

## Recovering and Revitalizing Economic Citizenship in American Law

Author : Jedidiah Kroncke

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K. Sabeel Rahman, [Democracy Against Domination](#) (2016).

eport.org/2018/04/24/florida-to-initiate-sweeping-consolidation-of-jScholars from a variety of disciplines have begun to recapture what they see as the lost virtues of political economy. In its broadest conception, this term is meant to capture the basic truism that any study of politics or economics should reflect their mutually constitutive character. A renewed interest in [political economy and the law](#) further reflects the same mutuality among [law, politics, and economics](#). Central to such renewal is a claim that analytically segregating these fields leads to analysis that is both descriptively inaccurate and has powerful and troubling normative consequences.

Sabeel Rahman's [Democracy Against Domination](#) is a leading example of a new generation of scholarship that demonstrates both the descriptive and normative promise of law and political economy. Rahman's mission in the book is to reinfuse debates on financial regulation with overt concern for democratic participation and to recover an ethos that sees American economic and political citizenship as inextricably intertwined. Rahman's history traces how this ethos was lost over the course of the twentieth century, and in doing so produces a sustained historical inquiry about how we arrive at what is considered "normal" or inevitable about legal regulation. *Domination's* chapters follow the pattern of presenting a modern problematic in regulation and then demonstrating how contemporary responses are both democratically impoverished and historically contingent. The aim of the endeavor is to argue that fields of law that have been exorcised of any referent to democratic values, notably antitrust and administrative law, need to be reopened and remade. The alternative is to face pressing issues of inequality with an ultimately ineffective set of regulatory responses.

*Domination's* history serves this mission by revealing the path by which political, legal, and economic concepts became isolated from each other in our collective intellectual and social vocabularies about regulation. The key consequence of this isolation has been the naturalization of unequal distribution of material resources and circumscribed democratic participation. Rahman's critique echoes the classic tension between formal legal freedom and substantive liberty as a lived experience. His recurrent use of "domination" itself explores the social context of political and economic choice, and its often illusory character in practice.

[Rahman](#) begins his narrative at the 1892 national convention of the People's Party in Omaha, Nebraska. Labor historians have long invoked the turn of the twentieth century as a time when the American regulatory response to industrial capitalism was unsettled and open to far more trenchant critiques.<sup>1</sup> Rahman's use of this era as a touchstone recaptures past imaginations of American citizenship in an era when legal and economic thought were more tightly intertwined. His favored example of antitrust regulation stands out as a regulatory response that originally justified itself through assumptions about the inherently political consequences of capital distribution, and vice versa. Not confined to static analyses of maldistributions of income or wealth, scholars and activists of this era saw financial regulation as an iterative process to realize democratic opportunity and accountability. As others have also noted, one can look to the work of thinkers like Richard Ely and John Commons as the true first wave of "law and economics" scholarship.

In welcome addition to the common cast of characters associated with histories of labor republicanism, Rahman's intellectual anchors are Louis Brandeis and John Dewey. Each thinker emphasizes a different aspect of the relationship of regulation to domination, with Brandeis focusing on what Rahman calls dyadic domination, or the exertion of concentrated private power over individual citizens, and Dewey focusing on what Rahman calls structural

domination, or the cumulative restraint of social institutions and practices on democratic agency. Rahman's analysis of Dewey's pragmatism is especially interesting as a theory of iterative learning that applies directly to how regulators should approach democratic decision-making. Rahman's critical engagement with Brandeis' thought is specifically revealing in its own right of the relevance of integrating legal thought with the broader concerns of political economy.

The central descriptive claim that Rahman makes is that a loss of this earlier concern with domination leads to a false contemporary choice between the competing theories of laissez-faire and what he terms "managerialism." One of Rahman's primary objectives is to take seriously the critiques that laissez-faire proponents advance, which he sees as possessing a "compelling moral account of freedom with a sophisticated institutional critique of government." (P. 170.) For Rahman, it is essential to recognize the force of these critiques, as they led directly to New Deal proponents' sidelining their concerns about economic and political dominations. Instead, they responded to critiques of state domination by defensively retreating to managerialism—which justified the regulation of markets solely through the rigor of technical expertise. Managerialism ultimately transformed inequality into a technical problem, rather than an issue of democratic accountability, and entrenched an expert anti-politics that still is at the heart of recent Democratic administrations. For Rahman, the failure of the New Deal lies centrally in eliding the tough but essential questions of how directly to incorporate the democratic participation of citizens into what today are considered arenas of pure technical expertise. Moreover, over time this technocratic move then undermined the tradition of civic mobilization that had energized earlier movements for regulatory accountability.

Marking his contemporary critical ambitions, Rahman goes beyond intellectual history to take on pragmatic issues of "institutional design." *Domination* focuses on financial regulation exactly because it is now understood as of great importance, but also generally invisible to the daily life of most citizens. Rahman advances his own vision of financial regulation as molded by a theory of democratic inclusivity, casting concerns with administrative overreach, tied to the rule of law or balance of powers, as insufficiently informed by parallel concern with the private sources of anti-democratic domination highlighted by Brandeis and Dewey.

It is here that hereto sympathetic readers might balk at how deeply embedded Rahman's historical account is with his own normative ambitions. But such ambitions are not hidden nor are they central to his descriptive archaeology. This openness allows Rahman to flesh out the application of these earlier ideas to specific arenas of financial regulation today. His discussion of the potential regulation of financial institutions as public utilities in Chapter 6 is thus rendered both imaginative and plausible. He achieves this by revealing the normality of such a perspective in the early twentieth century, how it was justified under domination concerns, how it was lost, and what it might look like reinvigorated today. In Chapter 7, he repeats the same for the design of the administrative state.

He frames much of *Domination* to explain the fate of financial regulation under the Obama administration. Rahman relates his own anticipation that the administration would recapture some of these lost concerns, and revitalize democratic regulation. *Domination* is subsequently marked by disappointment that such reimagination succumbed to doubling down on managerialism and the comparatively timid regulatory response to the Global Financial Crisis as compared to that after the Great Depression. As nostalgia for the Obama administration grows within the Democratic party, some could characterize Rahman's critique as an indulgence. Defenses of expertise are now commonplace in the midst of the resurgent success of laissez-faire.

Yet, part of the historical lesson *Domination* presents is that the democratic impoverishment of managerialism has become self-fulfilling. If one creates a system of regulation that presumes that citizens have no role in the administrative state, then it should not be surprising when they feel increasingly alienated from it. An anti-democratic technocracy inures citizens to public reason, and sets up the false set of choices that today seem natural.

Furthermore, Rahman's history demonstrates the great potential for legal scholars and lawyers to serve as key intermediaries in translating constitutional hopes into institutional realities. Many lawyers struggle with the relationship of their expertise to social movements, but Rahman shows us that it is not expertise that is the enemy of democracy but the presumption that its purview is exclusive. Expertise can co-exist with democratic accountability through visibility

and accessibility, but not solely through its own rigor. Rahman has himself worked to show how the participation of legal scholars is key to [attempts to revitalize](#) a democratic political economy in America.

In this way, Rahman's history is also timely given larger global debates on economic citizenship. His discussion of John Dewey's view of democratic freedom resonates with those expressed by Amartya Sen in grappling with economic development and human flourishing. If there is one weakness to Rahman's history, it is that it only touches on parallel debates abroad, signaled by his mention of participatory regulation in Brazil, India, Indonesia, and elsewhere. In reverse, authoritarian regimes across the globe are experimenting with [testing the limits](#) of elections as a mechanism of democratic accountability and using regimes of technical expertise as substitutes for democratic participation. But such limitation is more invitation than true critique.

In the end, it is possible that one might not be persuaded by the rich and intensive account of democratic citizenship Rahman imagines. Some might feel that citizens are all too happy to accept the excision of democracy from their daily lives, and to portray protests as only potential inconveniences in their daily commutes. But if the recent furor over network neutrality is any indication, citizens wanting to participate in regulatory debates are not in short supply. Yet, mechanisms to render their participation meaningful are. Establishing that this is a genuine problem for American democracy is a more than satisfying payoff for Rahman's historical efforts.

1. See, most recently, Alex Gourevitch, **From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century** (2014); Anna di Robilant, *Populist Property Law*, 49 **Conn. L. Rev.** 936 (2015); and Rebecca E. Zietlow, **The Forgotten Emancipator: James Mitchell Ashley and the Ideological Origins of Reconstruction** (2017). [?]

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