (p. 327 fig. 9.9).

FIGURE I.1: INCOME INEQUALITY IN THE UNITED STATES, 1910–2010



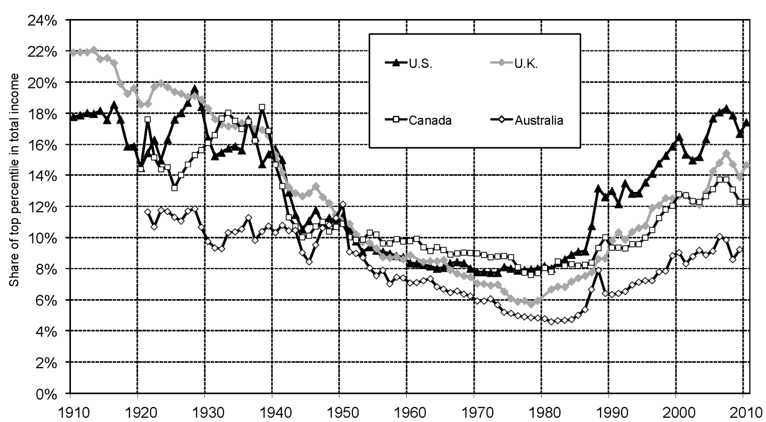
The top decile share in U.S. national income dropped from 45-50% in the 1910s-1920s to less than 35% in the 1950s (this is the fall documented by Kuznets); it then rose from less than 35% in the 1970s to 45-50% in the 2000s-2010s. Sources and series: see piketty.pse.ens.fr/capital21c.

FIGURE 8.6: DECOMPOSITION OF THE TOP DECILE, UNITED STATES, 1910–2010



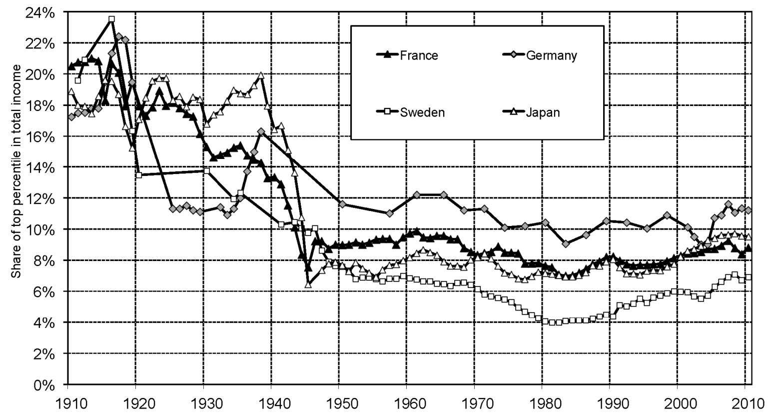
The rise of the top decile income share since the 1970s is mostly due to the top percentile.
Sources and series: see piketty.pse.ens.fr/capital21c.

FIGURE 9.2: INCOME INEQUALITY IN ANGLO-SAXON COUNTRIES, 1910–2010



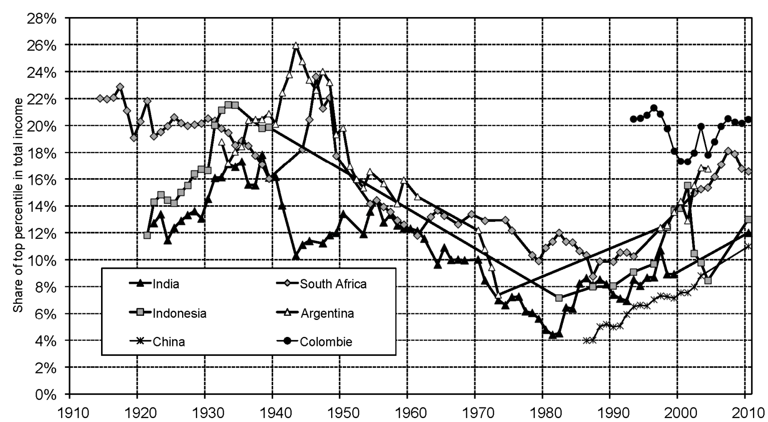
The share of top percentile in total income rose since the 1970s in all Anglo-saxon countries, but with different magnitudes. Sources and series: see piketty.pse.ens.fr/capital21c.

FIGURE 9.3: INCOME INEQUALITY IN CONTINENTAL EUROPE AND JAPAN, 1910–2010



As compared to Anglo-saxon countries, the share of top percentile barely increased since the 1970s in Continental Europe and Japan. Sources and series: see piketty.pse.ens.fr/capital21c.

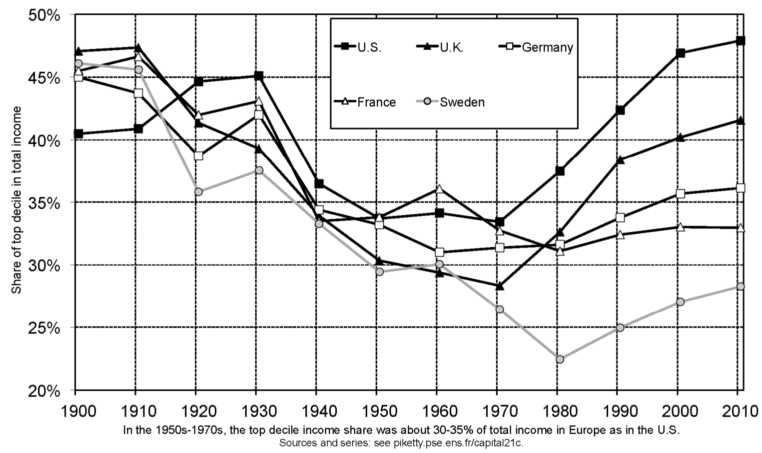
FIGURE 9.9: INCOME INEQUALITY IN EMERGING COUNTRIES, 1910–2010



Measured by the top percentile income share, income inequality rose in emerging countries since the 1980s, but ranks below U.S. level in 2000-2010. Sources and series: see piketty.pse.ens.fr/capital21c.

The share of income taken by the upper decile in 2010 varies across a range of countries, but it has followed the same broad trajectory (p. 323 fig. 9.7): a dip in the mid-century from Gilded Age heights and then a slow return. Some countries, such as Sweden, are still well below their 1900 levels, but others are closing in on those levels or, in the case of the United States, surpassing them. None seem exempt from increasing inequality, though some countries, such as France, have fared better than others.

FIGURE 9.7: THE TOP DECILE INCOME SHARE IN EUROPE AND THE UNITED STATES, 1900–2010



Some of this increase in income inequality reflects the growth of "supersalaries," the high incomes going to corporate executives and "supermanagers" of other people's money (pp. 315–35), particularly in the United States (pp. 298–303), but a great deal reflects a widening gap in nonwage income (capital gains and the like), driven by corresponding trends in wealth inequality. While wealth inequality declined in the United States from the early twentieth century until about 1970, it has gradually increased since then, with the top decile of wealth holders owning about 75% of national wealth in 2010 (p. 348 fig. 10.5). Trends for the highest percentile of wealth holders are similar, with the top 1% now owning approximately 35% of national assets. The major European countries (p. 349 fig. 10.6) demonstrate a similar pattern but with a steeper drop in postwar wealth inequality and without as great of a return to prior levels as in the United States, a result presumably of the much more violent mid-century experience and a more thoroughgoing program of postwar social transformation (p. 350).

FIGURE 10.5: WEALTH INEQUALITY IN THE UNITED STATES, 1810–2010

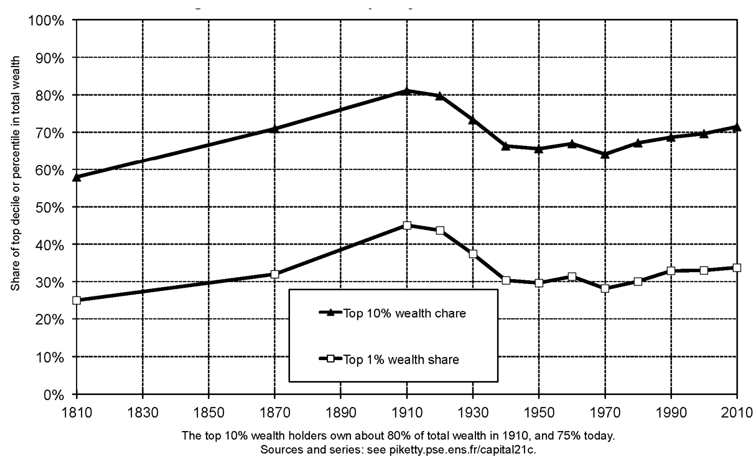
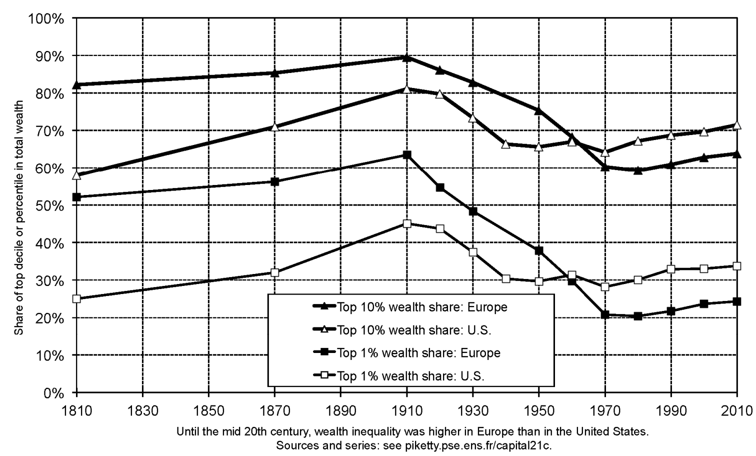
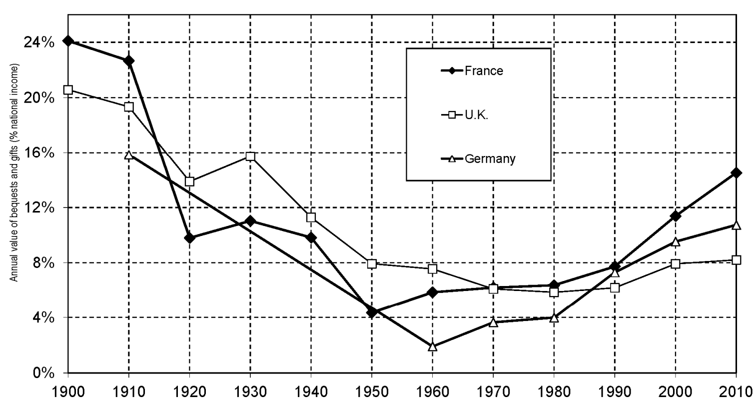


FIGURE 10.6: WEALTH INEQUALITY IN EUROPE VERSUS THE UNITED STATES, 1810–2010



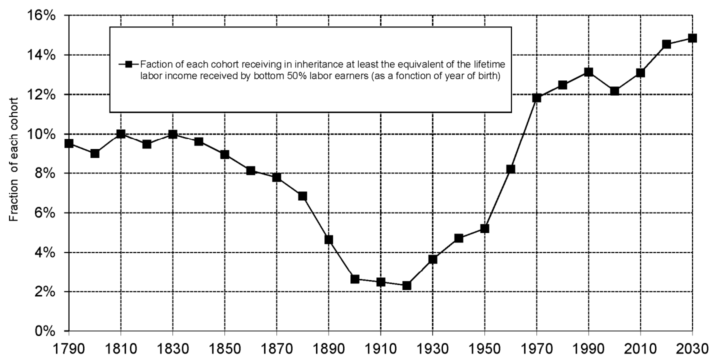
Wealth inequality in both Europe and the United States is now so great that inheritance flows make up a substantial share of the economy. Data from Germany, France, and the United Kingdom show bowed curves charting the decline of inheritance (as a percentage of national income) in the mid-century and its gradual recovery, albeit to levels roughly half those in 1900 (p. 425 fig. 11.12). What this means, as Piketty details in the case of France, is that the fraction of each demographic cohort that receives an inheritance equal to or greater than the amount a member of the bottom half of the income distribution earns over a lifetime is now roughly 15%, which is many times greater than in the early twentieth century (when family sizes and other factors reduced inheritance flows), and even significantly higher than in the nineteenth century (p. 421 fig. 11.11). These are not necessarily vast fortunes — Piketty calls these heirs "*petits rentiers*" (p. 420) — but they offer a significant advantage to the descendants of roughly the upper decile of the wealth distribution.

FIGURE 11.12: THE INHERITANCE FLOW IN EUROPE, 1900–2010



The inheritance flow follows a U-shaped in curve in France as well as in the U.K. and Germany. It is possible that gifts are under-estimated in the U.K. at the end of the period. Sources and series: see piketty.pse.ens.fr/capital21c.

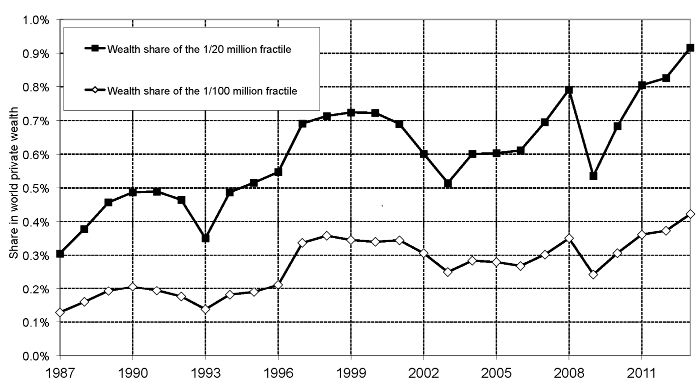
FIGURE 11.11: WHICH FRACTION OF A COHORT RECEIVES IN INHERITANCE THE EQUIVALENT OF A LIFETIME LABOR INCOME?



Within the cohorts born around 1970-1980, 12-14% of individuals receive in inheritance the equivalent of the lifetime labor income received by the bottom 50% less well paid workers. Sources and series : see piketty.pse.ens.fr/capital21c

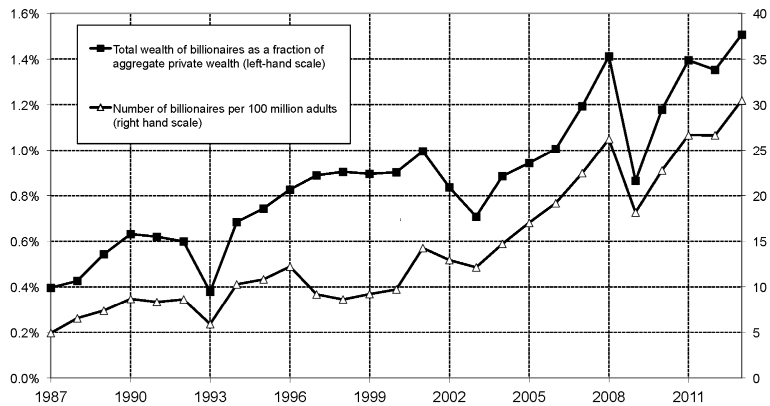
Of course, much of the popular interest in inequality concerns not these modest inheritances left by small businessmen and professionals, but the dramatic, worldwide rise of the superrich. Focusing on a small handful of fortunes *within* the top 1%, Piketty shows a triple and quadruple increase in the share of global private wealth owned respectively by the 1/20 million fractile and the 1/100 million fractile — 1 person out of 20 million and 1 out of 100 million — over the last quarter century (p. 436 fig. 12.3). The share taken by billionaires over the same period rose from 0.4% to 1.5% (p. 434 fig. 12.2), while the number of billionaires increased from approximately 1 in 20 million to 1 in 3 million (p. 434).

FIGURE 12.3: THE SHARE OF TOP WEALTH FRACTILES IN WORLD WEALTH, 1987–2013



Between 1987 and 2013, the share of the top 1/20 million fractile rose from 0.3% to 0.9% of world wealth, and the share of the top 1/100 million fractile rose from 0.1% to 0.4%. Sources and series: see piketty.pse.ens.fr/capital21c.

FIGURE 12.2: BILLIONAIRES AS A FRACTION OF GLOBAL POPULATION AND WEALTH, 1987–2013



Between 1987 and 2013, the number of billionaires per 100 million adults rose from 5 to 30, and their share in aggregate private wealth rose from 0.4% to 1.5%. Sources and series: see piketty.pse.ens.fr/capital21c.

Piketty's initial publicity came from his studies of the top of the income and wealth distributions. His percentage estimates give us a sense of the magnitude of the growth of the superrich, but we must re-individuate (so to speak) to understand the full impact of his data. A few hundred individuals now possess fortunes so vast that their wealth represents not so much private luxury as public power. They can buy media corporations[30] and private military contractors;[31] they can sway individual elections and determine electoral trends.[32] When they decide to engage in philanthropy, they can direct expenditures on a scale that rivals the capacity of almost any national government or international organization, and thus reorient humanitarian, cultural, and scientific agendas to their personal priorities.[33] They can coopt state functions to preserve or extend their wealth through privatizations, special bailouts, and preferential treatment of various kinds, which socializes risk while privatizing profit.[34] The main consolation for those

[30] For a list of the current holdings of the Murdoch media empire, see *Who Owns What*, COLUM. JOURNALISM REV., http://www.cjr.org/resources/?c=newscorp (last updated Oct. 24, 2014, 3:49 PM) [http://perma.cc/LN75-NQT8].

[31] *See, e.g.*, Bruce Falconer & Daniel Schulman, *Blackwater's World of Warcraft*, MOTHER JONES, Mar.–Apr. 2008, at 70.

[32] *See* MARTIN GILENS, AFFLUENCE AND INFLUENCE 241–52 (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014).

[33] *See, e.g.*, Marc Parry et al., *The Gates Effect*, CHRON. HIGHER EDUC., July 14, 2013, at A18.

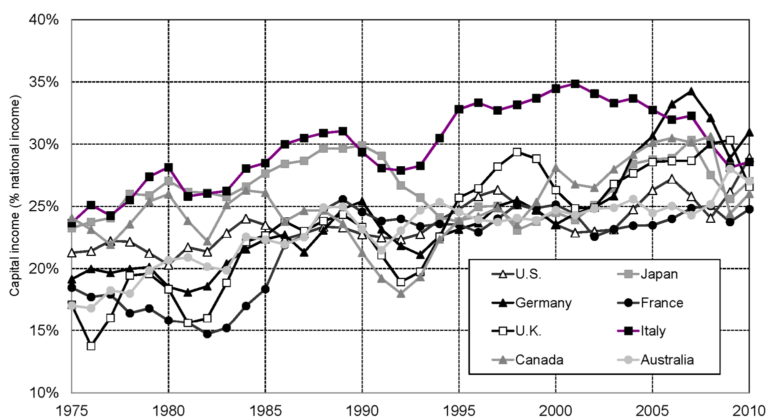
[34] *See generally* COLIN LEYS, MARKET-DRIVEN POLITICS (2003).

worried about this enormous concentration of power is that, like the rest of us, even these very privileged individuals will eventually die. But Piketty's point is that their fortunes don't.

C. Growth and the Rate of Return on Capital

In marshaling these data, Piketty introduces two equations that he calls the "fundamental laws of capitalism." In explaining them, he introduces a third formula, and it is this that has been widely dubbed Piketty's "law of capitalism." The first law Piketty proposes is that the share of national income going to capital, α, is equal to the rate of return on capital, r, multiplied by the ratio of capital to income, β, expressed $\alpha = r \times \beta$ (pp. 50–55).[35] This is an accounting identity that allows Piketty to relate the ratio of the value of capital assets to the value of annual production — (the ratio β) — to the share of total income going to capital owners, via the rate of return on their assets (p. 222 fig. 6.5). Piketty's second law is that the ratio of capital to income reflects the ratio of the savings rate to the overall growth rate, expressed $\beta = s / g$ (pp. 166–70). This second law is not actuarial but asymptotic: in the long run, given various assumptions, the relationship of the value of national assets to national income will be determined by the ratio of savings to annual growth.

FIGURE 6.5: THE CAPITAL SHARE IN RICH COUNTRIES, 1975–2010



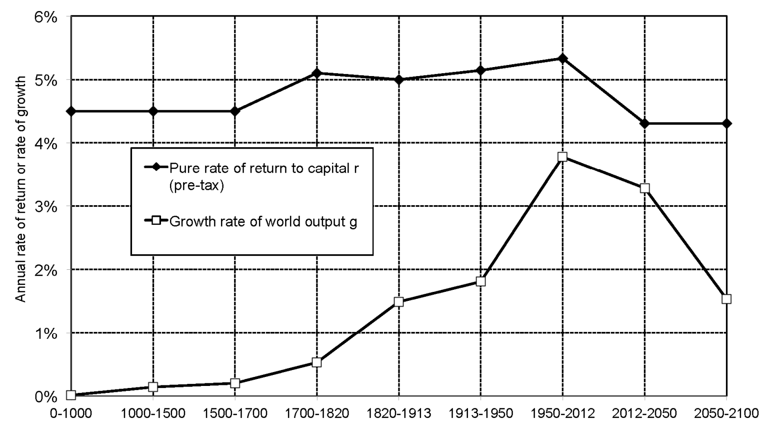
Capital income absorbs between 15% and 25% of national income in rich countries in 1970, and between 25% and 30% in 2000-2010. Sources and series: see piketty.pse.ens.fr/capital21c

[35] Piketty offers the fairly typical example of a country with total capital stock equivalent to six years' national income (β = 6 or 600%) which, given an annual rate of return on capital of 5% would mean capital's share in national income, α, is 30% (p. 52).

Both of these "laws" are familiar formulas used to generate economic statistics; neither of them explains why inequality has returned in the post-postwar period. To address that question, Piketty tracks the relationship between the return on capital, *r*, and the rate of growth, *g*. What he finds is that across the prior centuries of capitalism (as well as in a rather speculative back-projection to the economic history of earlier periods[36]) the return on capital has consistently outpaced the average growth of the economy as a whole, an inequality expressed $r > g$ (p. 354 fig. 10.9). Much follows from this inequality, including an increased accumulation of capital and concentration of its ownership; a higher share of capital's take of overall national income; an increase not only in inequalities of wealth but also in incomes, given the portions of income coming from capital; and the possibility of "supersalaries" for the managers of capital assets. Fundamentally, it signals a preponderance of capital over labor in the generation and distribution of income and wealth: "[C]apital reproduces itself faster than output increases" (p. 571). However, a burst of twentieth-century growth — that is, a high value for *g* — coincided with greater taxation and destruction of assets — leading to a low value for *r* — which together moderated and even temporarily reversed the inequality between the after-tax rate of return on capital and annual growth rates (p. 356 fig. 10.10). What made the postwar decades exceptional, therefore, is that they atypically saw a higher rate of growth, *g*, than posttax rate of return on capital, *r*, which resulted in a decrease in inequality. Piketty suggests, though, that this result was temporary and that in the twenty-first century the rate of return on capital will once again exceed the growth rate, resulting in an expansion of inequality.

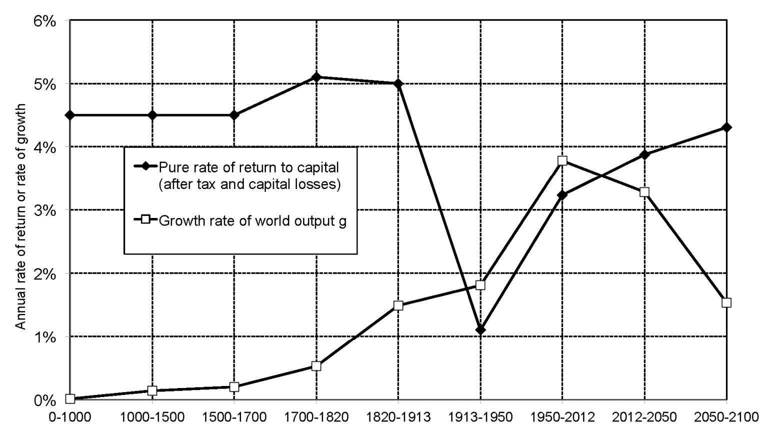
[36] Piketty's view of premodern or precapitalist history may be captured in his straightline extrapolation in Figure 10.9 from antiquity to early modernity. While this extrapolation is faulty in many respects, it is also inessential to his main purposes (p. 354). For an account of changing growth across several centuries in the Roman world (which would put pressure on any straightline extrapolation), see the seminal work of Keith Hopkins, *Economic Growth and Towns in Classical Antiquity*, *in* TOWNS IN SOCIETIES 35, 35–77 (Philip Abrams & E.A. Wrigley eds., 1978), which subsequently launched a reexamination of this question; and see also Keith Hopkins, *Taxes and Trade in the Roman Empire (200 B.C.–A.D. 400)*, 70 J. ROMAN STUD. 101 (1980).

FIGURE 10.9: RATE OF RETURN VERSUS GROWTH RATE AT THE WORLD LEVEL, FROM ANTIQUITY UNTIL 2100



The rate of return to capital (pre-tax) has always been higher than the world growth rate, but the gap was reduced during the 20th century, and might widen again in the 21st century.
Sources and series: see piketty.pse.ens.fr/capital21c

FIGURE 10.10: AFTER TAX RATE OF RETURN VERSUS GROWTH RATE AT THE WORLD LEVEL, FROM ANTIQUITY UNTIL 2100



The rate of return to capital (after tax and capital losses) fell below the growth rate during the 20th century, and may again surpass it in the 21st century. Sources and series : see piketty.pse.ens.fr/capital21c

In many reviews of the book, this inequality, $r > g$, has been termed the "law" of capitalism, and perhaps it should be dubbed "Piketty's law," though he does not claim it as such. Indeed, he seems divided as to whether it resembles a lawlike necessity at all. He sometimes discusses it as a quasi-natural fact, while at other times he emphasizes that it obtains only in particular political contexts.[37] Tellingly, he gives it a variety of names: a "fundamental inequality" or "fundamental force for divergence" (p. 25), a "mechanism of wealth divergence" (p. 350), a "historical fact" (p. 353), a "contingent historical proposition" (p. 358), and finally, in the conclusion, the "central contradiction of capitalism" (p. 571) and the "fundamental structural contradiction of capitalism" (p. 572). It is, of course, all of these things, but it is neither an actuarial identity (like the first law) nor a long-run condition (like the second). It is at once a historical generalization drawing on his empirical analysis and a conceptual frame in which to make sense of the data.

Why, then, has $r > g$ held generally? Piketty has painstakingly established that it has, and he has some suggestions as to how it undergirds the more visible inequalities of income and wealth (pp. 361–66, 372–75). As for its ultimate causes, however, we must treat Piketty's book as a catalyst for further research on the legal, social, political, and economic dimensions of inequality under capitalism, as he himself hopes it will be (pp. 573–75).[38]

III. QUESTIONING THE NUMBERS: INDEXING AND EVALUATION

Piketty's conclusions depend on an immense exercise in data collection and analysis. Where he and his collaborators have reliable data,[39] they are usually the result of working with tax records, supplemented by other sources, to estimate individual incomes and estate valua-

[37] *Compare* PIKETTY, *supra* note 8, at 1 ("When the rate of return on capital exceeds the rate of growth . . . capitalism *automatically* generates . . . inequalities . . . ." (emphasis added)), *with id.* at 25 ("If . . . the rate of return on capital remains significantly above the growth rate . . . then the *risk* of divergence in the distribution of wealth is very high." (emphasis added)). More generally, see Piketty's statement that "the inequality $r > g$ should be analyzed as a historical reality dependent on a variety of mechanisms and not as an absolute logical necessity" (p. 361).

[38] *Cf. id.* at 30–33.

[39] Piketty's numbers are less persuasive where he must rely on extensive historical reconstructions, as during the first two hundred years of capitalism (1700–1900), with the important exception of France, where the Revolution's introduction of estate taxes created a fuller documentary record than in any other society (pp. 337–39). For this early economic history, he mainly relies on the extensive estimates produced by Angus Maddison and his collaborators, which are available online. *See* MADDISON PROJECT, http://www.ggdc.net/maddison/maddison-project/home.htm (last visited Oct. 26, 2014); *see also* Jutta Bolt & Jan Luiten van Zanden, *The First Update of the Maddison Project: Re-Estimating Growth Before 1820* (The Maddison Project, Working Paper No. 4, 2013). For Piketty's speculations on premodern economic history, see *supra* note 36.

tions.[40] His argument moves from the unobserved fact of some real activity (such as the production of commodities) through an aggregation of data from records partly reflecting that activity (such as a report of individual income) to a set of statistics generated from the imposition of complex analytical concepts (such as the "return on capital"). Using these statistics, he then delineates broad historical trends (for example, diagnosing the reemergence of "patrimonial capitalism") and formulates policy responses (such as a progressive global wealth tax) to undesirable ones.

Each link in this chain can be questioned. Most obviously, his data are subject to all the usual problems affecting observable variables, compounded by the fact that tax records usually involve self-reporting, while different tax regimes may exempt entire categories of income. Piketty recognizes these problems and notes they will normally result in an underestimate of inequality (pp. 267–70, 281–84). However, in comparisons of inequality between countries, particularly between ones that do not have equally developed tax systems, the reliance on tax data may exaggerate levels of intranational inequality.[41] His calculations are also open to technical disputes,[42] although these will not always be significant. As he himself suggests, his numbers should be used as rough guides to the magnitude of inequality in the world today. Their purpose is to establish broad trends, not to present precise estimates (pp. 61–67).

A less obvious complexity concerns the normative and conceptual presuppositions of Piketty's estimates. These presuppositions affect the middle links of the argumentative chain sketched above — when data of disparate kinds, such as reports of different prices or incomes, are combined into a single representative "index number." An index number is an aggregate measure constructed out of multidimensional data — in other words, a number made up of component numbers. The most important indices for Piketty's analysis are measures of national income and wealth, each of which attempts to provide a metric comparable across time and space. For income, this means an index representing all the goods and services produced in a country in a given period; for wealth, it means the market value of all the assets used

[40] For more on Piketty's sources, see PIKETTY, *supra* note 8, at 16–20; and Alvaredo et al., *The Top 1 Percent*, *supra* note 7.

[41] *See* Galbraith, *supra* note 11, at 80. For another study that confronts this same challenge, see James K. Galbraith & Jiaqing Lu, *Measuring the Evolution of Inequality in the Global Economy*, *in* INEQUALITY AND INDUSTRIAL CHANGE, *supra* note 19, at 161.

[42] *See, e.g.*, Chris Giles, *Data Problems with Capital in the 21st Century*, FIN. TIMES: MONEY SUPPLY (May 23, 2014, 7:01 PM), http://blogs.ft.com/money-supply/2014/05/23/data-problems-with-capital-in-the-21st-century. Though none of these problems seem to require revision of Piketty's conclusions, the laudable decision to post all his data online (which is not yet standard practice) will allow further scrutiny of this kind.

in the production of those goods and services. Only by aggregating in this way can Piketty compare, for example, the GDP of France in 1900 with that of France or Britain in 2000.

An "index number system" — the method for generating a particular index — incorporates decisions about which component numbers to include and how to weigh them against one another in the process of aggregation. Each of these decisions requires a judgment that is independent from the assessment of the accuracy of the component numbers and any subsequent calculations, and these judgments are inherently contestable.[43] Unavoidably debatable reasoning thus sits behind Piketty's estimates, giving rise to numerous issues of conceptual and normative interest. Two are especially important: his use of index numbers to capture the normative salience of inequalities of income and wealth and his derivation of an average rate of return on capital, which is necessary to articulate the "fundamental inequality of capitalism."

A. Welfare and Well-Being

Estimates of real national income depend on establishing a benchmark that can serve as a point of comparison, such as a representative basket of consumer goods specified for a particular time and place. There is a point of complexity about this benchmark, however, because even a basket chosen for a specific geographic locale will change over time in terms of composition (and, ultimately, social meaning), which makes evaluating economic inequality much more complex than measuring it.[44] Often, selected goods will no longer be available at the same store at which they were previously purchased — this happens at a rate of about 20% a year.[45] Further, goods may simply disappear from the market entirely, replaced by new models or alternative commodities.[46] Goods may also be deemed no longer adequately representative of consumer habits and deliberately dropped from the basket. Quality, too, changes in ways that are hard to capture, and the appearance of new products generates additional problems — as does the fact that, even at a fixed time and space, the relevant market basket may differ for different groups of consumers. Debate persists about how to capture these changes in a single index number.[47] As Professor Erwin Diewert summarizes the issue:

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[43] On the normative dimensions of index number construction, see Sanjay Reddy & Benjamin Plener, *The Choice of Index Number: Part I, Valuation and Evaluation* (Inst. for Soc. & Econ. Research & Policy, Working Paper No. 06-02, 2006).

[44] For a general discussion of these issues (including the Laspeyres and Paasche approaches to national income indices), see W. Erwin Diewert, *Index Number Issues in the Consumer Price Index*, J. ECON. PERSP., Winter 1998, at 47, 47–49.

[45] *Id.* at 52.

[46] *Id.*

[47] *Id.* at 52–55; *see also* Reddy & Plener, *supra* note 43, at 3–5.

> The basic problem is that traditional index number theory assumes that the set of commodities is fixed and unchanging from period to period, so that like can be compared to like. Unfortunately, the real world is not so accommodating: new products, outlets and consumers appear; other products, outlets and consumers disappear. It is simply impossible to decompose period-to-period value changes into completely objective price and quantity components.[48]

The changing basket of goods means we are often comparing like with unlike, which leads to difficulties when attempting to give national income statistics a consistent welfare-theoretic interpretation. For instance, if we want to know how much additional income a person needs to be as well off as she was at an earlier time, we must assume that even a changing basket of goods will remain representative of a fixed level of welfare. However, over any period long enough to see fundamental changes in the relevant consumption profile — including in the social meaning of consumption, particularly of "positional goods"[49] — this cannot be the case. We require not simply a numerical comparison but an evaluation of what conduces to welfare at each point in time, including judgments about how the capacity to command certain commodities may affect individuals in the eyes of others.[50] Such an evaluation can only be made relative to a postulated, if implicit, baseline that must itself be coherent and normatively salient for the measure to have meaning, as recent work in the theory of index numbers reveals.[51] Pursuing this approach requires scrutiniz-

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[48] Diewert, *supra* note 44, at 55.

[49] Positional goods either are scarce in some absolute or socially imposed sense, or else take their value from their exclusivity — and lose value when they are consumed more widely. *See* FRED HIRSCH, SOCIAL LIMITS TO GROWTH 27–31 (1976).

[50] For careful studies of the dimensions of inequality, including how its meaning and measurement are connected, see AMARTYA SEN, INEQUALITY REEXAMINED (1992) [hereinafter SEN, REEXAMINED]; AMARTYA SEN, ON ECONOMIC INEQUALITY (1973); and see also Michael J. Boskin et al., *Consumer Prices, the Consumer Price Index, and the Cost of Living*, J. ECON. PERSP., Winter 1998, at 3, which discusses changes to the consumer price index and provides an account of the technical matters involved in constructing a welfare-consistent comparison; and Diewert, *supra* note 44.

[51] Professor Sanjay Reddy and his collaborators have developed an "exogeneity theorem," which shows that index number systems possess generally desirable properties (such as relevance and consistency across comparison units) only if they can be shown to "correspond to a single implicit or explicit normative criterion," Reddy & Plener, *supra* note 43, at 43. *See id.* at 42–43. The technical details of the theorem are outside the scope of this Essay, but it elaborates the underlying principle that "[e]very index number system compares units of comparison to one another according to some invariant concept," *id.* at 43. Index number systems that are not based on an invariant and normatively salient baseline will fail to produce coherent measurements, as Reddy and his collaborators demonstrate in the case of poverty estimates based on the widely used $1/day and $2/day standards. These statistics are incoherent because the "purchasing power parity" indices used in their construction are based on the prices of baskets of goods that include commodities that no poor person buys, which distorts the measurement of poverty that the index is meant to capture. *See* Sanjay G. Reddy & Camelia Minoiu, *Has World Poverty* Really *Fallen?*,

ing the ethical foundations of welfare economics and constructing empirical measures that can capture complex judgments about well-being that may go beyond using individual preference-satisfaction as a proxy for welfare.[52]

Consider the complexities in contrasting the consumption profile enabled in the United States by a "middle class" income in 1960 and 2010. It is not simply that the price and quality of cars, dishwashers, televisions, and trips to Europe have changed markedly as these became widely consumed. It is also that other goods — for example, family houses near desirable urban areas or a college education — have become less affordable, while entirely new infrastructures, such as the Internet, have generated vast classes of new goods, which have changed the meanings (and the prices) of all the rest. It is not possible to represent all these changes in a single number that is meaningful in welfare terms without referring to an invariant and normatively salient baseline, which requires an evaluative judgment that must precede and direct any measurement. Would you rather be a "middle class" consumer of 1960, with the reasonable hope of owning your house, or a "middle class" consumer today, living in a rented flat but with a personal computer and Internet access? Likewise, what it means to be relatively rich or poor — to be in the top 10% or bottom 10% of an income distribution — will vary across national contexts. The translation of unequal economic resources into unequal outcomes in other areas — education, health, social standing, political power — is not automatic but depends on the ways that nonmarket institutions mediate market outcomes in different policy settings.

Piketty recognizes the shortcomings of synthetic indices[53] and the normativity of all measures of inequality,[54] and he frequently elaborates his own numbers with reference to cultural or literary evidence that helps provide context (for example, pp. 104–15). But it can remain unclear — particularly over long periods of time — just what he is measuring, even when he works with simple distribution tables showing nothing more than the fractional share of income or wealth

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53 REV. INCOME & WEALTH 484 (2007); Sanjay G. Reddy & Thomas Pogge, *How Not to Count the Poor*, *in* DEBATES ON THE MEASUREMENT OF GLOBAL POVERTY 42 (Sudhir Anand et al. eds., 2010).

52 *See generally* AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT (1982). Professor Amartya Sen's work has led to critiques of the normative salience and analytic coherence of many existing measures of welfare (such as GDP) and to the proposal of new measures thought to better capture the normatively relevant aspects of human development. *See, e.g.*, Marc Fleurbaey, *Beyond the GDP: The Quest for a Measure of Social Welfare*, 47 J. ECON. LITERATURE 1029 (2009).

53 *See* PIKETTY, *supra* note 8, at 266 ("[I]t is impossible to summarize a multidimensional reality with a unidimensional index . . . ."); *see also id.* at 86–87.

54 *See id.* at 270 ("The way one tries to measure inequality is never neutral.").

across a country (pp. 266–77). The problem, in this case, is not simply that the meaning of consumption changes over time, but that the meaning of inequality changes in tandem, particularly as regards those goods whose value is determined by what Professor Fred Hirsch called "social scarcity."[55]

A natural thought is that what Piketty is measuring has no consistent or objective underlying referent. It is simply inequality as reflected in the indices measuring aggregate production, which may be thought to reflect unequal purchasing power among citizens across the changing historical landscape of capitalist production. Again, however, the meaning of this inequality requires further interpretation: whether citizens are unequal in normatively or politically salient ways cannot be determined based on the simple perusal of a distribution table without asking what greater wealth or income can command in one social context as against another. Related to this difficulty is the question why inequality of one kind or another is undesirable, which is never examined at length in *Capital in the Twenty-First Century*, but largely assumed — perhaps in part because much recent work in economics, political science, and public health has catalogued its negative consequences.[56] However, absent a more explicit normative assessment of the problems that inequality poses, it will remain unclear whether and how best to mitigate it.

Though these questions must be discussed further, Piketty does rely on two different value systems to give normative salience to his numbers. The first is a democratic perspective, one concerned with inequity insofar as it obstructs the articulation and realization of collective goals, including management of the economy (pp. 26, 422–24, 569–70). The second is what Piketty calls "meritocratic" (pp. 26, 31, 260–62).[57] This perspective reflects what might be considered a bourgeois orientation: an eagerness to see work, talent, and thrift rewarded (pp. 240–42, 378, 419, 443–44); to protect the asset-owning middle classes from the fluctuations of finance (pp. 294–98) and the skyrocketing prices of urban real estate (pp. 6, 198, 464); and to preserve higher education and a culture of entrepreneurship as avenues of upward social mobility (pp. 440–41, 485–87). In the immediate postwar experience of the United States and Western Europe, these two normative orientations

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[55] *See* HIRSCH, *supra* note 49, at 20–22.

[56] *See, e.g.*, SEN, REEXAMINED, *supra* note 50 (discussing the normative assessment of inequality along different dimensions); RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY MORE EQUAL SOCIETIES ALMOST ALWAYS DO BETTER (2009) (discussing the negative social and medical impacts of inequality); Gilens & Page, *supra* note 32 (discussing the political consequences of economic inequality).

[57] *Cf.* PIKETTY, *supra* note 8, at 417 (describing "worrisome" overextension of meritocratic values driving "greater and more violent inequality").

may not have been in manifest tension. However, as Piketty's own analysis suggests, that period was exceptional — and under normal circumstances, the successful entrepreneur and diligent businessperson eventually become *rentiers* (pp. 395–96). What this means is that the inequality $r > g$ may reflect the predominance of deeply held meritocratic values that can, in fact, come into conflict with democratic ones — a conflict that Piketty sometimes admits (pp. 334, 416–17, 443–44) but often obscures (pp. 1, 26, 422–24).

B. Aggregation and Capital

The aggregation of profits, rents, and other nonlabor incomes to produce the average "rate of return on capital" is a second area where contestable conceptual and normative evaluations come into play. Generating this rate of return (r) is crucial to Piketty's project, for it provides one half of the "fundamental inequality of capitalism," $r > g$.[58] Yet Piketty's deployment of the concept puts him in an interesting bind. The model used to calculate r presupposes a conception of capital as an abstract stock generating an annual flow, as in the standard neoclassical production function.[59] However, some of Piketty's own conclusions point toward an alternative conception of capital as a social relation, a view familiar to classical political economy revived in the mid–twentieth century to *counter* the neoclassical view.[60]

At the outset of this debate over capital theory, Professor Joan Robinson argued that capital could not be aggregated using any single measure because capital assets include a tremendous variety of goods: physical equipment, real estate, trademarks, financial products, and so on.[61] The normal remedy — and a move that lies at the heart of the neoclassical theory of capital — is to group these disparate entities together as a homogeneous stock or fund, using their market value to render them commensurate. Piketty adopts this approach, yet a problem arises when we want to calculate the rate of return on capital that has been aggregated in this way. According to standard economic the-

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[58] *See id.* at 199–208, 213–22, 230–32 (establishing the idea of a rate of return on capital and examining some of the controversies in capital theory).

[59] For questions concerning the meaning and measurement of capital in the neoclassical production function, see generally Joan Robinson, *The Production Function and the Theory of Capital*, 21 REV. ECON. STUD. 81 (1953–1954); and for an important later contribution, P. Garegnani, *Heterogeneous Capital, the Production Function and the Theory of Distribution*, 37 REV. ECON. STUD. 407 (1970).

[60] For a retrospective of this debate, sometimes called the "Cambridge Capital Controversies," see Avi J. Cohen & G.C. Harcourt, *Retrospectives: Whatever Happened to the Cambridge Capital Theory Controversies?*, J. ECON. PERSP., Winter 2003, at 197. For a reconstruction of the argument, see G. Hodgson, *Sraffa, Value and Distribution: An Expository Essay on the Capital Controversy*, BRIT. REV. ECON. ISSUES, Nov. 1977, at 44.

[61] *See* Robinson, *supra* note 59, at 81–82.

ory, the return on capital should be equivalent to its rental price at equilibrium — that is, to the cost of hiring capital at a given moment, independent of any short-term shocks or anomalies. This return should be equal to the "marginal product" of capital, because (assuming equilibrium) the cost of capital will equal the value of the additional production it enables. The problem with this solution is that calculating the equilibrium price of capital assets requires assuming a given rate of interest, as shown by several technical results from the 1960s and 1970s.[62] But (again according to standard economic theory) the rate of interest is *itself* endogenously related to the price of capital assets: it is supposed to reflect the marginal product of capital. Calculating the rate of return on capital would thus seem to require assuming the very thing that the calculation is supposed to discover, making the exercise circular.[63]

But what determines the rate of return on a capital asset if it is not simply the value of the additional production it enables? The force of the debate over this question stemmed from the ideological stakes of the conventional answer. The theory of marginal productivity was thought to naturalize capital and its share of national income, rationalizing profit as simply what was owed to one factor of production, capital, just as wages were what was owed to labor.[64] Against this, Professor Piero Sraffa's seminal contribution was to show that the rate of return could not be derived from the marginal product of capital but was rather an independent variable — given, he suggested, by factors "outside the system of production," such as monetary policy.[65] In effect, according to Sraffa, the equilibrium price of capital goods reflects a history of social struggle over the terms of economic cooperation and cannot be understood simply in terms of the aggregate production function.

Piketty is not indifferent to the force of this view. He frequently discusses the political determinants of the rate of return on capital (pp. 20, 47, 55, 372–75) and even describes capital early in the book as varying according to "the state of development and prevailing social rela-

[62] *See* sources cited *supra* notes 59–60.

[63] The attempt to model heterogeneous assets through single-commodity aggregate production functions failed, as Professor Paul Samuelson admitted at the conclusion to the Cambridge Controversies. *See* Cohen & Harcourt, *supra* note 60, at 206.

[64] The controversy over the measurement and conceptualization of capital was driven by a broader concern about the way that mainstream economics conceived of distribution under capitalism as nonpolitical. For an important corrective, see Amit Bhaduri, *On the Significance of Recent Controversies on Capital Theory: A Marxian View*, 79 ECON. J. 532 (1969).

[65] PIERO SRAFFA, PRODUCTION OF COMMODITIES BY MEANS OF COMMODITIES 33 (1960). More precisely, there must be some exogenous distributive variable — for example, the rate of profit or the determination of wages — that brings "closure" to the analytic system. *See id.* at 34–44.

tions of each society" (p. 47). Perhaps his two positions on capital — conceived of as a measurable stock generating a flow (pp. 47–50), but also as a social relation produced through political contest — may be thought to present an interesting hybrid position in the controversy over capital theory. On one interpretation, what the critics of the neoclassical position were suggesting was not simply that it is incoherent to attempt to value capital without positing an exogenous rate of return, but also that "capital" does not really exist in any determinate fashion. Rather, what exists is legally structured access to the variety of resources that people use to produce things, and the market value of this access cannot be determined without examining its distribution — which is necessarily given by politics and social conditions rather than by a purely technical process.[66] While critics have argued that Piketty missed this point, owing to his use of standard neoclassical formulations,[67] it may nevertheless be possible to interpret his conclusions sympathetically. What he has estimated is not a physical stock of stuff so much as the market valuation of the extent of capitalist privilege, ramified across a range of assets from houses to machines to software programs, which he recognizes has varied across historical periods as a result of changing economic policy (pp. 372–75). Perhaps his analysis can thus be said to be Sraffian in spite of itself: we may note the incoherence of trying to assume an aggregate rate of return on capital even while recognizing that the deepest import of Piketty's work will be to bring renewed attention to the view that distribution is a social and political issue.

IV. CAPITALISM AS A LEGAL ORDERING

Understanding why $r > g$ has generally held — and why it briefly did not — requires an account of capitalism as a socioeconomic system structured through law. Capitalism is fundamentally a legal ordering: the bargains at the heart of capitalism are products of law. While these legal foundations go mostly unexamined in *Capital in the Twenty-First Century*, the book should prompt further study of the actual laws of capitalism — those behind the statistical regularities discussed as "laws" —

[66] Distributional outcomes can affect the way that production occurs in the first place through a variety of mechanisms, including the choice of production technology (as in the "reswitching" argument), or through the path-dependent stimulation of aggregate demand in one fashion as against another. *See* Cohen & Harcourt, *supra* note 60, at 202–04.

[67] *See, e.g.*, Galbraith, *supra* note 11, at 78–79 (arguing that Piketty's treatment of the Cambridge Capital Controversy is "wildly misleading"); Benjamin Kunkel, *Paupers and Richlings*, LONDON REV. BOOKS, July 3, 2014, at 17; Dean Baker, *Thomas Piketty and the Ghost of Joan Robinson*, CENTER FOR ECON. & POL'Y RES.: BEAT THE PRESS (May 1, 2014, 8:16 PM), http://www.cepr.net/index.php/blogs/beat-the-press/the-ghost-of-joan-robinson-and-thomas-piketty/print [http://perma.cc/9RKS-F4S7] (arguing that claims by the Cambridge, United Kingdom, side of the controversy are in tension with Piketty's theory).

that is, of the various legal and institutional arrangements governing capitalist economic systems. In this task, a range of insights from legal scholarship may be usefully deployed, particularly if oriented to the study of specifically capitalist economic and social relations.

Before the term "capitalism" became widespread in the late nineteenth century, the regime in which most people secure material needs through market exchange was simply called "commercial society." The legal underpinnings of commercial society were of central concern to its early observers — students of classical political economy. From Smith's *Lectures on Jurisprudence*[68] in the early 1760s through the French *économistes*' analyses of agrarian production and property law[69] to Marx's study of labor regulations,[70] the ambition was not to study markets in the abstract, but to uncover the legal foundations of commercial society. In this pursuit, these economists were not merely observers but advocates of reform of one kind or another. To use a limited (and anachronistic) vocabulary, their concerns were inextricably "normative" and "positive" — in part for the general reason that there is never a clean analytic separation between these orientations,[71] but also because the "economy," which was the object of their study, was in the process of active construction.[72]

In that construction, the two markets of overwhelming concern to the early theorist-advocates were those in grain and labor. Reforming them required eliminating price controls and supply requirements on grain — which constituted what has been called the "moral economy" in food, whereby the state or local community accepted ultimate responsibility for its provision[73] — and abolishing guild restrictions on entry into trades, as well as feudal dues and related obligations in the countryside.[74] It was believed that the labor and grain markets were

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[68] ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek et al. eds., 1978).

[69] *See* PIERRE-PAUL LE MERCIER DE LA RIVIÈRE, L'ORDRE NATUREL ET ESSENTIEL DES SOCIÉTÉS POLITIQUES 67–118 (1767) (describing the physiocratic theory of natural law and property); *see also* STEVEN LAURENCE KAPLAN, PROVISIONING PARIS 420–40 (1984) (describing the relationship between physiocracy and grain policy).

[70] *See* 1 KARL MARX, CAPITAL 255–330 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Charles H. Kerr & Co. 1912) (1867) (discussing the length of the working day and maximum-hours regulations).

[71] HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY 7–45 (2002).

[72] For two seminal accounts of the legal construction of the economy, see MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS (Michel Senellart ed., Graham Burchell trans., 2008); and Karl Polanyi, *The Economy as Instituted Process*, *in* TRADE AND MARKET IN THE EARLY EMPIRES 243 (Karl Polanyi et al. eds., 1957). I pursue this theme in my forthcoming book, DAVID SINGH GREWAL, THE INVENTION OF THE ECONOMY (forthcoming 2015).

[73] See E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, PAST & PRESENT, Feb. 1971, at 76; and see also his follow-up in E.P. THOMPSON, CUSTOMS IN COMMON 259–351 (1991). For a discussion of the changing regulation of grain in eighteenth-century France, see KAPLAN, *supra* note 69.

[74] *See* JOHN MARKOFF, THE ABOLITION OF FEUDALISM 554–56 (1996).

linked, such that a reorientation in one required, and pushed along reciprocally, a corresponding reorientation in the other. The result of this deregulated[75] grain-labor market would be, according to its advocates, progress for the poor, productivity in agriculture, the enhancement of the power and wealth of the state (owing to a larger tax base), and the dissolution of vestigial feudal relations through the commercialization of labor relations and the free rental or sale of farmland.[76] At the heart of this argument was the claim that higher grain prices would lead to more abundant food and higher wages, ultimately helping the poor. Defenders of the moral economy resisted this conclusion, either on the ground that this claim, like many others in the discourse of political economy, was paradoxical, or else by arguing that higher grain prices might indeed stimulate agricultural production but that the increased long-run provision of food would do nothing to alleviate the short-term dearth that was the target of government regulation.[77]

The focus of free market advocacy on grain and labor dates to the birth of political economy in the work of Pierre de Boisguilbert[78] through Smith's *Wealth of Nations*,[79] but its prominent impact on European society continued to be felt in subsequent centuries. Reforming markets in grain and labor required reconceptualizing property and contract law,[80] in addition to developing new state regulations and public infrastructures.[81] Legal changes along these lines were pursued by successive British governments,[82] by the French monarchy,[83] and

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[75] This reorientation to the market is often described as "deregulation," but it actually constitutes a move from one legal-regulatory regime to another, under which private agents have new powers of decisionmaking delegated to them (often on the basis of property ownership), along with corresponding claims on public enforcement capacity.

[76] *See* Hont & Ignatieff, *supra* note 15, at 13–26 (giving an overview of the arguments); *see also* EMMA ROTHSCHILD, ECONOMIC SENTIMENTS 72–86 (2001) (explicating the views of Turgot, Condorcet, and Smith on these issues).

[77] *See* Hont & Ignatieff, *supra* note 15, at 17–19.

[78] For the work of Pierre de Boisguilbert (perhaps the first theorist of the self-regulating market), see 2 PIERRE DE BOISGUILBERT OU LA NAISSANCE DE L'ÉCONOMIE POLITIQUE (J. Hecht ed., 1966); and see also GILBERT FACCARELLO, THE FOUNDATIONS OF *LAISSEZ-FAIRE*: THE ECONOMICS OF PIERRE DE BOISGUILBERT (1999).

[79] *See* SMITH, *supra* note 15, at 524–43; *id.* at 135–59, 469–71 (criticizing the apprenticeship system).

[80] *See* JEDEDIAH PURDY, THE MEANING OF PROPERTY 9–43 (2010); *see also* sources cited *infra* notes 87–89.

[81] *See* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION 311–57 (Michel Senellart ed., Graham Burchell trans., 2007) (on eighteenth-century administration and "governmentality").

[82] For a broad overview, see P.J. Cain, *British Capitalism and the State: An Historical Perspective*, 68 POL. Q. 95, 95–98 (1997); and see also DAVID MCNALLY, POLITICAL ECONOMY AND THE RISE OF CAPITALISM 22–66, 250–56 (1988).

[83] *See* MCNALLY, *supra* note 82, at 148–51; ROTHSCHILD, *supra* note 76, at 72–86; JOHN SHOVLIN, THE POLITICAL ECONOMY OF VIRTUE 152–54 (2006).

later by the French revolutionaries[84] (who carried it across Europe in the Napoleonic Code),[85] albeit at different tempos and by different means. The consequence of these policies was the creation of the modern industrial economy, in which urban workers sell their labor in competitive markets for wages and then use this money to purchase foodstuffs produced by a much smaller number of farmers. The gradual generalization of such wage work in the eighteenth and nineteenth centuries made European states (and subsequently their colonies) into "capitalist" societies, in which markets and the division of labor are central to the distribution of essential goods and services, in contrast to earlier societies in which markets played a less central role in the production and distribution of basic resources.[86]

This "freeing" of the grain and labor markets was not a simple hydraulic process (though it was often depicted as such) in which the dead weight of state regulation was removed, allowing a wellspring of commercial sociability to bubble up. Rather, this new market regime was understood from its inception to be a positive legal construction. It required the creation of a new legal order, the drafting of the *laws* of capitalism. At the foundation of these laws was a new conception of juridical equality based on freedom of contract and private property in which no formal distinctions among parties would be recognized.[87] Corresponding to this equality before law was the delegation of productive activity to private agents linked through markets — that is, to agents understood to be acting in their "private" capacity.[88] The regime was given public legitimation through new constitutional orders

[84] The extent to which the French revolution was a "bourgeois" revolution within the familiar Marxist scheme remains much debated, but the intent of the August Decrees, for example, was straightforwardly to abolish feudal forms of property and privilege along with the traditional labor obligations of the peasantry. For a defense of its characterization as bourgeois, see COLIN MOOERS, THE MAKING OF BOURGEOIS EUROPE (1991). For a critical examination of the concept of bourgeois state form, see Heide Gerstenberger, *The Bourgeois State Form Revisited*, *in* 1 OPEN MARXISM 151 (Werner Bonefeld et al. eds., 1992); and for an exploration of this concept of the bourgeois state form in German history, without the corresponding idea of the "bourgeois revolution," see DAVID BLACKBOURN & GEOFF ELEY, THE PECULIARITIES OF GERMAN HISTORY (1984).

[85] On the history of the formulation of the code, see JEAN-LOUIS HALPÉRIN, L'IMPOSSIBLE CODE CIVIL (1992). On the continuing impact of Napoleon's legal reforms on post-Restoration Europe, see NAPOLEON'S LEGACY (David Laven & Lucy Riall eds., 2000).

[86] For a classic discussion of capitalism's development, see Polanyi, *supra* note 72.

[87] *See* PURDY, *supra* note 80, at 9–43. The shift from status-based inequalities to formal juridical equality was (and remains) very imperfectly realized, particularly considering formal discrimination against women. It was this imperfect realization of an ostensibly universal equality that led Mary Wollstonecraft to demand the "rights of woman" against the gender inequality of early bourgeois radicalism. *See* MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (1792).

[88] *See* RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS 75–104 (2001); *see also* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, SOC. TEXT, no. 25/26, 1990, at 56.

that ratified formal equality among persons and gave special protections to the rights of contract and property.[89]

In France and the United States — and then elsewhere — these new constitutional orders solved the puzzle of creating a political whole out of the legally equal, discrete individuals of commercial society by establishing revolutionary frameworks predicated on the distinction between "sovereignty" and "government."[90] In practice, this ordering provides for the periodic reaffirmation of the sovereignty of the people in the form of direct ratification of fundamental legislation, either at the moment of constitutional inauguration or through ongoing processes of constitutional amendment, but through a variety of countermajoritarian mechanisms, it places limits on the ability of the people to radically revise the legal rules underlying commercial society.[91] The result is what we might call the "constitution of capitalism," understood in a double sense as the constitutional order that most capitalist societies have adopted historically and the legal foundation of the social processes that constitute the economic system of capitalism.[92]

A detailed study of these legal foundations is essential to understanding the institutional structure of capitalism. Here the insights of institutional political economy and law and economics may be usefully adapted to the task.[93] As Professor Wolfgang Streeck has recently argued, the institutionalist turn in social science has produced general in-

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[89] *See* MARKOFF, *supra* note 74, at 450–69; SHOVLIN, *supra* note 83, at 191–97. For a study of the transformation of American labor law, see John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627 (2000).

[90] *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 6–17 (1991) (describing what he calls "dualist democracy"); *see also* THE PARADOX OF CONSTITUTIONALISM (Martin Loughlin & Neil Walker eds., 2008) (presenting a collection of essays on this theme in diverse jurisprudential contexts); RICHARD TUCK, THE SLEEPING SOVEREIGN (forthcoming 2014) (providing an account of the origin of the distinction between government and sovereignty in Bodin and its subsequent adaptation by Hobbes, Rousseau, and theorists of the American and French revolutionary orders).

[91] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 97–99, 146–48 (2004).

[92] One route to such a political analysis of capitalism is via an interrogation of the Marxist concept of the "bourgeois state," particularly if understood in its legal dimension and without a necessary dependence on the classical Marxist theory of revolution. For an account of nineteenth-century German history along these lines, see BLACKBOURN & ELEY, *supra* note 84, at 190–210; and for a similar ambition with respect to earlier French and British history, see HEIDE GERSTENBERGER, IMPERSONAL POWER 662–87 (David Fernbach trans., 2007). Also see more generally many of the contributions to OPEN MARXISM, *supra* note 84, particularly Werner Bonefeld, *Social Constitution and the Form of the Capitalist State*, *in* 1 OPEN MARXISM, *supra* note 84, at 93.

[93] By institutional political economy, I mean to indicate a variety of approaches that, as Professor Charles Maier describes (and then exemplifies), treat "economic ideas and behavior not as frameworks for analysis, but as beliefs and actions that must themselves be explained." *See* CHARLES S. MAIER, IN SEARCH OF STABILITY 6 (1987).

sights that can, with a few "parametric specifications,"[94] be put to use in the study of capitalism as a "specific type of social order," undergirded by distinct legal arrangements.[95] Supplementing Marx's insights about the organization of wage-labor, Streeck suggests a variety of other empirical features characterizing capitalism. These include the presumed legitimacy of pursuing gain through private contract without, for the most part, being constrained by traditionalist "supernorms,"[96] expectations of social solidarity, restraints on competition, or elite duties to ensure "system survival";[97] the expectation that rule followers are "rational-egoistic"[98] in their orientation rather than norm internalizers with respect to the purpose of a rule (as with, for example, financial regulations);[99] and a "differential endowment of classes with resources,"[100] which results in classes having different capacities for effective agency, including disparate ability to mobilize political coalitions to advance their interests.[101]

It is not difficult to appreciate how these and other aspects of capitalist societies are legally structured and, in turn, how they define the landscape of social interactions in which the "fundamental inequality of capitalism" holds.[102] Indeed, the mid-twentieth-century reversal of $r > g$ emerged from deep changes in the regulation of the market (pp. 355–56) — changes which led some contemporary observers, such as the Labour Party theoretician Anthony Crosland, to wonder whether their societies were still capitalist.[103] It remains a live question: were the mixed economies of the postwar period still capitalist if what Piketty calls the "central contradiction of capitalism" had been overcome (pp. 135–39)?

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[94] Wolfgang Streeck, *Taking Capitalism Seriously: Towards an Institutionalist Approach to Contemporary Political Economy*, 9 SOCIO-ECON. REV. 137, 140 (2011) (emphasis omitted).

[95] *Id.* at 137. Streeck relies on recent scholarship associated with "rational choice institutionalism," "sociological institutionalism," and "historical institutionalism" to advance this account of capitalism, understood as a historically specific "set of interrelated social institutions" and "not as a self-driven mechanism of surplus extraction and accumulation." *Id.* at 138.

[96] *Id.* at 147 (italics omitted).

[97] *Id.* at 150 (italics omitted); *see also id.* at 143, 147–48, 150.

[98] *Id.* at 143 (italics omitted).

[99] *Id.* at 143–46. On this point with respect to financial regulations, see Lev Menand, Safe and Sound Banking: Using Standards to Combat Excessive Risk-Taking at Large Financial Institutions (Apr. 27, 2014) (unpublished manuscript) (on file with author).

[100] Streeck, *supra* note 94, at 147.

[101] *Id.* at 147–48.

[102] To appreciate fully its legal structuring, we should employ what Professor Nancy Fraser calls an "expanded conception" of capitalism, taking into account the interrelation of class, race, gender, and other dimensions of inequality. *See* Nancy Fraser, *Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism*, NEW LEFT REV., Mar.–Apr. 2014, at 55.

[103] *See* C.A.R. CROSLAND, THE FUTURE OF SOCIALISM 56–76 (1956). Crosland's answer (describing the Britain of his time) was "no." *Id.* at 76 (internal quotation marks omitted).

Understanding the movement from patrimonial capitalism to the postwar "mixed economy" and back requires a nuanced account of what John Commons long ago called the "legal foundations of capitalism,"[104] and which legal realists from Robert Hale to Karl Llewellyn to Jerome Frank put at the center of their analyses.[105] The return to Hale-style legal realism in the analysis of public institutions and "private" law may help stimulate a "law and economics" approach to the study of capitalism, rather than an approach in which markets are considered abstractly.[106] Subjects that would be particularly important to study include the causes and consequences of the post-feudal reconstitution of property law,[107] and the ways in which labor, public benefits, and corporate law together structure the modern labor market as an arena of "contested exchange" in which "economic power" is structured through various contractual mechanisms.[108] These

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[104] *See* JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924); *see also* MAIER, *supra* note 93, at 121–273 (describing the requirements of economic stability in postwar Europe).

[105] *See, e.g.*, ROBERT L. HALE, FREEDOM THROUGH LAW (1952). For an account of Hale's relationship to the legal realists, see BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE 10–15 (1998); and see also Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 Legal Stud. F. 327 (1991); and Steven G. Medema et al., Institutional Law and Economics, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 418 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (on the institutionalist economics behind legal realism).

[106] Studies of default rules and incomplete contracts may prove especially valuable in helping us identify the "transaction structure" of capitalism. On the concept of the transaction structure, see Alvin K. Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 COLUM. L. REV. 905 (1985). On default rules and incomplete contracting, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995); and Oliver D. Hart, *Incomplete Contracts and the Theory of the Firm*, 4 J.L. ECON. & ORG. 119 (1988). For a revision of the Calabresian taxonomy of legal entitlements, see Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996).

[107] On post-feudal property regimes and their transformation, see sources cited *supra* note 87. For the importance of the *numerus clausus* principle in this reconstruction, see Claire Priest, Optimal Alienability in the Law of Property and the History of the *Numerus Clausus* (Mar. 31, 2014) (unpublished manuscript) (on file with author), which responds to Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000); and Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373 (2002). The extension of property concepts to the realm of ideas and the globalization of these protections in international intellectual property law are also part of this reorientation. *See* SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW 75–120 (2003).

[108] On the theory of contested exchange, see Samuel Bowles & Herbert Gintis, *Contested Exchange: Political Economy and Modern Economic Theory*, 78 AM. ECON. REV. (PAPERS & PROC.) 145, 147 (1988); and Samuel Bowles & Herbert Gintis, *The Revenge of Homo Economicus: Contested Exchange and the Revival of Political Economy*, J. ECON. PERSP., Winter 1993, at 83. On the conjunction of labor and welfare laws, see Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373 (2006); and Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011); and on the complexities of the American welfare state and its benefits programs, see JACOB S. HACKER, THE DIVIDED WELFARE STATE 5–77 (2002).

and related inquiries would help us understand the conditions under which formal equality of contract is compatible with widening economic inequality. We must also consider the way that law structures not just the particular bargains in capitalism (most prominently, the wage bargain), but also the broader social and political setting of the market. Here the dynamics of public and private debt,[109] the regulation of finance in an age of "financialization,"[110] the constraints placed on democratic control of the economy by international integration,[111] and the problem of "commodification" understood as the regulation of "contested commodities" and "blocked exchanges"[112] may prove especially salient.

In studying these issues, Piketty's work should lead us to consider how the legal foundations of capitalism influence the rate of return on capital and its consistent outpacing of overall growth. The ways different areas of the law interact to affect the inequality $r > g$ may be considerably complex. For example, Piketty analyzes the demographic contribution to the inequality by focusing on the impact of inherited wealth, which is more concentrated in low-growth demographic regimes; by contrast, in growing populations, labor is more determinative than inheritance (pp. 83–84). Yet slower demographic growth may also lead to increased bargaining power for labor, since the availability of fewer workers means those present can demand more from employers — a dynamic John Stuart Mill emphasized in his social reform agenda.[113] The *trente glorieuses* may have achieved their exceptionally high ratio of g to r — and their relatively egalitarian distribu-

[109] *See* Wolfgang Streeck, *The Crises of Democratic Capitalism*, NEW LEFT REV., Sept.–Oct. 2011, at 5; Wolfgang Streeck, *The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State*, 15 GERMAN ECON. REV. 143 (2014).

[110] *See* Tamara Lothian, *Democracy, Law and Global Finance: A Legal and Institutional Perspective*, *in* RECLAIMING DEMOCRACY: JUDGMENT, RESPONSIBILITY AND THE RIGHT TO POLITICS (Albena Azmanova & Mihaela Mihai eds., forthcoming 2015); Robert Hockett & Daniel Dillon, *Income Inequality and Market Fragility: Some Empirics in the Political Economy of Finance* (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204710 (last visited Oct. 26, 2014) [http://perma.cc/N7NA-THHX]. On the concept of "financialization," see COSTAS LAPAVITSAS, PROFITING WITHOUT PRODUCING 13–43 (2013).

[111] *See* ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM 223–40 (2011). And for a political-theoretic examination of the same, see THE ECONOMIC LIMITS TO MODERN POLITICS (John Dunn ed., 1992).

[112] *See* MARGARET JANE RADIN, CONTESTED COMMODITIES (1996). For an overview of studies of commodification in law and economics, see Susan Rose-Ackerman, *Inalienability*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 268 (Peter Newman ed., 1998); and in moral philosophy, see Judith Andre, *Blocked Exchanges: A Taxonomy*, 103 ETHICS 29 (1992); and see also RUSSELL KEAT, CULTURAL GOODS AND THE LIMITS OF THE MARKET 149–71 (2000). For in-depth studies of commodification in media, health, and administration, see COLIN LEYS, MARKET-DRIVEN POLITICS 108–210 (2001); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010); and Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013).

[113] *See* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 439–52 (1848).

tion of growth — at least partly because of relative labor scarcity.[114] Likewise, the end of the exceptional postwar period coincided with the beginning of "globalization," through which multinational companies gained the ability to resist wage demands by offshoring or threatening to offshore.[115] Understanding more fully how demographic change contributes to economic inequality thus requires a study of labor law, reproductive rights, corporate strategy, and international economic integration. Inquiries into other determinants of $r > g$ — for example, the impact of technological change — will likely prove just as complex, and just as legally structured.

Alongside this research into the legal foundations of capitalism, there remains the work of understanding the institutional structure of "democracy," which Piketty presents as the counterpoint to capitalism. Many of the current threats to broadly democratic decisionmaking in the United States fall within the special province of lawyers, including politically motivated redistricting,[116] voter suppression efforts,[117] the influence of special lobbies,[118] and the ongoing juridification of a conception of free speech that is oligarchic in effect, if not in intent.[119] The relation of these challenges to Piketty's narrative of increasing inequality — including the growing political power of the superrich — is important and underexplored.[120] More generally, it remains unclear how well the "rule of law" will cope with radically widening socioeconomic inequality. Here both historical and comparative legal analysis

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[114] We must remember that not only Europe but also the United States experienced rising growth and moderation of inequality in the postwar period (pp. 96–97), even though it was already at the "technological frontier" — and thus these trends cannot be credited to "catch-up" and reconstruction (p. 397). *See also id.* at 397 (discussing "Reconstruction capitalism" (internal quotation marks omitted)).

[115] The credible threat of offshoring may reduce the bargaining power of workers and thus their income (where wages include inframarginal rents), even without any factory relocations. *See* Arindrajit Dube & Sanjay G. Reddy, *Threat Effects and Trade: Wage Discipline through Product Market Competition*, 4 J. GLOBALIZATION & DEV. 213 (2013).

[116] For a critical overview and proposal, see Heather Gerken, *Getting from Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL'Y 1 (2010).

[117] The effort to overcome local voter suppression efforts will be made more difficult by the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), in which the Court struck down Section 4 of the Voting Rights Act of 1964.

[118] On which, see LAWRENCE LESSIG, REPUBLIC, LOST (2011); and Heather Gerken, *Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155 (2011).

[119] *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434 (2014); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); Citizens United v. FEC, 130 S. Ct. 876 (2010); FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007). On the nature of commercial speech in current Supreme Court constitutional jurisprudence, see Jedediah Purdy, *Neoliberal Constitutionalism*, 77 LAW & CONTEMP. PROBS. (forthcoming 2014); and see also ROBERT C. POST, CITIZENS DIVIDED 59–66 (2014), which discusses the conflicting conceptions of democratic legitimacy in the decision.

[120] For an important contribution, see Gilens & Page, *supra* note 32.

may help illuminate an intensifying dimension of capitalism in the twenty-first century.[121]

V. WHAT IS TO BE DONE?

What is to be done? In Part Four of *Capital in the Twenty-First Century*, Piketty introduces a set of policy proposals for redressing the growing inequalities he catalogs. He discusses the difficulties currently facing national social welfare and tax programs and advocates a global wealth tax and deeper European integration (pp. 471–92, 515–30, 556–62). Most serious criticisms of the book have rightly focused on the limitations of these proposals. But these limitations are not Piketty's alone: they reflect broader failures of intellectual imagination and programmatic ambition in economic policymaking. Furthermore, while Piketty's numbers invite a welcome debate on inequality, they do not, of course, tell us how to regard that inequality, let alone how to remedy it.

However, we can perhaps glean an orientation, if not a policy program, from the trends he identifies. Most important, we must recognize that his major conclusion exceptionalizes the *trente glorieuses*. Once that period of unusually high growth in the advanced world is denormalized, a different set of questions emerges about the structure of the economy and its relation to political agency. Should the unequal distribution of wealth and income be redressed, and if so, how? Is capitalism sustainable, and under which political conditions? Are capitalism and democracy complementary or antagonistic, and under what circumstances? These and related questions preoccupied late-nineteenth- and early twentieth-century observers of capitalism before giving way during the postwar interlude when what Professor Charles Maier calls the "politics of productivity" mitigated distributive conflict and generated broad, if temporary, consensus about economic policy.[122] Now, as capitalism resumes its longer-running pattern, these questions may be resurrected.[123]

In considering these questions, Piketty's empirical assessments need to be situated within a broader structural account of the dynamics of capitalism, as I suggest above in describing capitalism as a legal ordering. However, apart from the occasional aside, Piketty remains silent

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[121] For a criticism of the conflation of the "rule of law" with private property protections, see JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY (2012). For analyses of how neoliberalism is reconfiguring particular areas of law, see Symposium, *Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. (forthcoming 2014).

[122] *See* MAIER, *supra* note 93, at 121; *see also id.* at 121–84.

[123] *See* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. (forthcoming 2014) (discussing the return of questions from the early century that were considered settled by legal academics during the postwar period).

on numerous important debates about the structural features of capitalist economies. Not so the late Oxford economist Professor Andrew Glyn, who produced probably the most comprehensive Marxist analysis of late-twentieth-century capitalism.[124] Glyn's last book, *Capitalism Unleashed*, draws on much of the same data as Piketty's — including Piketty's earlier work and that of Professor Angus Maddison — as well as a range of other indicators such as measures of manufacturing profits, government expenditure, and labor market strife.[125] Glyn used these data to construct a detailed historical account of the role of class conflict in the history of postwar capitalism, as well as a set of policy proposals following on that account. Those stimulated by Piketty's analysis should turn to Glyn for a compatible but more fully elaborated depiction of distributional conflict and its consequences in postwar capitalist society.

Similarly, Streeck has recently produced a series of studies on the crises of democratic capitalism, focused especially on the role of public and private debt in achieving an accommodation between market imperatives and democratic demands.[126] Like Piketty, Streeck recognizes the exceptionalism of the *trente glorieuses*, but he regards the years since the 1970s as less a return to a "normal" form of capitalism than an *attempt* to return to an earlier form conducted under conditions of broadly distributed political power and aspiration. The social conflicts generated by a resurgent inequality reminiscent of the Gilded Age in the context of a post–Gilded Age mass politics have generated burgeoning levels of public and private debt, which, according to Streeck, only the 2008 financial crisis fully revealed.

Combining Glyn and Streeck with Piketty helps us to identify where the fault lines of future political contests will lie: in broad fights over debt, taxation, and public spending as the fiftieth through ninetieth percentiles in the income and wealth tables lose ground to the top 10%, and in more specific conflicts as professionals and small businesspeople in the top 10% lose ground to the 1% and yet smaller fractions. They also suggest that these problems ultimately emerge from differential power — the ability of some groups rather than others to control the state. Finally, these analyses help clarify that what is ex-

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[124] *See* ANDREW GLYN, CAPITALISM UNLEASHED (2006) [hereinafter GLYN, CAPITALISM UNLEASHED]; *see also* PHILIP ARMSTRONG ET AL., CAPITALISM SINCE 1945 (1991); SOCIAL DEMOCRACY IN NEOLIBERAL TIMES (Andrew Glyn ed., 2001) (discussing welfare states since the 1980s).

[125] GLYN, CAPITALISM UNLEASHED, *supra* note 124. Glyn's early death meant that he was unable to update his analysis in light of the financial crisis of 2008.

[126] *See* sources cited *supra* note 109; *see also* POLITICS IN THE AGE OF AUSTERITY (Armin Schäfer & Wolfgang Streeck eds., 2013).

ceptional about the *trente glorieuses* must be understood in a political dimension.

Unfortunately, Piketty engages with neither Glyn nor Streeck, though they would have proven useful interlocutors. Both, for example, are skeptical of the democratic potential of the European Union,[127] in contrast to Piketty, who advocates for European political unification to complement its monetary and economic integration (pp. 558–60).[128] This is not the occasion to rehearse that debate in detail, but many leftists have long argued that European integration, especially in its monetary dimension, would serve to undermine social democracy in member states rather than to extend it.[129] Lately, this view has even gained support among former architects of monetary union, such as Oskar Lafontaine.[130]

Piketty's consciousness of the difficulty of enacting any national project of social democracy, given international economic integration and the mobility of transnational capital, makes him understandably eager to seek solutions at the same transnational scale (pp. 558–62,

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[127] *See* Andrew Glyn, *Egalitarianism in a Global Economy*, BOS. REV., Dec.–Jan. 1997–1998, at 4; Wolfgang Streeck, *Markets and Peoples: Democratic Capitalism and European Integration*, NEW LEFT REV., Jan.–Feb. 2012, at 63.

[128] Piketty's support for deeper European integration reflects the influence of Pierre Rosanvallon, a theorist of post-national or cosmopolitan democratic forms, with whom he has collaborated in political advocacy. *See* PIERRE ROSANVALLON, DEMOCRACY PAST AND FUTURE 189–234 (Samuel Moyn ed., 2006) (describing the changing nature of democratic politics and arguing that European integration reveals the character of post-national democracy). Piketty and Rosanvallon have recently collaborated in advocacy for European political unification. *See* Thomas Piketty & Pierre Rosanvallon, *Manifeste pour une union politique de l'euro*, LE MONDE (Feb. 17, 2014, 11:53 AM), http://www.lemonde.fr/idees/article/2014/02/16/manifeste-pour-une-union-politique-de-l-euro_4366865_3232.html [http://perma.cc/Y8NE-7AET]. More generally, while Piketty understands himself as having come into political consciousness after 1989 (p. 31), he is arguably heir to Mitterrand's modernization of the *Parti Socialiste* following the economic crisis of 1983, which turned the French left increasingly away from its focus on social justice and economic equality toward market integration in an expressly post-socialist "social Europe." On Piketty's analysis, France entered the stage of increasing inequality starting in 1983, with the defeat of this program, from which he takes the lesson that the success of social democracy now depends on European integration. *See* PIKETTY, *supra* note 8, at 138–39 (describing France's trajectory); *id.* at 289–90 (describing the early years of Mitterrand's first presidency); *id.* at 561–62 (evaluating European unification). So far, at least, the turn to economic integration has apparently cemented this trend, rather than reverse it, as Piketty's own analysis shows. For further discussion of this shift in French policy, see sources cited *supra* note 21.

[129] *See* George Ross, *European Center-Lefts and the Mazes of European Integration*, *in* WHAT'S LEFT OF THE LEFT, *supra* note 21, at 319 (providing an overview of left responses to European monetary integration).

[130] On his shift, see Oskar Lafontaine, *Plädoyer für ein neues Währungssystem*, HANDELSBLATT (May 23, 2013, 6:43 AM), http://www.handelsblatt.com/meinung/gastbeitraege/gastkommentar-plaedoyer-fuer-ein-neues-waehrungssystem/8240638.html [http://perma.cc/GW3K-9FXS]; and for the report that influenced it, see HEINER FLASSBECK & COSTAS LAPAVITSAS, ROSA LUXEMBURG STIFTUNG, THE SYSTEMIC CRISIS OF THE EURO — TRUE CAUSES AND EFFECTIVE THERAPIES 5 (2013), http://www.rosalux.de/fileadmin/rls_uploads/pdfs/Studien/Studien_The_systemic_crisis_web.pdf [http://perma.cc/MWU7-JWLS].

573). But it seems hard to accept that an aggressive global tax on capital or a political union of the European states is politically feasible, while a return at the national level to Keynesian-style macroeconomic planning with strong labor protections is not. The relative volume of cross-border flows is not, after all, incomparably greater than it was in the early twentieth century;[131] indeed, the mid-century international order of "embedded liberalism" was constructed as a deliberate policy response to the highly globalized world of the early century and the chaos and war into which it descended.[132] Piketty may be assuming that elites are now better coordinated across countries and thus more capable of enacting transnational policy.[133] But even if this is true, an elite-driven response threatens to replicate the "democratic deficit" that has plagued most existing projects of transnational coordination,[134] and it sets up the risk — which Piketty admits (p. 573) — that these forms of coordination will exacerbate rather than ameliorate the inequality $r > g$.

Recognizing this risk, we should distinguish "democracy-enhancing" and "democracy-inhibiting" forms of international integration[135] and note that it is possible to aim for the former but end up with the latter, as the postwar history of Europe arguably reveals. By engineering the early merger of economic elites, from the Coal and Steel Union through to the Euro, those in favor of greater European integration correctly assumed that shared economic interests and repeated structural crises would prompt calls for political unification.[136] However, this strategy offered no guarantee of a *democratic* political response by newly integrated elites, and it has so far delivered only the liberal managerialism that many others predicted.

Relatedly, Piketty's proposal for a global wealth tax assumes a coordinated, top-down, data-driven, and retrospective response to the inequalities that capitalism generates — and in this he globalizes the familiar presumption of many economists that taxation ex post is a better way to address inequality than ex ante changes to the legal rules

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[131] *See* GLOBALIZATION IN HISTORICAL PERSPECTIVE 65–188 (Michael D. Bordo et al. eds., 2003).

[132] *See* John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

[133] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (describing transnational governmental networks).

[134] For a critical account, see Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, *in* DEMOCRACY'S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); and for a "pragmatic" response, see Andrew Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 GOV'T & OPPOSITION 336 (2004).

[135] Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 2, 27 (2009).

[136] *See* JEAN MONNET, MEMOIRS 417 (Richard Mayne trans., 1978).

governing the economy.[137] On that view, it is more efficient to allow the unencumbered market to generate wealth — which can later be redistributed — than to attempt to alter the organization of the market in the first place. But the question as to whether ex ante or ex post mechanisms are more efficient assumes that both are politically feasible — and it may be naïve to assume that after letting the inequality-producing market run its course there will be any agent left at the end of the process capable of demanding redistribution. Indeed, on a more path-dependent conception of political action, it may be only through structural changes to the economy — which galvanize political coalitions while resurrecting distributive questions — that an electorate becomes capable of demanding higher tax rates. It was mass political empowerment at the height of the labor movement, drawing on postwar solidarity, that achieved the high marginal tax rates of the midcentury as part of a broader redesign of the terms of economic cooperation. If Piketty's proposal for a global capital tax is, in his own words, "utopian" (p. 515), it is because it presumes a political agent capable of enacting it, which is neither present now nor likely to be generated by the trends he identifies.

Further, Piketty's policy proposals mainly borrow models developed by mid-century social democracies — high marginal tax rates, international coordination, and so on — and attempt to deepen or extend them. Yet his findings suggest that this period was exceptional. If contemporary capitalism increasingly resembles the period *before* the exceptional times began, we should perhaps draw on the corresponding array of political strategies: general strikes and labor activism, experiments with new forms of cooperative industrial organization, and radical political and social movements. Even if Piketty is right that we must now globalize any national response to transnational capitalism, it remains unclear that we can — or should — rely upon the policy repertoire of the *trente glorieuses*.

What, then, is to be done? It remains unclear what should or can be done about inequality absent a normative assessment of the kind proposed above in Part III and a legal-institutional analysis as suggested in Part IV. But if we look back at the answers to this question when capitalism was last in its Gilded Age, we find a debate on the left between Vladimir Lenin and Eduard Bernstein concerning revolutionary tactics as against parliamentary socialism, set in a broader discussion of the structural relation of localized economic contests (of

[137] *See, e.g.*, Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCANDINAVIAN J. ECON. 264 (1979); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

workers against capitalists) to working-class political consciousness.[138] Owing to a pessimistic assessment of the capacity of even highly organized workers to achieve fundamental reforms within bourgeois democracy, Lenin formulated a famous (and fateful) argument for a vanguardist party that would lead the revolution from above. But in the end, neither a disciplined Leninist vanguard nor its alternative, the alliance of mobilized workers and socialist politicians of the German Social Democratic Party, achieved an enduring democratic reversal of the inequality $r > g$, except in the exceptional postwar period. What, then, can we expect from today's unhappy alliance between the remnants of the old workers' parties of Western Europe and the *Bundesbank*?[139]

Perhaps the most plausible strategy at present looks to a politics of generational mobilization organized among the children and grandchildren of the "patrimonial middle class," which accumulated modest wealth in the twentieth century and enjoyed stable employment and reasonable security (pp. 346–47). Something of this is already visible in protests for debt-forgiveness and public goods, focused on educational opportunity and health care (either arguing for its public provision or resisting its tacit privatization). More ambitious proposals attempt to universalize the conditions of a secure middle class through guaranteed basic income[140] or the redistribution of capital to the young in the form of "stakeholding,"[141] often with the explicit suggestion that this redistribution should be paid for through a tax on elite wealth. But consider again Piketty's summary of the distribution of capital ownership across most developed economies: what has occurred since the 1970s, to varying degrees, is a shift of approximately 5% of national wealth from the fiftieth through ninetieth percentiles up into the top decile, much of it into the top percentile (pp. 248, 348–49). It seems doubtful that the children of the twentieth century's "patrimonial middle class," whose parents were unable or unwilling to alter this upward redistribution during decades of comparatively greater empowerment, will now be able to reverse the trend for themselves — let alone forge

[138] *Compare* V.I. LENIN, WHAT IS TO BE DONE? (1902), *reprinted in* 5 LENIN: COLLECTED WORKS 347, 352–73 (Victor Jerome ed., Joe Fineberg & George Hanna trans., Foreign Languages Publ'g House 1961), *with* EDUARD BERNSTEIN, THE PRECONDITIONS OF SOCIALISM (Henry Tudor ed. & trans., Cambridge Univ. Press 1993) (1899).

[139] More abstractly, what social base is now capable of supporting a transnational network to constrain capital, especially if we lack the faith that an "objective" class position is sufficient to generate a politics of social transformation? For an excellent history of the varieties of socialist politics in twentieth-century Western Europe (and the left's responses to this problem), see DONALD SASSOON, ONE HUNDRED YEARS OF SOCIALISM (1996).

[140] For a presentation of the basic income scheme proposed by Professor Philippe Van Parijs, along with commentaries on it by a range of academics and commentators, see PHILIPPE VAN PARIJS, WHAT'S WRONG WITH A FREE LUNCH? (Joshua Cohen & Joel Rogers eds., 2001).

[141] *See* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999).

a new social contract based on stakeholding or a basic income for all citizens. It is true that these children stand to lose even more than their parents, but the bet that immiseration will spur effective political action has never been a sound one.

The failure of the financial crisis of 2008 to produce any lasting movement for fundamental economic reform may seem to confirm Professor Perry Anderson's pessimistic assessment over a decade ago that "[t]he only starting-point for a realistic Left today is a lucid registration of historical defeat."[142] Piketty himself is pessimistic, as he has recently admitted.[143] To this pessimism of the intellect, however, we should muster an optimism of the will. More than Lenin or Bernstein, *Capital in the Twenty-First Century* brings Antonio Gramsci to mind. Whatever the limits of his particular proposals, Piketty has fired a forceful shot in what Gramsci described as the "war of position," the slow but vital work of consciousness-raising that must precede the "war of manoeuvre,"[144] or "movement,"[145] during which distributional claims are asserted directly in political contests. There are times when a clear-eyed account is the most radical act possible, and even those who doubt Piketty's remedies should welcome the clarity of his assessment. In the final analysis, what his book shows (despite its title) is that the history of capitalism in the twenty-first century remains to be written — and that politics, rather than the natural operation of the market, will finish the story. As Piketty concludes: "If democracy is someday to regain control of capitalism, it must start by recognizing that the concrete institutions in which democracy and capitalism are embodied need to be reinvented again and again" (p. 570).

[142] Perry Anderson, *Renewals*, NEW LEFT REV., Jan.–Feb. 2000, at 5, 16.

[143] Thomas Piketty, *Dynamics of Inequality*, NEW LEFT REV., Jan.–Feb. 2014, at 103, 116.

[144] ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 217–19, 238–39 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

[145] ANTONIO GRAMSCI, FURTHER SELECTIONS FROM THE PRISON NOTEBOOKS 349 (Derek Boothman ed. & trans., 1995).