

6 The active making of two foundationally unequal subjects

Liberal democracy's Achilles heel?

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My concern in this chapter is with the formation of two foundationally unequal subjects for the articulation of capitalism; critical in the analysis is the fact that these subjects were actively made within the law, and in that process of making the law, liberal democracy, so central to capitalism, began to emerge. These subjects can be identified as the bourgeoisie as owners of productive capital, and the workers as suppliers of labour. As liberal democracy has gone through multiple phases and in many diverse directions since that early industrial phase, but notwithstanding this diversity has democratized society and politics, we might have expected the deep inequality of those foundational subjects to have been neutralized in this evolution. But the current period and its deep socio-economic fractures and injustices show us that the foundational inequality built into the making and legitimating of those two subjects has survived these transformations and attempted democratizations. I explain this in terms of some of the specific capabilities through which each of these subjects was constructed in law and that have carried over through the changing organizing logics that mark the evolution of capitalism. Elsewhere (Sassen 2008) I have developed at length this notion of capabilities made in one historical period being able to switch to new organizing logics, a process that is often not particularly legible; this holds, I argue, also for other features of early capitalism and for pre-capitalist political economies in Europe.

The key to this notion of capabilities switching organizing logics is that it helps explain how the many changes in capitalism and in liberal democracy over time could occur *without* a foundational overriding of the sharply unequal capabilities marking these two subjects. This overriding did not even happen with the vast extension of property rights to all as a function of the development of markets and the interests of both political and economic actors in this extension. There have been epochs, such as the Keynesian period, when a combination of elements enabled a major expansion of advantages to large sectors of the population. It was easy to imagine the Keynesian period as the beginning of a whole new kind of capitalism – a kinder and more democratic capitalism.

But the trends that emerged in the 1970s and 1980s made it clear that those original foundational inequalities were indeed systemic, wired into the functioning of capitalism itself.¹ One open question is whether they are also wired into

1 the functioning of liberal democracy – was liberal democracy ultimately the
2 project of the historic bourgeoisie? This is a subject that no longer exists today
3 in the same form, which perhaps explains the growing incapacities of liberal
4 democracy to address and engage major contemporary challenges to the democ-
5 ratizing of economies and societies, a subject I examine at length elsewhere
6 (Sassen 2008: chs 4 and 5).

7 This questioning of the future potential of liberal democratic capitalism to
8 evolve into a more distributed and just system is the substantive rationality
9 running through this chapter's examination of the making of the two founda-
0 tional subjects of capitalism and the symbiosis between liberal democracy and
1 capitalism. Let me clarify promptly that I use both liberal democracy and capit-
2 alism to mean an actual trajectory, a living historic process, one that is to be
3 distinguished from normative and theoretical developments in liberal democratic
4 and capitalist thought.

5 The chapter proceeds with four sections. In the first I discuss the rapidity and
6 national diversity characteristic of the emergence of different bourgeoisies.
7 Second, I deal in detail with the emergence of the legal persona of the national
8 bourgeoisie in England and the United States. Third, I argue that the working
9 class in both countries was also legally constructed as a subject with inferior
0 rights and capabilities. Fourth and in conclusion, I explore the contemporary
1 implications of this foundational inequality for the current state of liberal
2 democracy.

3 **Making capabilities and their consequences**

4 The rich scholarship about the ascendance of capitalism documents the work of
5 making the institutional, legal, discursive, ideational and other capabilities
6 required for implementing the variable and diverse capitalisms that arise in
7 Europe. This work of making, while often highly innovative, was partly shaped
8 by the particular resources, cultures, dispositions and ideational forms of each
9 country and by the key actors whose interests shaped the process. It underlines
0 the national specificities at play in the shaping of each national capitalism and its
1 imperial geography² as well as the fact that the development of the world scale
2 was deeply intertwined with the formation of national capitalisms. The bourgeo-
3 sie sharply expanded foreign trade, which rose tenfold between 1610 and 1640,
4 and manufacturing, leading to an enormous increase of the workforce. Colonial
5 expansion was a key feature of England's rise from the beginning of the seven-
6 teenth century.

7 The growth in commerce and manufacturing was also the beginning of a new
8 political economy, with its need for specific types of protections and enable-
9 ments in each country. Though I return to this issue in more detail in the next
0 two sections, for now let me signal that in England the work of making the insti-
1 tutional and ideational infrastructure for the emergence of a national capitalism
2 based in an English-dominated imperial geography followed a rather different
3 path from that of Holland, further contributing to the national specificity of
4
5

capitalist development. In France, where the absolutist monarchy exercised far more control over the economy than it did in England, the bourgeoisie allied itself with the king against the nobility, and mercantilism was imposed, though it largely served the interests of the state. While France and England both aimed at ensuring the wealth of the prince, from the beginning the bourgeoisie in England also wanted and fought for free trade. In France, the state's major and active role in developing commerce and manufacturing and in promoting mercantilism pre-empted the emergence of the bourgeoisie as a historic subject with a distinct project. The royal absolutist state strongly supported the development of manufacturing and worldwide trade; the French bourgeoisie was formed under its protection and would bear its imprint for a long time. But notwithstanding the far larger role of the state, English- and Dutch-style mercantilism also took shape in France (which included control of the seas, creation of a company for overseas trading and the protection of monopolies). Mercantilism was at its height in France from 1663 to 1685.

The major transformations taking shape in the seventeenth and early eighteenth centuries were not immediately obvious. Even when the capitalist development of industry was taking over key economic sectors in England in the early nineteenth century, it was still far from prevalent. The industrial bourgeoisie was not yet a distinct social group; nor were wage workers. Older classes, such as the nobility, landowners, farmers, artisans and shopkeepers, were the prevalent presence in the economic landscape. They were also the source of growing criticisms of the new order they sensed was coming, criticism often in the name of values of the past or in the name of an alternative society ruled by norms of equity and reason. But only a few decades later, by the mid-nineteenth century, the bourgeoisie had become the visibly dominant class in England and the working class had become legible as a distinctly disadvantaged social group.

The illegibility of the dominance of industrial capitalism needs to be underscored, especially the fact that it remained so even as it was about to become very legible, or 'explode' on the scene. This supports the argument that in its early phases, a new dominant economic logic may not necessarily be the prevalent social form. By 1870 industrial capitalism was the dominant logic in Great Britain, but it had only changed part of Great Britain and was firmly grounded only in bounded zones of Western Europe and North America. However, it soon spread rapidly through the rise of new techniques and new industries, as well as ever larger and more powerful concentrations of capital whose field of action expanded to the world scale. Further, this expansion took place as the older state-controlled imperialisms declined, which, depending on one's interpretive categories, could easily be chosen to mark the period rather than the features of the new imperialisms. As industrial capitalism erupted on the scene, the enormously exploited national workforce became visible. This was also the moment of the rise and public recognition of a variety of workers' movements, as well as the development and implementation of new modes of domination over workers.

Even as it was reaching its zenith, Britain was already entering a phase of sharpened rivalries with ascendant powers that would challenge its position

of dominance. Britain was losing out to Germany and the United States, even though it did not look that way at the time (Beaud 1981). The often problematic legibility of major transformations in the making is underlined by the fact that only in Great Britain had the bourgeoisie become the visible dominant class by the mid-nineteenth century, even as industrial capitalism was developing in what were to become other major powers.³

Constructing the legal persona of a national bourgeoisie

There is an interesting tension in the historical development of a national bourgeoisie that needed national political institutions – notably Parliament in the case of the English bourgeoisie – to constitute itself even as its vested interests lay in imperial economic geographies. In this regard, England’s development of industrial capitalism is a natural experiment for illuminating three sets of issues. The first is the articulation of foreign trade, global pillaging and colonization with the growth and rise of a novel legal persona, the national bourgeoisie. The second is the lack of legibility of the fact that capitalism was dominant in the English economy at a time when it seemed kings and nobility were; elsewhere (Sassen 2008: chs 2 and 3) I examine how this condition recurs in diverse historical phases across time and place. I would see this illegibility of the dominance of industrial capitalism culminating in the early nineteenth century. The third is the political economy that was constructed as the bourgeoisie carved out a legal persona for itself, *a rights-bearing subject that began as a legal non-persona striving against absolutism and the nobility*. The outcome is the construction of a novel subject – a legitimate owner of means of production and a legitimate bearer of the means for powerful controls over the workers it needs and depends on. This process, extended over a century, enacted a major historic switch, which if concentrated over a briefer temporal frame would be akin to what Sewell (1980) has described as ‘events’ that disrupt existing structururations.

All of this was arising out of an older context where this history in the making was not particularly legible. Wallerstein (1974) notes that the sixteenth century was indecisive. The capitalist strata formed a class that survived politically but did not yet triumph in the political domain. The sectors benefiting from economic and geographic expansion of the capitalist system, especially in the core areas, tended to operate within the political arena as a group defined primarily by their common role in the economy. This group included farmers, merchants and industrialists with an orientation toward profit making in the world economy. Other actors – the traditional aristocracy, guilds, owners of inherited farms – fought back to maintain their status privileges. But the major historical dynamic was toward novel class formation, even as all these other groups often seemed dominant and even as the ‘vener of culture’ led to a sense of unity.

By the seventeenth century the English bourgeoisie was strong enough to defy absolutism and to legitimate a new form of government. Locke gave them some of the instruments with his *Of Civil Government* (1690). It contained a justification for the overthrow of the sovereign in the name of freedom.

Locke's emphasis on the protection of property as key to the social contract leads him to argue that if the sovereign were to take away property it would justify insurrection by the people. Locke's rejection of absolutism (which places the sovereign above the law and thus beyond civil society) pivots on his proposition that what establishes society and government (social contract) is the free consent of the citizens. Yet in Locke's work these principles were in fact confined to the 'proper' classes – those who had won themselves the right to handle their affairs – especially enlightened landowners, commercial and financial bourgeoisies, the landed nobility, clergymen and the gentry. He did not believe the working classes were capable of governing themselves. To cope with the poor he recommended force (Bourne 1969: 378). All in all, the bourgeoisie found in Locke their theoretician. Locke's ideas were also a success among the ruling classes in England and Holland and, in the eighteenth century, among jurists and philosophers in France. They were the ideas for an enlightened bourgeoisie.

Locke offered a substantive rationality for major developments already in motion by the time his work was published. His ideas corresponded to the interests of the sectors of the bourgeoisie that saw in free trade the stimulus for a new expansion of commerce and production, and in Parliament the vehicle for politically legitimating their economic project. Operating at the world scale necessitated innovation in both institutional infrastructure and operational capabilities. The use of Parliament signalled the making of a new political economy, that is to say, more than just an elementary accumulation of capital.⁴ In 1694 the Bank of England was created. It raised 1.2 million pounds in twelve days, an indication of the emergent power of capital owners. In return for lending to the government, the bank became the first English joint stock bank and was permitted to discount bills (Carruthers 1996). The government did not have to repay but only serve up interest. The New East India Company was also founded in part to lend the government money (1698). Both the New East India Company and the Bank of England were controlled by Parliament, which increased its control over the Crown (Ashley 1961: 185) and thereby enhanced the political power of the bourgeoisie.

The growing power of Parliament contained a critical political shift that enabled the formation of the bourgeoisie as a rights-bearing subject. This shift was part of a long history of accumulating partial powers and claims in the emergent capitalist class. For instance, the 1624 Statute of Monopolies regularized patent law allowing the developer of an innovation to assert a right to revenues produced by its introduction, i.e. to assert 'property rights over invention' whereas previously the Crown might have awarded prizes for innovation but granted no private returns to the innovator (Hartwell 1971: ch. 11; Douglass C. North 1981: 164ff.).⁵ Another indication of accumulating 'rights' was the resolution of a conflict surrounding the wool trade during the Stuart years concerning the extent of taxation; in the terms of the compromise the Crown received revenues, Parliament won the right to set taxation levels and merchants got the monopoly of trade (North and Thomas 1973).

1 The capabilities developed in this extended and multifaceted politico-
2 economic process of gathering advantages eventually became part of a system of
3 private property protections, enablements for global operations and the formaliza-
4 tion of political decisions that began to concentrate advantages in the emerg-
5 ing bourgeoisie. Acts of Parliament, its enhanced taxation powers (Ashley 1961),
6 and the enormous commercial expansion of eighteenth-century England were
7 critical variables in this process.

3 In the eighteenth century, long-distance trade became crucial to England's
) rapid development. Colonial domination, pillaging and exploitation of native or
0 imported workers, mostly through slavery, remained fundamental sources of
1 enrichment that contributed to trade and production. The effort included devious
2 tactics, such as the 1700 prohibition on the import of Indian calicoes, a textile
3 superior to anything made in England, which threatened domestic manufactur-
4 ers. Commerce quintupled and national income quadrupled. Foreign trade was a
5 major factor that enabled the sharp growth of the British port cities – Liverpool,
6 Manchester, Bristol and Glasgow.

7 However, a sharp difference began to take shape. While state accumulation
8 proceeded in the eighteenth century in the same domains as before (roads, water-
9 ways, harbours, fleets, administrative machinery), bourgeois accumulation took
0 a new turn: even as it proceeded through an increase in private fortunes and
1 stocks of merchandise, a growing share of capital became productive capital –
2 raw materials, machines and mills. Turgot (1795), Quesnay (1958 [1757]) and
3 Smith (1976 [1759]) saw this new logic: a net product could be extracted from
4 productive labour that could enlarge or improve production. The principal agent
5 was the bourgeoisie that had come from the merchant and banking sectors, from
6 dealers and manufacturers, and, in England, from a portion of the nobility. This
7 emergent new class articulated its economic and political project around the
8 notion of freedom, something that held across the major powers of the time. In
9 England, this class was involved with affairs of the state through Parliament: it
0 sought and secured freedom of trade and production, freedom to pay labour at its
1 lowest level, and freedom to defend against workers' alliances and revolts.

2 The emergent notions of a liberal *democracy* gave the bourgeoisie an institu-
3 tional form that enabled the 'lawful' development of a 'legitimate' system of
4 laws and regulations that privileged the bourgeoisie and property as a criterion
5 for granting rights.⁶ It sought authority rather than simply the raw power of
6 capital. This meant a government constituted through a social contract – rather
7 than the divinity of the sovereign – and through political regimes. Where it once
8 had taken shelter in royal authority against the nobility, liberalism now allowed
9 it a variety of alliances in order to advance its own projects, including alliances
0 with artisans and the petty bourgeoisie. Thus, at some point the notion of
1 national unity ceased to be constructed in terms of the monarch and became a
2 vehicle for alliances of the bourgeoisie and others against the monarch. While it
3 remained allied with the monarch through a shared interest in colonial expansion
4 and mercantilism, the English bourgeoisie knew how to use popular discontent
5 in its fight against absolutism, which was also a battle to strengthen its own

power. By the end of the eighteenth century, the idea of the nation, connected to mercantilism, was used against the king; the French and American revolutions were the most prominent formulations of this shift.⁷

Consolidating state support

We see at this time the first instantiation of what was to become the liberal state: the development of a 'legitimate' system of laws and regulations that privileged the owners of productive capital. The project of formalizing the rights of capital owners was most developed in England, but the trend was also evident in the other major powers of the time. Holland had long had a sort of embedded regime favouring merchant, banking and manufacturing capitalists. The French Revolution, a far more complex and sudden event than the more extended struggles of the English bourgeoisie, eventually brought enablements to the French bourgeoisie, but these were only rendered fully effective in the 1850s through the alliance with the monarch, Napoleon III.

The losers in this configuration were the nobility, small artisans, and, above all, the workers. The nobility, between the king and the bourgeoisie, saw their relative power and privileges decline. As for small artisans, even as they made claims against the landed nobility, a new mode of value extortion was the indirect domination by intermediaries and traders. Poor artisans did not ask for democracy and freedom but for basic protections by regulation: better prices or wages, a shorter workday and protection from foreign competition. The poorest layers of the peasantry were hurt badly by the new wave of enclosures in the mid-seventeenth century. Agricultural workers became destitute as both the earlier and later waves of enclosures expelled them from land. Various disciplining measures aimed at controlling workers and the poor generally in cities and towns all contributed to much discontent and agitation.

The enclosure movement continued strongly in the eighteenth century, especially after 1760, and increasingly took the form of laws passed by Parliament. The enclosure acts passed by Parliament illuminate the process of developing capabilities that gave the bourgeoisie economic and political instruments. In these acts Parliament formalized specific advantages for the owners of productive capital and enabled the formation of a particularly disadvantaged and vulnerable labour supply. These acts also resolved the tensions between the Crown and the bourgeoisie to the advantage of the latter. Enclosures were not new to the modern period, dating back at least to the Statute of Merton (1236) (North and Thomas 1973: 151). Enclosures were justified in terms of the positive consequences of private ownership rights for agricultural productivity (Thompson 1963: 217). Monarchies had diverse positions on enclosures (Polanyi 2001: 37–8). According to Briggs, 'Between 1761 and 1780 during the first phase of enclosure by Act of Parliament, 4039 Acts were passed: there were a further 900 between 1781 and 1800' (1959: 41).⁸ The General Enclosure Act of 1801 rationalized the procedure.⁹ The creation of this particular type of working class became a key resource for a dynamic that was expanding in

1 England: producing more in order to produce more. The implementation of this
2 project brought many changes in the organization of agriculture, mining and
3 processing. In the last third of the eighteenth century and the first third of the
4 nineteenth century, this logic was extended to a growing number of sectors:
5 clothing and textiles, machines, tools and metal domestic utensils, railroads,
6 and armaments.

7 Perhaps the key analytic import of this type of relationship between workers
8 and the bourgeoisie is that even as it progressed along different paths in the dif-
9 ferent major European powers of the time, it produced a similar outcome: a pro-
0 letariat shaped both in terms of a systemic position in the emerging new
1 economy and in terms of a particular type of legal persona through the passing
2 of a variety of laws and regulations in each of the major countries – each with its
3 own specifics. This was the making of a legal subject that *lacked critical rights
4 and enablements*, in contrast to the propertied classes, which had been granted
5 considerable rights. Both of these very different subjects were created as
6 national, and as deeply embedded in and constitutive of a ‘national economy’.
7 The progress of this nation-based liberalism across the next centuries never fully
8 overcame that original geometry of ‘lawful’ inequality, even as it allowed for
9 hard-fought struggles by workers to gain rights. Today’s capitalism, with its
0 wider global operational space and neoliberal policy frameworks, has made this
1 brutally clear. This foundational inequality in law had become less evident in the
2 preceding period marked by Keynesian policies and a strengthened social con-
3 tract in much of the world – both partly a result of workers’ struggles and the
4 state’s need for soldiers.

5 The articulation of this industrial project with a particularly disadvantaged
6 working class might suggest the necessity of that disadvantage – the need for
7 such a working class if industrial production was to proceed. While the historical
8 trajectory might further reinforce this notion, the historical record also admits
9 deeper complexity. The Stuarts in England at times sought to resist or at least
0 weaken the enclosure acts as a way of reducing the brutality and velocity through
1 which the rural workforce was made into an urban industrial labour supply. Tra-
2 ditional liberal readings see the Crown as reactionary and impeding progress.
3 But Polanyi (2001: 39) credits king and church with preventing enclosures from
4 completely tearing the social fabric apart; this may have made an extremely
5 destructive process into a somewhat more sustainable system of production and
6 innovation. The king and church were anxious about rural depopulation and
7 sought to impede the process of dislocation of agricultural workers; this brought
8 them into conflict with the local lords and nobles. Parliament, by contrast, tended
9 to favour enclosure. While Parliament seems to have usually been successful
0 legislatively, the Crown did manage to implement the system of Poor Laws,
1 which were aimed at easing the transition and protecting local authority
2 relations.¹⁰ In this effort to slow down enclosures and give some protections to
3 the disadvantaged, the state did also enable the industrial project by making life
4 somewhat more manageable for the workers and the poor even as they were
5 subjected to greater control.

Whatever paternalist protections the state may have provided for weaker groups overall, the state's major role in the process of industrial development was to strengthen the national capitalist project – through protectionist measures, the licences and monopolies of mercantilist policies, and the laws and acts that protected the rights of the propertied classes and sharply weakened the status of workers. On the one hand, the state provided political and military support for commercial and colonial expansion. On the other hand, the state used the police and the law against the poor and to suppress workers' revolts. Parliament frequently aligned with the interests of the bourgeoisie and played a crucial role in this process. For instance, a 1769 law classified the voluntary destruction of machines and the buildings that contained them as a felony, and instituted the death penalty for those found guilty of such destruction and a 1799 law prohibited the formation of workers' associations that wanted wage increases, a shorter workday or any other improvement in working conditions.¹¹

The law was used to implement a massive assault on the poor and on workers. In this process the bourgeoisie began to take shape as a privileged legal persona. The new propertied classes mostly benefited from the state's interventions, and in that sense differed from the nobility, which was itself a propertied class but played a far smaller role in stimulating extensive and innovative state work, especially in the legal domain. The emerging bourgeois propertied class included a mix of social groups, both old and new: members of the nobility involved in commercial enterprises, farming or mines; great merchants and financiers who displayed their success by purchasing estates; merchants who became manufacturers and then established mills; and manufacturers and traders who became bankers. Together they handled the country's economy, and the state helped enable this.

We can see here the creation of what we now call the 'rule of law'. In this case, it legitimated private property, protected the rights of the emerging bourgeoisie from abuses of power by the king and the nobility, and sanctioned decisive control over workers as the legitimate right of these specific propertied classes. We see here the making of a rights-bearing subject that represents a contestation of absolutist power, opens up a space for the rights of novel actors and institutionalizes overwhelming power over the workers it employs. It thus emerges as a historic subject in that it sets in motion a variety of processes shaping a new political economy. While this is only part of the formation of capitalism, it helped draw the key alignments in the emerging political economy. The developing practical and legal architecture enabled the formation of national economic projects that could accommodate foreign pillaging and trade, growing rights for the national bourgeoisie and massive social divisions inside that national unit. And yet, the rights discourse was also to become a tool for the claims by the oppressed for expanded formal protections under democracy.

All of this took place against a context of a changing relationship between the bourgeoisie and the nobility. In the second third of the nineteenth century, Britain saw a decisive change in the composition of its national capital: components linked to the development of capitalism (overseas securities,

1 domestic railroads, industrial capital, and commercial and finance capital, includ-
2 ing buildings) became dominant compared to traditional landed inheritance
3 (estates and farms).¹² Throughout the nineteenth century the landed aristocracy
4 lost its monopoly over political and local power. Many of the great reforms of
5 this century benefited the rising bourgeoisie, not the old nobility, although they
6 shared interests, were on the same side of the conflicts involving property and
7 were against the ‘masses’. In the political arena, confrontation between conserv-
8 atism (nobility) and liberalism (bourgeoisie) often masked the growing interac-
9 tions and alliances between them.

10 But nineteenth-century England is marked by the rise of the bourgeoisie. The
11 landed aristocracy did not necessarily recognize the epochal transformation afoot
12 and its displacement as a powerful political actor by the rising bourgeoisie,
13 whom it could still force into disadvantageous positions through laws and
14 decrees passed in Parliament, a body it could still control. Its displacement was
15 further veiled by the ongoing political and economic weight of traditional eco-
16 nomic institutions and activities, even though industrial capitalism was already
17 the dominant political economy.

18 While the rise of industrial capitalism in England positioned the English bour-
19 geoisie as emblematic of the formation of such a class, the other major powers
20 had their own trajectories in this process. The fact of multiple trajectories is
21 significant because they all eventually fed into the development of imperial
22 geographies and thereby engraved national features and projects in the formation
23 of the world scale. By the late 1800s, the national bourgeoisie in each country
24 pursued the development of imperial geographies for trade and investment.

25 The United States at this point emerges as an interesting case, separately from
26 the fact of its being on the way to becoming the major power in the world. Its
27 development as an industrial capitalist political economy differed from that of
28 France and Britain. It had no old feudal or agrarian society, as did Britain and
29 France, and was originally a loose confederacy with a weak central state. It also
30 lacked the medieval lineages of the legitimacy of a national sovereign that could
31 become the source of law and authority.

32 One critical difference with England lies in the origins of the American polit-
33 ical economy. While wealth in England had been grounded in land ownership,
34 the abundance of land made this system impractical in the colonies. Land distri-
35 bution differed across the colonies, but it tended to benefit ordinary people. In
36 New England, the Puritan colonies encouraged social cohesion by granting land
37 to groups of settlers through townships and church congregations, which were
38 then charged with its redistribution. Some of the colonies restricted the transfer
39 of land and maintained common land: overall, however, they preferred indi-
40 vidual ownership. Outside New England, a system of ‘head right’ prevailed –
41 land was awarded to each person immigrating to the colonies; some colonies
42 offered this to indentured servants after their terms expired. Under this system,
43 land could be purchased and sold, and many of the owners were formally
44 required to remit a quitrent to the king or an overlord, although actual collection
45 of these was spotty at best. This system lasted until the late seventeenth

century.¹³ After 1763, with the French and Indian Wars completed, the British Parliament sought to tighten imperial control over its colonies through stronger enforcement of the Navigation Acts and taxation. The closing of Boston Harbor in the early 1770s, which was seen as an assault on the economic liberty of Bostonians and an appropriation of private property without compensation or representation, shifted the colonies' relationship with England. In 1781 the Articles of Confederation were signed.

A second critical difference was a general disposition toward utility more than privilege. Thus, while generally enacting protections for private property, most colonies also enacted provisions requiring that land be productively used and developed. New England colonies frequently required either settlement or cultivation within a specified period of time. Ely (1992) provides a detailed yet concise overview of specific policies. Before the drafting of the Constitution, each state had a slightly different articulation of property rights – some were embedded in a state's constitution, some in subsequent legislation. Generally, they included some form of protection of private property, some attempt to limit monopoly power, and some trade-off between eminent domain and compensation (Ely 1992: 30–2). A number of diverse conflicts and difficult problems led to growing support for the Constitutional Convention of 1787, which would more consistently protect property rights, regulate commerce and restore public credit.

One of the key dynamics at work in the shaping of industrial capitalism is that its formation entailed the establishment of a working class and the rise of a new ruling class. Each class was a mix of social groups, though eventually some of these became the majority or the marking group. Most, if not all, of the groups within each class were, no matter how heterogeneous internally, on a particular side of the social conflicts of the epoch and the foundational economic relations taking shape. Yet the particular social, political and legal trajectories through which the two groupings were constituted diverged significantly across countries even as key systemic features of the position of each were similar in an abstract sense.

Constructing the legality of a disadvantaged subject

The key analytic issue I want to focus on has received less attention than have the larger social and economic dynamics in the shaping of the working class. It is the active construction of the legal persona of the worker in juxtaposition to that of the owner of productive capital – that is to say, the class that ran the economy. There are rich debates about whether the law generally, particularly in the case of workers, is a derivative factor or can be constitutive (Bok 1971; Rogers 1990; Forbath 1991; Archer 1998; Steinfeld 2001). It is not my purpose here to engage, let alone settle, these debates. Rather, I want to focus on the law as one factor in shaping the disadvantage of workers, a factor sufficiently formalized and explicit as to render legible the work of constructing such a disadvantaged subject. Nor does this particular role of the law preclude the fact

1 that the law was also used by workers and by third parties to claim rights *for*
2 workers. What workers, their organizations and political parties did with these
3 laws varied depending on the conditions in their countries and the institutional
4 channel through which this work proceeded.

5 British legislation was clearly aimed at controlling workers. Engels (1892)
6 and others at the time observed that the law and the actual conditions of workers
7 had made the proletariat de facto slaves of the property-holding class, with the
8 added advantage that employers could dismiss workers and need not be stuck
9 with them, as was the case with slavery. Workers were subjected to severe regu-
0 lations, repression by fines, wage reductions or dismissal; unhealthy and unsafe
1 workplaces; harsh work; and long workdays.¹⁴ These conditions were the bases
2 on which British industry developed in the nineteenth century. The relation
3 between the emergent manufacturing working class and the owners of the facto-
4 ries was, at this point, a sort of primitive accumulation, where even minor profit
5 differentials mattered and there were almost none of the intermediary structures
6 that came later with the development of the welfare and regulatory aspects of the
7 state.

8 By the mid-nineteenth century, the British industrial system was highly diver-
9 sified and hence engendered a highly diversified working class. The previous
0 system continued to exist through craftwork, homework, manufactories and
1 workhouses, as well as through the mill system, which appeared at the end of the
2 eighteenth century. Handlooms remained dominant for cotton weaving until
3 1829–31. What did develop was the factory system. The emergence of the
4 factory and putting-out systems signalled the emergence of a new logic. The
5 latter was a new form of work in the home that put workers at a sharp disadvan-
6 tage and, to variable extents, engaged unpaid family labour; it gave employers
7 full control over wage levels. In 1830, one-third of garments were produced
8 through this system in London.

9 As had been the case with the Corn Laws, regulating factories became the site
0 for playing out the opposing vested interests of agriculture-linked elites and
1 manufacturing capitalists. A series of laws called the Factory Acts aimed at pro-
2 tecting workers in key manufacturing sectors.¹⁵ In general, Protectionist and
3 Tory MPs were more likely to support factory legislation, while Radicals
4 opposed the ‘improper’ intrusion of the state (Rubinstein 1998: 80). The Tories’
5 support was tied to their support for maintaining the Corn Laws: noting that
6 most workers remained in agriculture, Tories argued that the best way to protect
7 workers was to maintain agricultural protection, which would prevent the
8 outflow of workers from the countryside to the city and avert high unemploy-
9 ment. There were other conflicts and alliances, often unrelated to concern for the
0 actual conditions of workers, that steered the legislation.¹⁶

1 As English industrial capitalism accelerated, manufacturers sharpened their
2 attempts to control workers. A supplementary compromise factory act was
3 passed in August 1850, which lengthened the workday of women and children to
4 ten and a half hours for the first five days of the week, and seven and a half hours
5 on Saturday. Although England in 1848 was not marked by the sharp social

uprisings taking place on the Continent, manufacturers used it as an excuse to clamp down on workers by eliminating meals at work, restoring night work for men, dismissing women and children and so forth (Marx 1977: 398). This basically revived the ‘relay system’ used by employers to evade the regulations by simply shifting young workers to another position in the factory (400–3). English courts had shown themselves to be unwilling to punish manufacturers for such practices; an 1850 decision by the Court of Exchequer ruled that these practices violated the spirit of the law but not its letter, effectively legalizing the practice. Throughout, class antagonism was continually flaring up, and factory conditions now varied widely across the country, depending on the sentiments of factory owners, enforcement of legislation and other variables.

The traditional account about labour in this period identifies legal change as a type of natural, perhaps inevitable, outcome or as a change running parallel to the social and economic forces that shape a market economy.¹⁷ Although English workers were ‘free’ in the sense that they were not owned or bonded servants, the implementation of a formal apparatus for the control of workers and the possibility of the direct exercise of power by employers over workers make for a far more problematic account. One way into the bundle of issues is a focus on the rules that governed the treatment of British workers who breached their labour contracts in the nineteenth century. Steinfeld (2001) argues that the origins of what we currently call free labour (that is, the right to quit a job without penalty or other forms of pressure such as physical restraint or criminal punishment) did not emerge from market forces and the expansion of contractual social relations in the early nineteenth century, as is commonly assumed. Instead, he finds that ‘free waged labor’ came out of ‘the restrictions placed on freedom of contract by the social and economic legislation adopted during the final quarter of the century’ (2001: 10). Steinfeld uses court records, judicial opinions, parliamentary debates and data about criminal and civil prosecutions of labour contract breaches between 1857 and 1873 to demonstrate that for much of the nineteenth century British workers were not free, in the sense of twenty-first-century notions of free labour.¹⁸ If British workers left their employers before they completed their contracts, they faced a variety of non-pecuniary punishments including prison terms with hard labour and whipping.¹⁹ For example, in 1860, 11,938 British workers were prosecuted for breach of contract, among whom many were coal miners and iron workers. A majority of these workers received criminal convictions. Steinfeld writes, ‘Of the 7,000-odd convicted, 1,699 served a sentence in the house of correction, 1,971 were fined, 3,380 received other punishments (wages abated and costs assessed, in all likelihood), and one person was ordered whipped’ (2001: 80–1). The evidence shows a sharp expansion of penal sanctions in Britain between 1823 and the 1860s, indicating an increase in prosecutions during affluent moments in Britain’s trade cycle. When unemployment was high, prosecutions tailed off, as happened between 1857 and 1873 though they stayed above 7,000 a year. Further penal sanctions also reached British workers indirectly through the threat of prosecution should the worker quit or refuse to comply with orders.

1 The timing of various repressive measures captures the accelerated and massive
2 drive toward capital accumulation. For instance, trade unions and Jacobin
3 associations were organizations with the potential to gain rights and become a
4 stronger subject of liberal democratic capitalism. The 1799 Combination Act
5 outlawed them, a move that coincided with the beginnings of the sharp expansion
6 in the English economy (Rubinstein 1998: 20). Yet, in character with the
7 contradictions of the struggle by the bourgeoisie, their outlawing unintentionally
8 brought these two groups into association (Thompson 1963: 500). The Combination
9 Act that prohibited unions was repealed in 1824 but partly reinstated in
0 1825. The campaign in the 1820s to abolish the Combination Act found some
1 support in Parliament (in Francis Place and Joseph Hume, though Thompson
2 qualifies this by arguing [517–18] that Place and Hume crushed more radical
3 proposals) among those who argued that the act prevented the cooperation of
4 workers and owners. The act's repeal in 1824 engendered a wave of strikes and
5 riots, and a new parliamentary committee was set up to investigate the repeal.
6 The new act in 1825 allowed 'combination' only to discuss demands concerning
7 wages and hours. Unionization was then not illegal as such, but it was still
8 tightly regulated (Rubinstein 1998: 20ff.; Thompson 1963: 516ff.). Nevertheless,
9 Thompson argues it was during these years (1799–1820) that union organization
0 made its greatest advances (503–4). He further notes that sufficient legislation
1 already existed to make any particular union activity illegal; the legislation was
2 passed mainly to intimidate by sweepingly prohibiting all combination. He suggests
3 that it was used much less against artisans than factory workers, although
4 the threat of its use was probably common. Even in factories, however, the
5 Combination Act was not often used to effect prosecution; rather, an older piece
6 of legislation was often cited (504–7; Briggs 1959: 136). A 'semi-legal' informal
7 world of 'combinations' (mutual benefit societies, trade clubs and so on)
8 was tolerated and created organizational infrastructure for the working class
9 (Thompson 1963: 505, 508).

0 With the 1825 act, British workers had to give their employers one-month's
1 notice of their intention to strike; if they failed to do so, they faced penal sanctions.
2 The British historian D.C. Woods (1982) finds that 38 per cent of criminal
3 prosecutions in coal-mining districts between 1858 and 1875 were for unlawful
4 strike actions rather than for unlawful quitting. If an employer signed a contract
5 with a worker and then fired her, technically she could still collect wages on a
6 'minimum' number of days of employment. Yet the Master and Servant Acts
7 were rarely enforced against employers. For example, judges rarely forced
8 employers to hire particular employees when trade was slow (Woods 1982: 165).
9 Employers had 'it both ways, criminally enforcing long agreements while at the
0 same time disclaiming any responsibility for finding work during the term of
1 the contract if fired or not hired' (107). Here again we can see how the laws of the
2 early liberal democracy instituted legally unequal subjects, a possibility both
3 premised on and enabled by differentiated relationships to property.

4 The developments in England launched a massive phase in the capitalist
5 transformation of production. Production increased sharply, the system of wages

was extended, the workforce grew and workers' struggles multiplied. At the heart of this new type of economic logic were the mills and multiple technical inventions to promote increased production. Mills, typically housed in four-storey brick buildings, employed hundreds of workers and were controlled like prisons. The exploited workers, many of whom were women and children, came from many different places and social groups, from farmers driven out of the countryside by enclosures to small artisans driven out of business by merchants. The working class that was taking shape was enormously diverse, but most workers were equally desperate.²⁰ This wide diversity of origins in the working class was constituted as the raw matter for the work process: this diversity was being reshaped by a particular type of logic.

Just as the formation of the national state in the United States followed a distinct trajectory, so did the shaping of workers' disadvantage and the ensuing struggles by workers. In addition, there was no strong class-based political movement that could fight for workers' rights. As in England, employers used the state to formalize their advantage over workers, but instead of Parliament the United States had the courts. US laws provided, as they continue to do, far fewer protections against abuse, injury, illness and unemployment (e.g. Forbath 1991: chs 1 and 5; Rogers 1990) than did European laws in response to workers' mobilization in the late 1800s and on. They covered, and continue to do so, a small share of all workers and fail to stipulate terms of employment that ensure basic protections (Bok 1971). While Europe's major powers saw the growth of labour organizations that took on broad class-based programmes of reform and redistribution by the end of the nineteenth century, in the United States the American Federation of Labor rejected or avoided such broad programmes (Forbath 1991; Bok 1971). Most of the scholarship explains this American difference or 'exceptionalism' in terms of the conservatism and individualism of US workers.²¹ However, some scholars (Bok 1971) have seen the law and the courts, rather than workers' individualism, as critical in explaining US workers' disadvantage. A few have consistently rejected the notion of American workers' 'exceptionalism' (Gutman 1976; Katznelson and Zolberg 1986; Montgomery 1980; Sassen 1988, 1999), and lower rates of workers' organization than in European countries, notably France (Katznelson and Zolberg 1986).

Without reducing the weight of these diverse explanations, I want to isolate the one centred on the role of the law and its institutional orders to see how the law has fed the construction of the disadvantage of workers (Perlman 1928). For example, the US government attacked the labour movement so aggressively that by the end of the 1890s it had been seriously weakened and, with few exceptions, opted for more moderate tactics. In Europe, by contrast, state attacks on workers had radicalized the large labour unions. It was through the courts, including their policy-making, that the US state exercised this function, much more so than through legislative or executive action (Bok 1971). Forbath (1991: ch. 3) documents how one union was destroyed through the courts' outlawing sympathy strikes, ordering mass imprisonments and putting armed force behind court decrees.²² Judges and courts played a critical role not just in judiciary action but

1 also in policy development, since the US government throughout the nineteenth
2 century lacked a professional civil service, that is to say, a class of state workers
3 that had tenure in the state bureaucracies and agencies, a key feature of the major
4 European states. The legal personae of the worker and of the owner of productive
5 capital were in good part established through a series of major court decisions.

6 There is a specific American prehistory to these nineteenth-century develop-
7 ments. Employment law in colonial America varied by location. But it was based
8 on that of the Old World (Ray *et al.* 1999). The prevalence of slavery meant that
9 in the eighteenth century much of the labour force was not free; employers could
0 be owners or masters who used slaves, apprentices and/or indentured servants.²³
1 Unlike British workers, roughly after 1830 they generally experienced no civil or
2 criminal penalties for labour breaches.²⁴ This was due to the existence of chattel
3 slavery in the United States and the vigorous efforts of Northern wage earners to
4 abolish slavery – and any penal sanctions that evoked it – in Northern states
5 where wages became common after 1820. The particular freedoms of American
6 workers were not a result of capitalist market forces but reflected strong political
7 and moral forces (such as the abolitionist movements of the North). Other legal
8 historians discuss the persistence of coercion in the United States when free
9 labour relations were supposed to be the rule of law. Writing about labour rela-
0 tions after the Civil War, Amy Dru Stanley (1998) notes that local laws against
1 the poor worked to coerce transient individuals into the workforce, even though
2 the Thirteenth Amendment to the Constitution abolished slavery. While American
3 workers were free from penal sanctions (unlike British workers), they were
4 coerced and regulated through a process called wage forfeiture. Under this prac-
5 tice, a worker who left a job before its completion would lose any unpaid wages
6 to the employer. British judiciaries outlawed this practice, but in the United States
7 employers used this practice as a method of controlling workers.²⁵

8 The pertinent laws in the 1800s and early 1900s stated that the relationship
9 between the American worker and her/his employer was simply a matter of con-
0 tract. This permeated the American legal landscape. Courts conceptualized
1 labour largely in terms of the right to contract, making it difficult for American
2 workers to bargain for better work conditions. For example, in a landmark case
3 (*Lochner v. New York*), the US Supreme Court ruled that a New York state
4 labour law – which regulated the number of hours a baker could work – was
5 unconstitutional because it violated an individual's fundamental right to engage
6 in contracts.²⁶ The freedom to exchange labour was also part of the common law
7 under the doctrine known as employment-at-will (Feinman 1976).

8 Because of the employment-at-will doctrine, many American workers did not
9 receive remedy for workplace injuries. Many employers used defences based on
0 contract liberty to escape liability, including contributory negligence (the work-
1 er's actions contributed to the injury), assumption of risk (the worker assumed
2 the risk of the danger he/she was engaged in) and the fellow-servant rule (Finkin
3 *et al.* 1989). The freedom to enter contracts also largely protected corporate
4 employers to the detriment of American workers who assembled or organized to
5 improve worker conditions (Forbath 1991).

Employers' use of labour injunctions as legal weapons was well established at the turn of the century. A court-issued labour injunction banned union activities (that is, picketing) during labour disputes. Injunctions also forbade individuals and groups from boycotting an employer. The injunction was an effective weapon through which those who violated the court order could be fined or sentenced to prison. In the 1870s, employers used the labour injunction to fight strike activity when it became prominent once again (particularly on the railways). Courts recognized that individuals could withhold their own labour from employers, but they did not believe that individuals and groups could protest and intimidate other workers and customers. Courts used a theory that, no matter how peaceful, moral intimidation by workers and/or appealing to customers created hostile environments that interfered with employers' businesses. Conspiracy charges were becoming a less effective tool for employers as juries became more sympathetic to unions (both because there was more public support for unions and because workers were increasingly represented on juries). Employers began leaning more on injunctions against labour. The Debs (1895) case ruled this constitutional (Taylor and Witney 1992: 19ff.). This case originated in a dispute between the Pullman Car Company and the American Railway Union in 1894 over a wage cut and the dismissal of union leaders. When the strike failed, the union appealed to railway companies to boycott Pullman cars; when the railways refused, the strikes spread throughout the railway industry. Since the railways were involved in interstate commerce, an injunction was filed against the union.²⁷

Employers also used antitrust laws to appeal to the courts to control the activity of labour unions. In *Loewe v. Lawlor*, the Supreme Court allowed the Sherman Antitrust Act of 1890 to be enforced against unions that maintained unfair employer lists.²⁸ In an attempt to allow unions to organize without fear of antitrust suits, Congress passed the Clayton Act of 1914.²⁹ But while under the Sherman Act only the government could file to obtain an injunction in an anti-trust case, Clayton wound up being interpreted as extending this capacity to employers (Taylor and Witney 1992: 47).

However, as industrial capitalism became an increasingly massive process, the workforce of citizens and immigrants became a force to be reckoned with as well. Both in the major European powers and in the United States, notwithstanding their different trajectories of labour organizing and of employers' uses of the state to control workers, the 1900s saw significant victories for workers' causes. In the United States, the New Deal and its accompanying legislation created a revolution in American labour law. Many of the legal tools from the nineteenth century discussed above were changed. Eventually, employers' widespread use of labour injunctions resulted in the 1932 Norris-LaGuardia Anti-Injunction Act – an attempt to give workers more protections. Congress intended for the act to strengthen workers' rights to assemble and stop courts from prohibiting union organization, strikes and assembly. Some courts remained hostile to workers' activities and continued issuing injunctions during labour disputes (A. Cox 2001: 17–51). But in 1935, Congress passed the Wagner Act (currently known as the

1 National Labor Relations Act [NLRA]), which gave workers the right to
2 organize and engage in collective bargaining or other orchestrated activities; it
3 also formed the National Labor Relations Board (NLRB) to prohibit employers'
4 unfair labour practices and to require workers' compensation.

5 These hard-won rights for workers were further enabled by the ascendance of
6 a type of economy that needed people as workers and as consumers. This is
7 clearest in the expansion of mass manufacturing, mass consumption, mass con-
8 struction of suburbs and so on. The associated growth of a prosperous working
9 class and a rising middle class signalled the beginning of a fully realized liberal
0 democratic system. But the crises of the 1970s and the rise of a new global neo-
1 liberalism made visible the exceptionalism of that expanded prosperity of
2 workers. Despite the gains of the twentieth century, the political situation and
3 power of workers is precarious, as is evident in the loss of workplace rights and
4 the sharp increase in the rights of employers. Does this show us that that original
5 making of two foundationally unequal subjects cannot be overridden through
6 liberal democratic regimes by themselves?
7

8 **Conclusion: continuities in contemporary liberal democratic** 9 **capitalism** 0

1 The histories discussed in this chapter point to the limits of the rule of law and
2 rights-based legal proceduralism in securing equality in the law. While not the
3 subject of this chapter, elsewhere I have extended this argument to the limits of
4 electoral rights and electoral proceduralism in securing types of equality that go
5 beyond partial formalisms, e.g. the right to vote, and are actually substantive, e.g.
6 making one's vote count to launch new agendas. As I indicate throughout the
7 chapter, these histories are charged with contradictions. The extreme inequality led
8 to vigorous class conflict and struggles by the disadvantaged to gain (some) rights
9 and protections. The regulatory state and the Keynesian social contract are prod-
0 ucts of these struggles. They illuminate how powerlessness can be complex; in that
1 complexity lies the possibility that the powerless also make history.

2 At the heart of liberal democracy, both as practice and as doctrine, there is a
3 tension between the privileging of property rights and a more substantive under-
4 standing of equality, including today, human rights. That tension has never been
5 resolved. The Keynesian period produced the conditions for a prosperous and
6 growing middle class in many countries and for an active working class. Con-
7 ceivably this could have been a step in a liberal democratic trajectory that was an
8 advance over the past and was to continue and bring only more equality. But
9 today's phase of global neoliberalism shows us otherwise – an impoverishment
0 of the traditional modest middle classes and working classes in the older liberal
1 democracies – even as some of the newer liberal democracies have entered the
2 process of expanded middle classes, evident in India.

3 The potential of liberal democracy to enable struggles by the disadvantaged –
4 both in the past and today in emergent democracies – showed its promise in the
5 regulatory state and in the Keynesian social contract. But it may also be showing

its limits in the current phase of global neoliberalism, with a return to often extreme inequalities and extreme poverty of a sort that liberals considered part of the past during the Keynesian phase. Today's phase shows us liberal democracy's limits to ensure ongoing progress for the disadvantaged and ongoing curtailment of extreme power and wealth. Instead, the change concerns the composition, rather than the existence, of each extreme. The disadvantaged today include not only impoverished middle classes but also a growing range of capitalist firms that dominated national capitalisms. And the privileged include global elites with thinning national interests and increasingly dominant sovereign wealth-funds which are reshaping the logics of capitalism. Many of the economic, organizational and ideational capabilities historically made by the rising bourgeoisie still exist today, but they have jumped organizing logics.

Ultimately, liberal democracy has not succeeded in overcoming the foundational inequality of its two historic subjects. This does not preclude that, imperfect as it is, it might still be the best option. I could have agreed with this had I not have witnessed the current era of global neoliberalism, and its disastrous social and economic outcomes.

Notes

- 1 This can be partly explained, I posit, because a given capability is not only specific to a formation but also relational vis-à-vis other capabilities in that formation; the differential capabilities of each the worker and the factory owner are clearly a relational condition that can carry over even as each subject undergoes significant transformation.
- 2 The question of periodization is always subject to debate and revision. I chose Beaud's (1981: 115ff.) identification of three phases in capitalist industrialization on a world scale: 1780–1880, 1880–1950 and 1950 onward. Each of these phases is marked by specific sectoral and geographic dimensions. What follows owes much to Beaud.
- 3 Among the other major powers in Europe at the time, Holland had stabilized, Portugal and Spain were declining, and Russia continued its expansion toward Asia. During the Restoration France took possession again of its colonies, which had been neglected during the revolution and the empire. This neglect may partly have been connected to the fact that industrial capitalism was moving slowly, further signalling the importance of colonialism for capitalism. French colonial expansion was mostly military.
- 4 Sir Dudley North wrote in his 'Discourse upon Trade' (1856 [1691]) in defence of free trade, which was clearly different from mercantilism. There is a strong correspondence between the ideas of political freedom (Locke) and the necessity for economic liberalism (North).
- 5 Previously patents had been caught up in a system of monarchial privilege and favours, dating back at least to 1331, whereby the Crown used the issuing of a patent or trade monopoly to expand its coffers. This came under attack during the second half of the sixteenth century (North and Thomas 1973: 147ff.).
- 6 It was the rich peasants, the dealers, the rich gentry and locally important men, the banking and trading bourgeoisie, the jurists and the liberal professions who asked for parliamentary democracy (not necessarily in those words), freedom and property. These groups represented an important new social force, underestimated by the monarchy re-established after Cromwell's death. In a compromise the monarch agreed to

- 1 respect a 'Declaration of Rights' (1689), which asserted that the king could not
2 suspend the application of the laws, collect taxes or raise and maintain an army in
3 times of peace without the consent of Parliament.
- 4 7 Wallerstein (1974) notes that the bourgeoisie identified with the nation-state, but it
5 could have identified with other entities, notably other bourgeois classes in other
6 nation-states. The bourgeoisie became conscious of its position in a system but did so
7 within the frame of the nation-state. There were other choices: they could have
8 become conscious of themselves as a world class, and many groups pushed for such a
9 definition. There were also capitalist farmers in the peripheral areas. At the height of
0 Charles V's reign, many in the Low Countries, southern Germany, northern Italy and
1 elsewhere tied their hopes to the imperial aspirations of the Hapsburgs: these groups
2 were a social stratum but could have become a class. The failure of the empire made
3 the bourgeoisie in Europe realize that their fate was tied to nation-states. This points
4 to the existence of possible alternative trajectories and thereby de-essentializes the
5 historical record, and, more specifically, it points to contestations of the nation-state
6 and thereby de-essentializes the latter.
- 7 8 Briggs (1984) gives 1,300 acts from 1760 to 1801, and another 1,000 from 1800 to 1820.
- 8 9 After 1801, 'The procedure used was usually enclosure by act of parliament rather
9 than by voluntary agreement or pressure. A successful Enclosure Act did not require
0 local unanimity but it did require enough money to pay for the lawyers' and surveyors'
1 fees and for fences, hedges, roads, and drainage after the bill had been passed.
2 This was largely a formality since the Enclosure Commissioners appointed to survey
3 the land invariably favoured the parties wishing to enclose and so, too did Parliament'
4 (Briggs 1984: 172).
- 5 10 The reasons for intervention varied, but at the heart was a concern about the rising
6 population (especially in the urban working population). In the late eighteenth century
7 this increased the demand for cheap food, creating further pressure for agricultural
8 improvement.
- 9 11 Thus troops were sent to break up the riots in 1779 in Lancaster and in 1796 in
0 Yorkshire.
- 1 12 In 1819 there was what we might describe as a return to sound money (Briggs 1984:
2 201). The 1825 Bank Charter Act liberalized country banks; the 1826 Banking Act
3 had deflationary effects; and so on. The 1844 Bank Charter Act established that only
4 the Bank of England could issue paper bank notes. The 1844–61 corporation laws
5 (McNeill 1986: 507) allowed all companies, except banks, to become limited liability
6 concerns; banks were allowed in 1858.
- 7 13 It was most successful in Virginia, Maryland and Pennsylvania; it was *completely*
8 absent in New England, as residents resisted its feudal overtones (Ely 1992: 11ff.).
- 9 14 Women and children were a large part of the workforce. In 1834 children under thir-
0 teen made up 13 per cent of the workforce in the English cotton industry; 5 per cent
1 by 1850; and 14 per cent in 1874 (Beaud 1981: 39).
- 2 15 The manufacturing sector was quite diverse and included wool, silk, cotton and flax
3 spun or woven by steam or waterpower. Other sectors were knitwear, lace, printed
4 fabric, bleachers, dyes, metal wares, pottery and glass manufacture. And there was an
5 agricultural and mining proletariat. The Factory Acts were passed to protect women
6 and children, the more vulnerable workers, though this in turn engendered efforts
7 among employers to limit these protections. The 1819 Cotton Factory Act prohibited
8 child labour (under nine years old) in cotton factories and limited hours of work for
9 ages nine to eighteen. The 1833 Factory Act required some schooling for children.
0 The 1842 Mines Act prohibited girls, women and boys under ten from working under-
1 ground. The 1844 Factory Act limited the hours of work for children aged eight to
2 thirteen and women in factories; a related bill mandated that the workday should
3 begin at the same time every day (this was the first time Parliament regulated hours of
4 work for adult males) and that clocks should be publicly visible, and it lowered the

- minimum working age from nine to eight (Marx 1977: 394; Rubinstein 1998: 80). In 1845, calico printing works were subjected to safety legislation (Rubinstein 1998: 80). The 1847 Factory Act—Ten Hours' Bill limited work for women and children to ten hours, and it de facto applied to men, since most factory work also required some child labour (McNeill 1986: 508).
- 16 During this period the 1833 Emancipation Act was also passed, which abolished slavery or, rather, 'administered freedom drop by drop' (Marx 1977: 392).
 - 17 In this account, workers were not free in the medieval period but gained legal freedoms in the late fourteenth and fifteenth centuries when Englishmen were allowed to work for wages. The law of the employer-employee was known as the law of 'master and servant' for everyone except house servants and apprentices.
 - 18 This is similar to arguments made by Steinfeld in his earlier work on the United States, in which he writes that the replacement of the unfree labour with free labour was not an inevitable by-product of eighteenth- or nineteenth-century capitalism. He argues instead that free labour resulted from struggles in which republicanism, the American Revolution and the persistence of the increasingly odious institution of black slavery (1991: 137–46) impelled average American working men and women to act (123–7, 181).
 - 19 The ability of magistrates to penalize growing numbers of British workers derived from revisions of the Master and Servant Acts, which regulated the interactions between employers and employees.
 - 20 Periods of major social transformation contain the possibility of major upheavals in people's lives and livelihoods, as well as a sharp increase in the level of desperation. The elimination of serfdom had a similar effect in Prussia. And, as I will argue later, the current formation of a highly mixed class of needed workers in major developed economies evinces similar patterns. One could use these features of the formation of a new workforce as an indicator of major transformations.
 - 21 There were other factors, such as the ethnic fragmentation of the American working class, that are often used to explain the failure to organize. For a critique of this factor, see Wilentz (1984). Further, the working classes in all the major European powers had immigrant workers in the 1800s (Sassen 1999), a fact that is not quite made part of 'official' European history.
 - 22 Forbath observes (1991: 27) that the framers of the Constitution, concerned about factionalisms, particularly the possibility of a factionalism of the poor that might lead to political moves to forcefully redistribute wealth, placed matters of property and markets in a suprapolitical realm of private right: these were then constituted as matters of law and not politics. From the perspective of contestation during the period of industrialization, the fact of a diffuse federation made organization difficult, even if early on (by the 1830s) white men had the right to vote: but 'there was no unitary state to defend or transform' (Katznelson 1985: 273).
 - 23 In 1740 South Carolina declared slaves 'to be chattels personal, in the hands of their owners and possessors', and hence could be purchased, sold, inherited, taxed or seized to pay a master's debts (Ely 1992: 15).
 - 24 Steinfeld (1991) also points out that while criminal penalties for employment breaches were not the norm in the United States, some American workers faced the same 'unfree' labour environments as their British counterparts. Not all US workers were free from penal sanctions after 1830. Steinfeld examines groups of workers who continued to face penal sanctions after 1830: sailors who were jailed if they quit; and Southern sharecroppers who faced punishments if they breached work agreements. He uses these (and other) examples to suggest that even in the comparatively free labour context of the United States, workers' actual freedoms were frequently at risk.
 - 25 Early labour organizers were typically attacked by employers through the courts under conspiracy charges drawn from English common law. The first such case was *Commonwealth v. Pullis* (1806, Philadelphia). The place of common law in the

republic was already controversial; republicans wanted only legislatively enacted law to be binding and believed that the power of the police (administration of law) rested exclusively with the legislature and that just outcomes would emerge from a free market. Using the common law, the journeymen combinations (organizations) were seen as a conspiracy. From 1806 to 1842, there were seventeen such trials. Judges typically handed down small fines, with threats of higher fines for repeat offenders; juries were typically composed of merchants and employers (Taylor and Witney 1992: 6–7; Tomlins 1993: 134). These cases tended to invoke the public welfare as a criterion for judging combinations: judges advocated common law as the source of this welfare; radicals advocated the market. Through the 1820s and into the 1830s, the emphasis shifted from forbidding combination as such to the lawfulness of the means used and ends pursued (Tomlins 1993: 144–7).

- 26 In *Lochner v. New York* (1905) the Court threw out a statute restricting work in bakeries to ten hours a day or sixty hours per week because it violated the liberty of contract embodied in the Fourteenth Amendment. The Court argued that long hours did not endanger the *health* of workers; therefore, the New York legislation was intended to regulate labour relations, not protect health. This decision embodied the laissez-faire libertarian outlook and provided the foundation for stifling Progressive attempts at reforms in the states for the next thirty years (until the depression) (Ely 1992: 103). The Court remained open to cases where health and safety were obviously at stake, for example, in mining and industrial accidents. Further, some restrictions in working hours were allowed. For example, *Muller v. Oregon* (1908) allowed the limitation of working hours for women in factories and laundries to ten hours per day, on the grounds of ‘special health needs’ (104). The Court struck down prohibitions of ‘yellow dog contracts’, which stipulated that employees could not belong to a union, since these prohibitions would interfere in contracts (formal equality as a screen for maintenance of inequality). Labour unsurprisingly saw this as confirmation of anti-union bias in the courts (105). The courts were also reluctant to set minimum wages: *Adkins v. Children’s Hospital* (1923) overruled a DC statute establishing a minimum wage for women. Similarly, it struck down a Kansas compulsory wage arbitration system in *Charles Wolff Packing Company v. Court of Industrial Relations of Kansas* (1923). Most of these decisions relied on contract logic.
- 27 By 1931, 1,845 injunctions were issued (Witte 1932: 234, as reported in Taylor and Witney 1992: 20). The *Debs* decision also upheld injunctions against people who might have aided workers in a labour dispute, that is to say, it applied to ‘all other people whomsoever’ who were ‘interfering in any way whatsoever’.
- 28 The Sherman Antitrust Act declared illegal every contract or combination in restraint of trade among the states. Sherman was applied to unions as well: the clauses in the act outlawing combination and targeting monopolists did not specifically *exclude* labour, so the Court applied the act to unions (Taylor and Witney 1992: 37). The first application to a union came in Louisiana in 1893; the Court found that the interruption of trade resulting from a strike constituted a restraint of trade, forbidden under the act (38). The Supreme Court declined to determine whether the act applied to unions in 1895 (*In Re Debs*), but found that it applied to unions in the *Danbury Hatters* case (*Loewe v. Lawlor* 1908). In this case, the United Hatters brought pressure on Loewe & Company by organizing a successful nationwide boycott; a circuit court found for the union, but the Supreme Court reversed the decision. A second case in 1915 – *Lawlor v. Loewe* – ruled that damages could be recovered from the union and its membership.
- 29 The Clayton Act (1914) was an attempt to outlaw specific types of competitive behaviour that were thought to result in monopoly conditions (Fligstein 1990: 25).

