

# INTRODUCTION: LAW AND NEOLIBERALISM

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“Neoliberalism” refers to the revival of the doctrines of classical economic liberalism, also called *laissez-faire*, in politics, ideas, and law. These revived doctrines have taken new form in new settings: the “neo-” means not just that they are back, but that they are also different, a new generation of arguments. What unites the two periods of economic liberalism is their political effect: the assertion and defense of particular market imperatives and unequal economic power against political intervention. Neoliberalism’s advance over the past few decades has reshaped most important domains of public and private life, and the law has been no exception. From constitutional doctrine to financial regulation to intellectual property and family law, market and market-mimicking approaches are now commonplace in our jurisprudence.

While the term “neoliberalism” may be unfamiliar to some American legal audiences, it is a common part of the scholarly lexicons of many disciplines and is widely used elsewhere in the world, notably in Latin America and Europe. Some of the explanation for the term’s unfamiliarity may be parochialism.<sup>1</sup> But in the United States in particular, neoliberalism’s political expression has proven less the reincarnation of a doctrine thought to be abandoned (classical liberalism) than the intensification of a familiar and longstanding “anti-regulatory” politics.<sup>2</sup> Familiar as this political expression may be, it is our

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1. As Jamie Peck observes, in spite of the association of neoliberalism with a “distinctively American form of ‘free-market’ capitalism . . . the term conspicuously lacks purchase in the United States itself—outside graduate-school seminar room and the organs of the left intelligentsia,” and “has largely remained a subterranean critics’ word.” JAMIE PECK, *CONSTRUCTIONS OF NEOLIBERAL REASON* 1–2 (2010).

2. A combination of libertarianism and small-business, antistatist politics persisted throughout the twentieth century, forming a line connecting resistance to the New Deal, enthusiasm for the antiplanning arguments of Friedrich Hayek’s *Road to Serfdom*, and persistent elite mobilization against the regulatory and welfare states. ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012). This last found famous expression in soon-to-be Justice

contention that U.S. legal scholars have much to gain by considering a variety of important changes in legal doctrine and scholarship through the lens of neoliberalism. We hope that, in demonstrating this point, the present issue of *Law & Contemporary Problems* will contribute to situating current legal debates in relation to global and long-term contests between market imperatives and democratic demands.

Alongside diverse academic uses of neoliberalism, political leaders and social movements deploy the term variously in concrete struggles in different national settings. The result is a range of meanings that leaves some scholars worrying that the term is too vague or polemical for responsible use.<sup>3</sup> We contend that to give it up would be a serious intellectual loss, and we hope in this special issue to bring it more fully into legal scholarship. We gladly acknowledge that neoliberalism is not conceptually neat and cannot be defined by a set of necessary and sufficient conditions for its use—a problem, if it is a problem, that neoliberalism shares with many other “essentially contested concepts,” such as conservatism, individualism, and democracy.<sup>4</sup> We define neoliberalism instead *contextually*, with reference to the situations in which neoliberal claims are prominent, and *pragmatically*, in terms of what those claims accomplish. Neoliberalism is an overlapping set of arguments and premises that are not always entirely mutually consistent, and that are united by their tendency to support market imperatives and unequal economic power in the context of political conflicts that are characteristic of the present historical moment.

As we use it here, neoliberalism refers to a set of recurring claims made by policymakers, advocates, and scholars in the ongoing contest between the imperatives of market economies and nonmarket values grounded in the

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Lewis Powell's 1971 memorandum for the Chamber of Commerce, urging a concerted campaign against “socialism.” Memorandum from Lewis F. Powell to Eugene Sydnor, *Attack on American Free Enterprise System* (Aug. 23, 1971), available at <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [hereinafter Powell Memorandum].

3. Some of the doubt arises from the fact that those who use the term are mainly critics of what they call neoliberalism, while few, if any, claim it positively, which results in raising suspicions that the term is merely polemical or denunciatory. Perhaps still more doubt comes from the fact that “neoliberalism” is used to name a variety of policy programs and intellectual positions, a warning that it may lack a core definition. On the frequency of the term's use, see Taylor C. Boas & Jordan Gans-Moore, *Neoliberalism: From New Liberal Philosophy to Anti-liberal Slogan*, 44 *STUD. COMP. INT'L DEV.* 137 (2009); Terry Flew, *Michel Foucault's The Birth of Biopolitics and Contemporary Neoliberalism Debates*, 101 *THESIS ELEVEN* 44, 44–45 (2012). For complaints about imprecision in the use of the term, see, e.g., Flew, *supra* at 44–45. For a more sympathetic assessment, see PECK, *supra* note 1, at 15 (“The tangled mess that is the modern usage of neoliberalism may tell us something about the tangled mess of neoliberalism itself.”).

4. Other examples include capitalism, socialism, communitarianism, originalism, realism, liberalism itself, and arguably law. “Essentially contested concepts,” as Walter Gallie first defined them, are “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.” Walter Gallie, *Essentially Contested Concepts*, *PROC. OF THE ARISTOTELIAN SOC'Y*, 167, 169 (1956). By using this idea, we intend no claim concerning the possible differences between “essentially contested” and “essentially contestable” concepts, nor the difference between a “concept” and a “conceptualization” (understood as a particular realization of a concept).

requirements of democratic legitimacy. Of course, neither the “market” nor “democratic politics” is a given domain, a natural kind, but, as ideal types, they represent competing and potentially opposed principles of social ordering, as we discuss in greater detail below. More specifically, our argument in this article does not concern markets considered abstractly, but markets deployed to further capital accumulation under present historical conditions. Of course markets have not always functioned in the way they do under capitalism and, more speculatively, they could be deployed for other social purposes under other political circumstances.<sup>5</sup> Finally, we also recognize that the term “capitalism” may seem old-fashioned or otherwise confusing to many scholars. In this article, we use it to denote a range of related socioeconomic systems in which private contracting through markets is used as a means of collective ordering among persons differing in their initial resource endowments—and thus in a range of important agentive capacities.<sup>6</sup>

Neoliberal claims advance the market side of this contest in capitalist democracies between capitalist imperatives and democratic demands. The contest is persistent because of pressures that capitalist markets make on the legal and political order—pressures not just for familiar protections of property and contract, but also for a favorable return on investment and managerial authority (“freedom to manage”). Neoliberalism, like classical liberalism before it, is also associated with a kind of ideological expansionism, in which market-modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally “economic” areas.

Democracy, however, makes its own demands, which can prove incompatible with capitalist imperatives and hostile to the conceptions of personhood and politics that the latter imperatives entail.<sup>7</sup> Democratic citizens

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5. For an account of precapitalist markets in the ancient world, see NEVILLE MORLEY, *TRADE IN CLASSICAL ANTIQUITY* (2007); for an account of how markets might be deployed as instruments of socialist planning, see JOHN ROEMER, *EQUAL SHARES: MAKING MARKET SOCIALISM WORK* (1996). Note that the substantive commitment to market-making in neoliberalism is analytically separable from microeconomic analysis (which is why the new welfare economics was of use to socialist economists interested in the strategic use of the price mechanism in centrally planned regimes.) For a programmatic argument defending the strategic use of markets to oppose capitalist prerogatives, see Carlos Salinas de Gortari & Robert Mangabeira Unger, *The Market Turn Without Neoliberalism*, *CHALLENGE*, Jan.–Feb. 1999, at 14.

6. More precisely, a historical-institutionalist account of capitalism need not endorse the view common to some strands of Marxism conceiving capitalism as a total system both driven to and sustained by mechanisms of surplus-value extraction. Whether our account proves ultimately compatible with this view is something we cannot here consider. For a recent institutional analysis of the political economy of capitalism, which proceeds via a “parametric specification” of standard social-science models tailored to this historical system, see Wolfgang Streeck, *Taking Capitalism Seriously: Towards an Institutional Approach to Contemporary Political Economy*, 9 *SOCIOECON. REV.* 137, 140 (2011). For a critique of the view of “capitalism” as a totalizing system and an effort to engage it as a *constructed* one, see Fred Block, *Deconstructing Capitalism as a System*, 12 *RETHINKING MARXISM* 83, 89 (2000). For a historical study of the decline of midcentury mixed systems and the reemergence of neoliberal capitalism in the last quarter of the twentieth century, see ANDREW GLYN, *CAPITALISM UNLEASHED: FINANCE, GLOBALIZATION, AND WELFARE* (2006).

7. We do not intend any technical or strict sense of “democracy”; in fact, our use of the term

tend to hold a set of expectations about economic and political life that may go beyond or even contradict market logic: for instance, a reasonable level of economic opportunity, distributive fairness, workplace security, community and solidarity, and civic equality.<sup>8</sup> When pressed in politics, these popular expectations become candidates for criteria of democratic legitimacy.<sup>9</sup> Neoliberalism, then, takes its meaning from this contest between market imperatives and democratic demands; it names a suite of arguments, dispositions, presuppositions, ways of framing questions, and even visions of social order that get called on to press against democratic claims in the service of market imperatives.

We must emphasize that this contest between democratic demands and market imperatives always unfolds in a particular social context, which does much to set its terms. There may be times and places in which historical circumstances permit the extensive realization of both capitalist market relations and the demands of democratic politics. For example, as we argue toward the end of the article, a swathe of the rich North Atlantic world enjoyed, in the immediate postwar era, a measure of immunity from clashes between capitalism and democracy owing to historically exceptional rates of growth.<sup>10</sup> As that growth has abated, we have seen a return to a set of conflicts that marked earlier eras of capitalist expansion. Neoliberalism plays an ideological role in this context, during the decades that comprise what might be called the “post-

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applies to any political and legal order that is popularly responsive because it requires a robust level of practical consent to survive. For a recent defense of democracy as a “second-order” mechanism of social choice (defended against alternatives, including the market) used to determine first-order institutional responses to social problems, see JACK KNIGHT & JAMES JOHNSON, *THE PRIORITY OF DEMOCRACY: POLITICAL CONSEQUENCES OF PRAGMATISM* (2011). See also *infra* note 63.

8. This list is meant to be exemplary but, of course, not exhaustive. It should be noted that many advocates of neoliberalism hope that a greater reliance on market modes of allocation will deliver these and other goods more readily and widely than other systems. Conforming to market imperatives is sometimes suggested as a proxy policy for providing these social needs directly, as has been suggested since the time of Adam Smith. See Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations*, in *WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* 13–44 (Hont & Ignatieff eds., 1983).

9. Crises of “democratic legitimacy,” in the sense we mean here, may occur in regimes that are not formally democratic—and arguably have occurred many times in recent decades, from Latin America to Eastern Europe to North Africa. By describing this basic tension, we are not trying otherwise to offer a unifying interpretation of the dynamics underlying these different crises. Indeed, as these examples suggest, democratic legitimacy may also be in tension with economic regimes of a state-socialist and corporatist variety; however, neoliberalism specifically addresses the tension between democratic legitimacy and the imperatives of capitalist markets.

10. This is a major theme of Wolfgang Streeck’s recent work. See Wolfgang Streeck, *The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State*, 15 *GERMAN ECON. REV.* 143, 143–44 (2013); Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 *NEW LEFT REV.* 5, 12 (2011). See also text accompanying notes 64–75. It is also a central to Thomas Piketty’s landmark empirical analysis of capitalism and inequality, which centers on the exceptional postwar interlude in which the (after-tax) return to capital was briefly outpaced by aggregate growth in the economy overall, leading to declining levels of inequality during those decades. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

postwar.”<sup>11</sup>

In most prominent cases, neoliberalism has shielded market relations from particular kinds of politicization. This shielding is, in many ways, its signature move—and the one that is most straightforward to identify. For example, neoliberal arguments were deployed against economic planning in a wide range of countries in the middle of the twentieth century and against constitutional scrutiny of economic inequality in the United States in the 1960s and 1970s.<sup>12</sup> At other times, however, neoliberalism has supported the affirmative use of political power to restructure areas of law and social life along market lines, from labor relations to universities to the professions.<sup>13</sup> Therefore, the neoliberal position can appear shape-shifting, both because policy stakes vary with time and place, and because neoliberalism gets put to work in several postures. It is used (1) defensively, to preserve existing market relations; (2) affirmatively, in support of the roll-out of market-making policies; and (3) ideologically, as the basis of an account of government’s purposes and an account of political legitimacy.<sup>14</sup> This variation in use is part of the reason for doubts about the term’s coherence; nevertheless, the coherence becomes clear enough at a different level of generality.<sup>15</sup> This variation is, of course, most pronounced with respect to different national trajectories, and we should note that our concern is mainly with the impact of neoliberalism on U.S. law, with

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11. On the “post-postwar,” see David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 631 (2014) (reviewing PIKETTY, *supra* note 10).

12. See generally F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 162–75 (1960); Powell Memorandum, *supra* note 2.

13. See generally COLIN LEYS, *MARKET-DRIVEN POLITICS: NEOLIBERAL DEMOCRACY AND THE PUBLIC INTEREST* (2001).

14. On this transformation in underlying ideas of legitimacy and its effect on governance, see Colin Leys, *The Cynical State*, 42 SOCIALIST REG. 1 (2006).

15. In this vein, Wendy Brown cautions that the popular concept of neoliberalism, which equates it “with a radically free market: maximized competition and free trade achieved through economic deregulation” may inadvertently “reduce neo-liberalism to a bundle of economic policies with inadvertent political and social consequences.” Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1, 2 (2003). She suggests instead—following Michel Foucault’s prescient lectures on neoliberalism from the late 1970s—that students of neoliberalism focus on “the *political rationality* that both organizes these policies and reaches beyond the market.” *Id.* Without such a focus, we risk obscuring “the specifically political register of neo-liberalism in the First World, that is, its powerful erosion of liberal democratic institutions and practices in places like the United States.” *Id.* While they are not incompatible (and indeed, are often combined), it is possible to distinguish two strands of current interest in neoliberalism, one coming from a tradition of radical political economy, the other out of Foucauldian social theory, particularly following the publication of Foucault’s prescient lectures on the “birth of biopolitics.” See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–1979* (2010). Both direct attention to the governing structures and ideologies of capitalism, but the former does so with greater attention to the class-dominated nature of those structures and ideologies, whereas the latter is characteristically concerned with the operations of “governmentality” and the way that knowledge constitutes a form of generative power in the construction of a social order. For the former, see, e.g., ANDREW GLYN, *CAPITALISM UNLEASHED: FINANCE, GLOBALIZATION AND WELFARE* 129–30 (2006); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 18–19 (2005). On the latter, see Brown, *supra* at 2–4. On the distinction at large, see generally Flew, *supra* note 3.

reference to other countries that have shared the midcentury experience of a relatively regulated or “mixed” economy in an era of high postwar growth.<sup>16</sup>

Even while the substance of neoliberal positions varies, we argue that neoliberalism has had the consistent purpose of promoting capitalist imperatives against countervailing democratic ones. More specifically, four overlapping premises mark the neoliberal attitude and make up much of its argumentative repertoire. The first premise is an efficiency-based “market fundamentalism,” or the view that strong property rights and private contracting rights are the best means to increase overall welfare, with the sole justification for “political intervention” being to “correct market failures.” The second premise is another version of market fundamentalism, based on the belief that strong property rights best protect the equal freedom and dignity of individuals, so that a commercial social order governed by the market is the most decent society that is possible to achieve. Neoliberalism’s third overlapping premise, often a backstop for the first two, is a pessimistic denial that democratic politics and public institutions can successfully shape and discipline economic affairs—a supposition, in short, that alternatives to the “market-fundamentalist” agenda are futile and likely to backfire, even if market-fundamentalist programs fail to deliver on their advertised promises.<sup>17</sup> The last premise is the most diffuse but arguably the most important: a set of implicit bounds that is ostensibly pragmatic but typically less than fully argued for, which defines some policy options (such as nationalizing banks) as “off-the-wall” in respectable and influential conversations, thus setting presumptive limits on political possibility.<sup>18</sup> Although this conception of neoliberalism is an

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16. Although we do recognize a variety of national (and, indeed, subnational) conflicts that shape any particular history, we do not subscribe in this instance to the currently fashionable orientation to extremely localized arguments. All localities are connected in a system of international economic governance that was designed to be—and is—global in scope. Recognizing the dialectic between local conflicts and global structures should not mean neglecting either of them, even though it complicates any pretension to a single universal narrative of development or progress. For an insightful account of how neoliberal globalization is influencing the shape of the regulatory state (in its market-making capacity) in the developing world, see Kanishka Jayasuriya, *Regulatory State with Dirigiste Characteristics: Variegated Pathways of Regulatory Governance*, in *THE RISE OF THE REGULATORY STATE OF THE SOUTH: INFRASTRUCTURE AND DEVELOPMENT IN EMERGING ECONOMIES* 185, 190–94 (Navroz K. Dubash & Bronwen Morgan eds., 2013).

17. However logically distinct, these strands are connected in a variety of ways, coming together in the argument that has been termed TINA (“there is no alternative”), which was supposedly coined by and became a catchphrase of Margaret Thatcher, and has become a rallying cry for parts of the anti- or counter-globalization movement. Thatcher used it in many important speeches. See, e.g., Margaret Thatcher, Press Conference for American Correspondents in London (June 25, 1980), available at <http://www.margarethatcher.org/Speeches/displaydocument.asp?docid=104389&doctype=1>. On the role of TINA in the assessment of the recent financial crisis, see PHILIP MIROWSKI, *NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN* 241–42 (2013). On the rhetoric of reaction in conservative ideology generally, which is often focused on the alleged unworkability of alternatives to the status quo, see generally ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

18. Of course, these limits can and do change with context. See JACK BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 179–82 (2011) (for an account of how ideas about legal changes can be “on” or “off-the-wall”).

ideal type, intended neither to classify particular academic arguments nor to name the necessary and sufficient conditions of neoliberalism, we imagine that many readers will recognize these elements even without such classification.<sup>19</sup>

To characterize these four premises as the elements of neoliberalism is not, of course, to condemn them without further analysis, nor to denounce their advocates. This neoliberal repertoire is attractive to so many scholars and policymakers in our time for a set of good-faith reasons. A widespread collapse of faith in government's ability to deliver on democratic demands along with a deep and deserved disillusionment with "actually existing socialism" has led to a conviction among many well-meaning people that "actually existing capitalism," for all its problems, is the best regime that can be realized in practice. Neoliberal premises have helped to guide this disappointment with politics toward a renewed faith in "the market," rather than toward a more insistent experimentation with other ways of imagining democratic supervision of the economy.

Crucially, however, neoliberalism can never be a self-consistent and thoroughgoing program because the market imperative can never simply "win." This is so for two reasons—one conceptual, the other political. First the conceptual limitation: The very idea of a "market" has no operational content without a series of prior political decisions that define and allocate economic rights, such as property and the power to contract—who owns what, what they may do with what they own, and how they may contract with others. These legal building blocks of a market, in turn, depend upon relatively widespread popular legitimation.<sup>20</sup> Thus, disputes that are styled (however usefully or unavoidably) as about the extent of the market—for example, disputes over privatization of municipal water systems—must always presuppose a political and legal framework that forms a specific market in the first place. That limitation is conceptual: the idea of a "pure market" is empty without specific legal content. The second limitation on the full realization of the neoliberal agenda is political: any form of responsive governance faces perennial demands to depart from market discipline. These demands may range from simple rent-seeking to

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19. In an oft-cited passage, David Harvey defines the term thus: "We can... interpret neoliberalization either as a *utopian* project to realize a theoretical design for the reorganization of international capitalism or as a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites." HARVEY, *supra* note 15, at 19. Harvey argues that "the second of these objectives has in practice dominated." *Id.* One important effect that these claims have conjointly is to disregard or downplay legally constituted structural settings—that is, the constructed rather than natural character of much of the social order—as was argued forcefully by the Critical Legal Studies movement in its critique of legal ideology. For a recent account of neoliberalism in financial regulation that extends this critique, see Roni Mann, *Paradigms of Financial Regulation and the Transformation of Capital Requirements* (Apr. 8, 2013) (unpublished manuscript), *available at* [http://www.wzb.eu/sites/default/files/u32/rmann\\_text\\_co\\_paradigms\\_of\\_financial\\_regulation.pdf](http://www.wzb.eu/sites/default/files/u32/rmann_text_co_paradigms_of_financial_regulation.pdf).

20. *See, e.g.*, ROBERT L. HALE, *FREEDOM THROUGH LAW* (1952) (making this argument through extensive legal example); Amartya Sen, *The Moral Standing of the Market*, in *ETHICS AND ECONOMICS* 1, 13 (Ellen Frankel Paul et al. eds., 1985) (pursuing the same argument through an analysis of the moral standing and institutional value of markets).

widely shared and articulated democratic commitments. The combination of these two limitations on the realization of the neoliberal agenda means that the contests in which neoliberal arguments recur concern both the very *definition* of markets and the specific question of *who* will be subjected to market discipline.

To put it more bluntly, the opposition between “market” and “state” as conventionally posed is nonsensical. What the neoliberal position advances is not a claim of “market against state” or even simply a push for “more market, less state,” but rather a call for a particular kind of state.<sup>21</sup> In this respect, the postwar school of German economic thought called “ordo-liberalism” advances a much more coherent application of a market ideology than neoliberalism.<sup>22</sup> It does so (1) by describing what form of governance a state must pursue to uphold markets, and (2) by providing a fuller range of consequentialist reasons according to which the state should support markets than standard efficiency criteria alone. Although ordo-liberalism and neoliberalism are often discussed together (as early as Michel Foucault’s lectures on biopolitics from the 1970s), ordo-liberalism differs from neoliberalism in salient respects, particularly in its express theorization of the state as an instrument to enforce market processes that are independent, if necessary, of democratic legitimation.<sup>23</sup> We find it normatively unattractive on democratic grounds, but it offers a more coherent institutional analysis of political economy than neoliberalism.

The questions that neoliberalism addresses at the deepest level, then, are not How much market?, or How much governance?, but Which interests will enjoy protection, whether as property rights, constitutional immunities, or objects of special regulatory solicitude, and which others will be left vulnerable or neglected? Unavoidably, these are contests over the distribution of economic claims and privileges *and even of market discipline itself*.<sup>24</sup> As we noted in the opening passages of this article, skeptics of the term neoliberalism sometimes

21. As Jamie Peck and Adam Tickell explain, “[o]nly rhetorically does neoliberalism mean ‘less state;’ in reality, it entails a thoroughgoing *reorganization* of governmental systems and state-economy relations.” Jamie Peck & Adam Tickell, *Conceptualizing Neoliberalism, Thinking Thatcherism*, in *CONTESTING NEOLIBERALISM: URBAN FRONTIERS* 26, 33 (Helga Leitner et al. eds., 2007). As Peck notes elsewhere: “capturing and transforming the state was always a fundamental neoliberal objective . . . Notwithstanding its trademark antistatist rhetoric, neoliberalism was always concerned—at its philosophical, political, and practical core—with the challenge of first seizing and then retasking the state.” Peck, *supra* note 3, at 4.

22. On ordoliberalism, see Werner Bonefeld, *Freedom and the Strong State: On German Ordoliberalism*, 17 *NEW POL. ECON.* 633 (2012). Note that more research remains to be done to draw out the connection between ordoliberalism and neoliberalism, as a matter of both intellectual and economic history. As pertains to our critique here, it may be that, where they succeed, neoliberal policy reforms operate on unexamined ordo-liberal premises, using state power to introduce or reinforce market processes.

23. On the connection between neoliberalism and the earlier German “ordo-liberalism,” see Foucault, *infra* note 44. See also Bonefeld, *supra* note 22.

24. This conception of market discipline as itself something that capitalism distributes unevenly is inspired by Karl Polanyi. See, e.g., Karl Polanyi, *The Economy as Instituted Process*, in *TRADE AND MARKET IN THE EARLY EMPIRES* 243–70 (Polanyi et al., eds., 1957). See also the contemporary reconstruction of his argument in Block, *supra* note 6, and Streeck, *supra* note 6, at 150–53.

point out that it is hard to identify an entirely consistent program to attach to it. On our analysis, this ambiguity is unavoidable, even expected: there cannot be such a program, only a series of partial approaches to it in the face of specific, countervailing alternatives. The coherence of these approaches, understood in the context of conflicts between market imperatives and countervailing democratic demands, *just is* the coherence of neoliberalism.

Partly for this reason, we focus this issue of *Law and Contemporary Problems* on neoliberalism's relation to law. Whether defensive or offensive, whether through a "rolling back" of regulation or a "rolling out" of market-style governance,<sup>25</sup> neoliberalism is always mediated through law. The disputes it addresses are embedded in such questions as the scope and nature of property rights (including intellectual property), the constitutional extent of the government's power to regulate, the appropriate aims and techniques of administrative agencies, and the nature of the personal liberty and equality that basic constitutional protections enshrine. These, among many other elements, constitute *both* the sphere of institutions and relations that we call market capitalism *and* the activity of political (and so, potentially democratic, or at least popularly responsive) governance.

Understanding neoliberalism's role in recent legal developments should concern all those who agree, as Philip Mirowski has recently written, "that current market structures can and should be subordinate to political projects for collective human improvement."<sup>26</sup> Like many of the contributors to this issue, we share this concern: it motivates our interest in these questions. Although some contributors in the pages that follow engage actively the question of how the neoliberal turn in a substantive area of law is being resisted, or can be reconfigured, we do not, in this introductory article, attempt to defend any particular alternative to neoliberalism. Nor do we believe that a critique of our kind must be accompanied by such an account. However, we do wish to note that the experience of a different accommodation between the demands of democracy and those of the market economy remains within the living memory of many hundreds of millions of people who have enjoyed lives of relative security in postwar welfare states.<sup>27</sup> Decent societies in which markets play a subordinate role to other decisionmaking processes are not utopian fantasies, however unsustainable any particular accommodation between capitalism and democracy may have become in recent decades.

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25. On "rolling back" and "rolling out" as interrelated modes of neoliberal governance, see PECK, *supra* note 3, at 22.

26. MIROWSKI, *supra* note 17, at 15.

27. Although we do not recommend any particular social-democratic arrangement as the obvious solution to problems today, we think it is important not to lose sight of the fact that alternatives to the neoliberal normalization of market relations have been historically realized in a wide range of societies. For a personal account of growing up in a state in which the market played a subordinate role to democratic decisionmaking in many important arenas (and a defense of this normative priority), see TONY JUDT, *ILL FARES THE LAND* (2011).

## I

## NEOLIBERALISM AND CLASSICAL LIBERALISM

Our approach connects neoliberalism with classical liberalism—another of those seemingly indispensable terms that turn out to resist clean definition. In its economic dimension, as the doctrine of laissez-faire, classical liberalism sought to define an area of social life standing outside of or prior to political governance and not appropriate for political decision. In the lore of U.S. law, this is often described as the doctrine of the “*Lochner* era,” a reality that is also a simplification. In the late-nineteenth and early-twentieth centuries, U.S. law enforced classical liberalism’s state–market boundary in erratic but important constitutional doctrines of personal economic liberty, as in the notorious *Lochner* case, but also in structural limits on Congress’s power to regulate “commerce.”<sup>28</sup> Just as importantly, U.S. “private” law maintained a relatively laissez-faire system of labor contracts, authorized private business-owners and other property-holders to enforce racial hierarchy (and therefore perpetuate economic stratification along racial lines) by refusing to do business with minorities, and otherwise established the underlying structure of economic power that the constitutional doctrines intermittently protected from legislative adjustment.<sup>29</sup>

As with today’s neoliberalism, classical liberalism was not a unified theoretical structure, nor did it take one unique legal form. Those who defended market imperatives shifted among welfarist arguments (that markets are good for everyone because they increase wealth),<sup>30</sup> fairness arguments (that

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28. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548–50 (1935); Hammer v. Dagenhart, 247 U.S. 251, 273 (1918); *Lochner v. New York*, 198 U.S. 45, 56–57 (1905). Many scholars have highlighted that the “*Lochner* era” was never characterized by consistent laissez-faire doctrine and that much work was done in these cases by changing conceptions of the state police power, rather than by strict personal rights of contract. Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 1–18 (1993) (explaining the historiographic origins and methodological stakes of the revisionist movement); Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in THE STATE AND FREEDOM OF CONTRACT 161, 161–97 (Harry N. Scheiber, ed., 1998) (tracing the origins and variations of the free-labor idea); Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 756–57 (2009). All of this only enriches the picture of *Lochner* and other such cases as aspects of the contest between political regulation and market imperatives.

29. See generally ROBERT L. HALE, *supra* note 20, at 1–28 (setting out the relationship between public law, including constitutional law, and the “private” exercise of economic power); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767 (1985) (exploring the relation between public-law and private-law versions of economic liberty and economic power in the late nineteenth and early twentieth centuries); but see Buchanan v. Warley, 245 U.S. 60, 77–78 (1917) (holding housing segregation law unconstitutional on liberty-of-contract grounds).

30. For a classic statement justifying the wealth-producing inequalities of the modern division of labor in market societies, see ADAM SMITH, WEALTH OF NATIONS 1.i.11 (1991). For a discussion of Smith’s position, see Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations*, in WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 1

markets treat all participants alike, unlike labor protections and other laws, which laissez-faire's defenders classified as rent-seeking and class privilege),<sup>31</sup> liberty arguments (that there really is a natural or constitutional right to pursue careers open to talents, which implies, for instance, the *Lochner* doctrine of free contract),<sup>32</sup> and "anti-utopian" or common-sense arguments to the effect that laissez-faire was the only workable economic system.<sup>33</sup> These argumentative devices of classical liberalism parallel those of today's neoliberalism.

What accounts for the return of such arguments within neoliberalism and the perspective they crystallize—in other words, what accounts for the arrival of the "neo-"? Much of the answer, we believe, lies in the revival of concrete, material conflicts over the distribution of resources and power, particularly in the advanced industrial countries.<sup>34</sup> During the second half of the nineteenth century and the early decades of the twentieth, it was quite ordinary to recognize that a paradigm of these conflicts, the clash of capital and labor, was front and center in questions of political economy.<sup>35</sup> The legal doctrines of classical liberalism typically worked to secure boundaries between the claims of capital and those of labor.<sup>36</sup> Classical liberalism's doctrines regulated a conflict that was widely recognized as being both basic to modern commercial societies and inescapably mediated through legal choices. From the prohibition of labor unions through the shackling of government regulations, the ideology of classical liberalism secured the structures and fundamental relations of early industrial capitalism from collective interventions that threatened its ideal of "free contract." But throughout, courts and other actors were fairly transparent about what they were doing and why they thought these actions were justified. Conflict over the terms of shared socioeconomic life in modern commercial societies was simply endemic; class divisions were undeniable, and the problem was managing the tensions they produced through enlightened pedagogy and

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(Hont and Ignatieff eds., 1983).

31. *Lochner*, 198 U.S. at 59–61.

32. See *Slaughter-House Cases*, 83 U.S. 36, 118–19 (1873) (Bradley, J., dissenting) (making an argument sounding in liberty for laissez-faire freedom of contract).

33. Max Lerner, *The Social Thought of Mr. Justice Brandeis*, 41 *YALE L.J.* 1, 28–32 (1931).

34. Alongside this recurrence of a mode of distributive conflict familiar in earlier periods has been a concerted effort by intellectuals and politicians to revive classical liberalism in a new form. See BURGIN, *supra* note 2, at 12–54 (discussing the history of these intellectual efforts). See also DANIEL STEDMAN-JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* (2012). For a study of neoliberal think tanks, see Deiter Plehwe & Bernhard Walpen, *Between Network and Complex Organization*, in *NEOLIBERAL HEGEMONY: A GLOBAL CRITIQUE* 27 (Dieter Plehwe, Bernhard Walpen, & Gisela Neunhöffer, eds., 2006).

35. See, e.g., Abraham Lincoln, *State of the Union Address* (Dec. 3, 1861) (discussing the conflict of labor and capital, though also claiming proper liberal rights would shield the United States against the worst class divisions); Theodore Roosevelt, *Address at Osawatimie, Kansas* (Aug. 31, 1910) (criticizing the influence of business interests in politics and calling for new economic and welfare regulations).

36. For example, *Lochner* had the effect of invalidating redistributive aims. See Cass Sunstein, *Lochner's Legacy*, 87 *COLUM. L. REV.* 873, 878–80 (1987).

law.<sup>37</sup>

What happened to the early-twentieth-century conflict between capital and labor? In the narrow, internal narrative of law, classical liberalism perished on or about March 29, 1937, with the Supreme Court's repudiation of classically liberal constitutional constraints on economic regulation, which removed the last break on a flood of legislative and administrative adjustment of property, contract, labor, and the rest of economic life.<sup>38</sup> These doctrinal changes amounted to a legitimation of the New Deal in the face of the Great Depression and massive congressional majorities for President Franklin Roosevelt. The doctrinal result was a constitutional settlement in which the Supreme Court largely left the federal government to define its own powers to regulate interstate commerce and the states to exercise economic regulation without significant due-process constraints.<sup>39</sup> Constitutional interpretation turned to the noneconomic dimensions of personal liberty and equality, while in "private-law" areas such as property, scholars and judges alike largely adopted the legal-realist view that economic rights are political creations that give shape to economic life, not boundaries on political intrusion into the private economy.<sup>40</sup>

These legal developments were symptoms, as much as causes, of the U.S. version of a transatlantic settlement on basic terms for a politically regulated marketplace. The recovery from the Great Depression and the end of World War II brought approximately thirty years of historically unique prosperity and consensus in the political economy of the United States and Western Europe. This prosperity was relatively widely shared across the Western world during the *trente glorieuses*, a time still remembered as the "golden age of capitalism."<sup>41</sup> These prosperous decades had great and continuing intellectual consequence because, to many, they seemed to have settled a basic tension in democratic governance for the postwar capitalist world. They achieved, for a time, relative labor peace, widely shared increases in prosperity, and considerable consensus on the role of the state and the scope of democratic choice in economic life. This description leaves out many tensions and exclusions, and the *trente glorieuses* form no fit object for nostalgia; but this sketch of the settlement, in

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37. It may be unfamiliar for many legal scholars today to conceive a set of doctrines or ideas as comprehensible through the distributive settlement that they mediated. Nevertheless, it was true of classical-liberal doctrine, and we argue that same tendency characterizes neoliberalism today.

38. *West Coast Hotel v. Parrish*, 300 U.S. 379, 391-92 (1937). See generally MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933* (1998) (detailing the origins and context of New Deal reforms); James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 750, (1991).

39. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 279-311 (on the constitutional significance of the New Deal).

40. See, e.g., ROBERT LEE HALE, *supra* note 20, at 3-18 (giving a classic statement of this argument).

41. See *THE GOLDEN AGE OF CAPITALISM: REINTERPRETING THE POSTWAR EXPERIENCE* (Stephen A. Marglin & Juliet B. Schor eds., 1990). See also PIKETTY, *supra* note 10, on the broadly equitable economic growth of the postwar period.

practice and as a dominant ideological self-understanding for many in that era, strikes us as being broadly accurate.<sup>42</sup>

That relatively settled historical moment stands in contrast to the contests over interest and principle in which neoliberalism has emerged, and also to the fraught time in which classical liberal doctrines of free contract held sway. The favored circumstances of the post–World War II era obscured the basic and continuing tension between the two defining imperatives of democratic capitalism that we discussed at the beginning of this introduction.<sup>43</sup> Under a new series of pressures, both the settlement on the terms of a politically regulated marketplace and the impression of consensus around it have broken down, putting the disputes that neoliberalism aims to police squarely back on the agenda.

Our concern in this article is to understand the relation of law to neoliberalism: to identify the ways that neoliberal efforts necessarily rely upon (and thus must engage) law, but also, more importantly, how apparently diverse jurisprudential trends show the impact, both subtle and direct, of the broader neoliberal moment in which the world finds itself today. A full examination of this impact must await the contributions to this issue, as these conceptual distinctions are most useful when they are distilled from specific conflicts. However, we hazard a few summary sentences here, on the question of what the “neo-” adds substantively, beyond demarcating the latest phase of liberalism.

First, in the picture of economic life that neoliberalism celebrates, the touchstone act of personal choice is not the employment contract, as it often was in classical liberalism (and, in particular, in the *Lochner* line of cases), but instead the consumer purchase. Equality in economic life has thus been refocused from the distribution of power and income in the workplace to equal enjoyment of unfettered consumer choice, either as a buyer of traditional commodities or as a consumer of any other activity that can be recast as a form of individual consumption, such as education. Because the consumer conception of autonomy is not tethered to any specific institutional setting, it is easily extended to new areas, not just those such as educational or professional endeavors, where cash changes hands for “services,” but even voting.

Second, neoliberalism proves compatible with normatively attractive doctrines of personal autonomy and identity that operate outside economic relations. The self-defining, self-exploring, identity-shifting constitutional citizen of recent Supreme Court discussions of race, gender, and sexuality (some tending “right,” others “left” in the current lexicon) reflects the consumer–citizen model of neoliberal economic doctrine in contrast with the stolid bourgeois ideal of the classical-liberal subject. Third, the intensity of governance in a technologically and economically hyper-complex world makes

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42. See JUDT, *supra* note 27.

43. On the tensions in democratic capitalism, see Streeck, *supra* note 10, at 5; Leys, *supra* note 13, at 26–29. The tensions are more extensively discussed below. See *infra* text accompanying notes 65–77.

it inescapably clear that neoliberalism can never be a “hands-off” antiregulatory doctrine as classical liberalism purported to be. Neoliberal governance cannot fall back on the old differentiation of public and private or to a naturalized domain of “the economy” and expect these ideological formulations to succeed in securing the prerogatives of capital at present. Instead, it must work through overt choices about ways of shaping social and economic life and strive to secure consent to these.<sup>44</sup> Finally, today, the politics of debt are as salient as those of labor solidarity at the start of the twentieth century, and neoliberal claims have arisen in fights over austerity policies and the political and constitutional status of national debt and spending levels.<sup>45</sup>

## II

### NEOLIBERALISM AND THE STAKES OF LAW

The concept of neoliberalism casts light on law and legal scholarship in a variety of ways. For one, it can highlight patterns of events across different legal areas. By understanding neoliberalism as a field of connected arguments with a single tendency—defining and regulating market relations in ways that insulate them from democratic politics—scholars can appreciate that neoliberalism means more than the somewhat simple paradigm of using law to implement “market fundamentalism.” Admittedly, in some cases, this is exactly what happens, as, for instance, in labor-market liberalization, privatization of pensions, withdrawal of public support for basic needs, insulation of private uses of property from uncompensated regulation, and so forth—in other words, in legal changes that throw individuals into a situation more closely approximating classical *laissez-faire* than where they started.<sup>46</sup> However, in other cases, more affirmative uses of government power create market-modeled relations. Although both “roll-back” and “roll-out” of regulation are instances of neoliberal governance, the too-simple idea that neoliberalism is straightforwardly antiregulatory can obscure greater coherence among the premises of neoliberalism.<sup>47</sup>

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44. The prerogatives of capital in our present networked age require, in fact, the extension of relatively extensive governance operating through active participation (i.e., through the construction of consenting subjects). See DAVID SINGH GREWAL, *NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION* 247–65 (2008).

45. Current conflicts include pensions, housing, educational debt, national debt (in the United States and in Europe), the status of collective property as collateral for debt in the post-crisis economy (everything from state-owned enterprises to national pension funds to the art in the Detroit Art Museum). Theoretical work is already beginning to reflect this new concern. See Streeck, *The Crises of Democratic Capitalism*, *supra* note 10; Streeck, *The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State*, *supra* note 10. Strategies for managing the debt have also begun to be debated on the left; see, for example, David Graeber & Thomas Piketty, *Soak the Rich: An Exchange on Capital, Debt, and the Future*, *THE BAFFLER*, no. 25, 2014, at 148.

46. See Peck & Tickell, *supra* note 21, at 28–35.

47. This image of neoliberalism became the paradigm partly because it maps the impression created by “Washington Consensus” reforms in developing countries, and partly because it reflects the market-fundamentalist ideology frequently pronounced by critics of regulation and public social

Take, for instance, the way a series of constitutional doctrines have coalesced around a vision of personal liberty that centers on individual choice in spending, consumption, and self-expression, in disregard of the legally constituted structural setting in which these choices take place. In this kind of analysis, the concept of neoliberalism ties together the operational effects and ideological predicates of a series of judgments that work in different doctrinal areas, such as free speech, equal protection, and substantive due process. This analysis highlights both the doctrinal interpretations that the Supreme Court gives to constitutional text and the ideological predicates of these interpretations, such as which theories of social and political life they presuppose and which claims, such as alternative conceptions of liberty and equality, they implicitly reject. Throughout, this type of analysis focuses on what law actually *does*, the specific conflicts that courts are mediating. Neoliberal constitutional doctrines have recently extended market-modeled liberty into areas of law where other versions of liberty have previously been important (such as campaign-finance law) or where legislatures have long regulated market transactions to address distributive concerns (such as transfers of prescription data for marketing purposes).<sup>48</sup> Decisions based on neoliberal commitments also cultivate in constitutional reasoning a habit of ignoring structure, even restricting legislative attention to it, in favor of exclusive concern with the negative liberty of the choosing individual or corporation.

Our use of neoliberalism especially illuminates ideological stakes in areas of law that are not often treated together these days, notably at the intersection of constitutional law and the private economy. Much of the interest in public law for many decades in the United States has been in defining and expanding the principles of noneconomic personal liberty and equal protection. Contests have concerned new areas of application for these principles, such as consensual adult intimacy and marriage equality, and the substance of the principles, as in the color-blind versus antisubordination versions of equal protection.<sup>49</sup> Meanwhile, private-law scholarship has largely organized itself around the concept of efficiency, whether devising efficiency-enhancing reforms or debating the correct definition of efficiency and the appropriate scope of efficiency concerns.<sup>50</sup> The basic contours of these debates are immediately

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supports. See PECK, *supra* note 1, at 22 (on “roll-back” and “roll-out” in neoliberal governmentality).

48. Sorrell v. IMS Health Inc., 131 S.Ct. 2653 (2011); Citizens United v. Federal Election Comm’n, 558 U.S. 310 (2010); Buckley v. Valeo, 424 U.S. 1 (1976).

49. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (arguing that guarantees of equal citizenship are undermined by pervasive social stratification and that law should reform institutions and practices that enforce the subordinate status of oppressed groups); Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COM. 379, 383 (1993) (arguing that the definition of state action has done political work in limiting the scope of claims to equal constitutional citizenship); Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (exploring the background of social movement and constitutional-interpretive politics that generate extensions of equal citizenship in formal constitutional doctrine).

50. See JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE*

recognizable to anyone who has been awake to these areas of law in recent decades.<sup>51</sup>

Our view is that this familiar distinction between “public” and “private” law is partly an artifact of the mid-twentieth century impression that the relation between capitalism and democracy is settled, and, in the United States, of the transient constitutional settlement in which courts retreated from constitutional review of economic claims. In the period of classical liberalism, when it was ordinary to consider liberty of contract, the acquisition and sale of property, and federalism-based protections of “liberty of commerce” as features of constitutional governance, there would have been no such easy distinction. Of course, classical-liberal doctrines such as liberty of contract worked to define and police the line between democratic politics and capitalist imperatives; but legal and political actors who engaged this question moved naturally across “public” and “private” lines, from tort actions against union boycotts to constitutional protections of labor contracts. The “public” law foundation for the “private” law orderings of that era was both obvious and also the target of enormous critical scrutiny from within and outside the law.

If the United States is entering what one of us has called an era of neoliberal *Lochnerism*,<sup>52</sup> then scholars may need to find new or revived ways of integrating “public” and “private” law in terms of some of the questions our contributors address in this issue. How is market discipline being distributed—on whom is it imposed, who is exempted from it, and on what grounds? How is the scope of democratic prerogatives being defined and policed around the market economy—through which doctrines is this done, and to what effect? Which kinds of lawmaking does this end up blocking, and what kinds of existing arrangements does it protect? Where and how is democratic political judgment about public purposes blocked by market-mimicking lawmaking metrics such as conventional cost-benefit analysis? In a more ideological register, which elements of the interlinked neoliberal arguments are deployed for each move

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LEGAL IMAGINATION 9–27 (2010) (outlining the major perspectives and concerns of private-law scholarship through the lens of property); *id.*, at 111–56 (proposing ways of integrating concerns about welfare with those of freedom and personhood); see generally HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 3–36, 229–44 (2011) (similarly discussing the variety of motives at work in private law).

51. Classic contributions include GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970 (1998) (arguing for the importance of a noneconomic approach to private law, rooted in values of community and citizenship); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (discussing variations on a general efficiency-based theory of law); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981) (seeing a general efficiency-based theory of law); Frank Michelman & Duncan Kennedy, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980) (arguing that there is no independent standard of efficiency from which a political and legal allocation of rights can be judged).

52. See Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY J., Winter 2012, at 46, 47 (characterizing the Roberts Court as neo-Lochnerian; “the judicial voice of the idea that nearly everything works best on market logic, that economic models of behavior capture most of what matters, and political, civic, and moral distinctions mostly amount to obscurantism and special pleading”).

around these questions? Do market versions of liberty, equality, and personal dignity, or notions of efficiency, or pessimism about the capacities of politics come into play? And through which channels—judicial opinions, elite legal theory and opinion, political parties, popular movements and legislation, or transnational governmental institutions—are these arguments being deployed to practical effect?

Even the ready assimilation of the corporation to constitutional protection may reveal something about how the constitutional liberty of individuals is being imagined here. It is not simply that corporations are expected to act in their economic self-interest, or without regard for public commitments or obligations; natural persons are expected to exercise their rights on these motives much of the time in the Madisonian republic.<sup>53</sup> Rather, what is distinctive is the idea that the pursuit of individual preferences through spending decisions (including the economic “preferences” of corporate “persons”) is *sufficient* as an account of personal liberty *and of the structural relation of that liberty to a scheme of good-enough government*. So, for instance, the Supreme Court praises unlimited corporate campaign spending as a key contribution to good governance because it amplifies the perspective of important and legitimate interests; and, at the opposite end of the economic scale, the individual decision to refuse health insurance (or to buy broccoli) is rhetorically cast as self-evidently a legitimate part of a viable scheme of government, without regard for the aggregate effects of such decisions.<sup>54</sup>

These considerations connect neoliberalism with constitutional legitimacy and so with claims about what “the rule of law” means. This question became prominent at least as early as the 1980s and 1990s, given reforms in Latin America and formerly state-socialist Eastern Europe, in which the rule of law became a way of characterizing market-making reform.<sup>55</sup> This characterization of the rule of law as an adjunct to neoliberal policy reforms has spread, such that most empirical studies on the extent of the “rule of law” now emphasize

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53. For more and less friendly views of James Madison’s expectations of his fellow citizens’ motives, see RICHARD K. MATHEWS, *IF MEN WERE ANGELS: JAMES MADISON AND THE HEARTLESS EMPIRE OF REASON* (1996) (representing a more friendly view); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN LEGACY AND ITS FRAMEWORK* (1994) (representing a less friendly view).

54. See Purdy, *supra* note 52, at 55–56 (characterizing the Roberts Court through an interpretation of its relation to these positions); Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill’s “Harm Principle,” and American Social Morality*, 38 AM. J. L. & MED. 374 (2012) (discussing, inter alia, the interstate effects of insurance-market regulations).

55. For these historical reasons, the admittedly limited discussion of neoliberalism in American legal scholarship has come mainly from scholars watching the Latin American reforms. See Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT’L L. 517 (2001); ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 8–10 (1996). For a penetrating account of how, in spite of a widespread conflation of legal liberalism with neoliberalism, courts in some post-Soviet countries resisted (successfully and unsuccessfully) neoliberal austerity drives, see Kim Lane Scheppele, *Liberalism Against Neoliberalism: Resistance to Structural Adjustment and the Fragmentation of the State in Russia and Hungary*, in *ETHNOGRAPHIES OF LIBERALISM* 44–59 (Carol J. Greenhouse ed., 2010).

various private-law protections for property and market access as constitutive of the concept.<sup>56</sup> A different version of the same kind of move is at work in the constitutionalization of market modes of liberty in the United States and the juridification of an essentially economic conception of European integration.<sup>57</sup> Both developments, in effect, embed particular normative conceptions of what will count as legitimate legality in the future.

A basically political and legally oriented account of neoliberalism can also show what is happening when lawmakers appear to “betray” a certain version of putatively neoliberal commitments. Seeming betrayals of market fundamentalism are exemplary here. As we argue above, it is too simple to identify neoliberalism with the consistent, principled application of market discipline. The *ideology* of neoliberalism is much too simple to guide the tasks of market-making and market-maintenance that are required of the neoliberal state, and which constitute the *governmentality* of neoliberalism.<sup>58</sup> The question is rather *who* is to be subject to market discipline, and on which rationales (efficiency, personal responsibility, elite agreement that there is no “on-the-wall” political alternative), and who is exempt from it. A domestic case in point is the allocation of federal bailout aid between the bad risks taken by banks and the debt burdens weighing down homeowners and university graduates. An international case is the imposition of austerity programs in Europe, premised on the thought that national polities must be subjected to debt obligations whereas creditors should enjoy relative confidence in their repayments. The point is not that these are departures from market-fundamentalist principles (as libertarian critics of the U.S. bailouts have observed), but that, in practice, neoliberal policies are *always* distributive decisions, yet ones in which distributive choices get couched in the neutral-sounding language of efficiency, liberty, and responsibility, or the pragmatic language of “what works.” What neoliberal governance distributes is market discipline itself.

In sum, we are inviting an integrated approach to questions that arise from renewed attention to the unstable boundary between state and market. We

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56. Consider the dimensions of “economic liberty” of various kinds in the World Bank’s Worldwide Governance Indicators, the Freedom House indices, as well as those promulgated by USAID and most major development banks. For an overview and critique, see César Rodríguez-Garavito, *The Globalization of the Rule of Law: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America*, in *LAWYERS AND THE TRANSNATIONALIZATION OF THE RULE OF LAW* (Bryant Garth & Yves Dezalay, eds., forthcoming), available at <http://www.cesarrodriguez.net/docs/articulos/towardsociology.pdf>. For a thoughtful account that does not conflate the “rule of law” with private property protections, see JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* (2012); see also Michaelman & Kennedy, *supra* note 51; Tor Krever, *Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense*, 34 *THIRD WORLD Q.* 131 (2013) (on the modes of reasoning that connect neoliberal governmentality and indices of legal governance or ‘rule of law’ measures).

57. On the former, see Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *LAW & CONTEMP. PROBS.*, no. 4, 2014 at 195; on the latter, see Streeck, *supra* note 53.

58. On the concept of governmentality, see *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (Burchell et al. eds., 1991).

understand the articles in this special issue as *essays*—literally little sallies, probing expeditions—into what such an approach might generate. In setting out this fairly ambitious introduction, we do not mean to presume the last word on this matter, but rather to offer one first word.

### III

#### THE HISTORICAL SETTING

The term neoliberalism first appeared in early-twentieth-century efforts to recapture the spirit (if not all the policies) of classical liberalism.<sup>59</sup> The term found diverse uses in many settings before its late-twentieth-century sense was first established in Latin America, where pro-market economists adopted the term *neoliberalismo* to describe their agenda, propelling into the development debate a term that became roughly synonymous with the “Washington Consensus,” a debt-driven program of privatization and austerity.<sup>60</sup> At around the same time, the economic crisis that began in the early 1970s in the North Atlantic world undermined confidence in what has been called in hindsight the “post-war Keynesian welfare state.”<sup>61</sup> Neoliberalism came to the fore in Britain and the United States in the midst of the electoral victories of Reagan and Thatcher and the implementation of new economic policies based on what had been heretical positions, such as monetarism and supply-side economics.<sup>62</sup>

As argued at the beginning of this article, these crisis-driven origins of contemporary neoliberalism need to be understood in relation to long-standing tensions in liberal governance: the conflict between capitalist market

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59. The idea of the market system as self-regulating has deep roots before Adam Smith. See generally GILBERT FACCARELLO, *THE FOUNDATIONS OF ‘LAISSEZ-FAIRE’: THE ECONOMICS OF PIERRE DE BOISGUILBERT* (1999) (discussing Pierre de Bousbuilbert, perhaps the first theorist of the self-regulating market); JEAN-CLAUDE PERROT, *UNE HISTOIRE INTELLECTUELLE DE L’ÉCONOMIE POLITIQUE: XVIIIÈ–XVIIIÈ SIÈCLES* (1992). For recent histories that discuss the relation of twentieth-century neoliberalism to classical political economy, see BURGIN, *supra* note 2, at 55–86; STEDMAN-JONES, *supra* note 34.

60. See John Williamson, *In Search of a Manual for Technopols*, in *POLITICAL ECONOMY OF POLICY REFORM* 11 (John Williamson ed., 1994); *AFTER THE WASHINGTON CONSENSUS: RESTARTING GROWTH AND REFORM IN LATIN AMERICA* app. at 26–28 (Pedro-Pablo Kuczynski & John Williamson eds., 2003) (Appendix: The Washington Consensus); see also GREWAL, *supra* note 44, at 249–51.

61. As with the term “neoliberalism,” the straightforward delineation of that category remains contested; for an analysis of the varieties of postwar Keynesian welfare state, see GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

62. For an early account of neoliberalism in the context of what was then called “Thatcherism,” see generally *THE POLITICS OF THATCHERISM* (Stuart Hall & Martin Jacques eds., 1983). It is important to note that the connection between midcentury German “ordo-liberalism” and the “neoliberalism” of the Thatcher era was not merely one of ideological affinity; Thatcher was an admirer of the economic management of the post-war German state. See David Runciman, *Rat-a-tat-a-tat-a-tat-a-tat*, 35 *THE LONDON REV. OF BOOKS* 13, 18 (2013) (reviewing CHARLES MOORE, *MARGARET THATCHER: THE AUTHORISED BIOGRAPHY. VOL. I: NOT FOR TURNING* (2013) (“It is easy to forget that Thatcherism in its initial phase was a broadly pro-German project. It took much of its inspiration from the West German economic miracle, achieved under the philosophy known as ‘ordo-liberalism’ (a free market in an ordered society).”).

imperatives and countervailing popular demands pressing on democratic (or, at least, popularly responsive) governments.<sup>63</sup> As explained earlier, we treat neoliberalism as one especially prominent effort to settle the terms between the market and democratic politics.

The impression that neoliberalism might have ended with the recent financial crisis, which saw the collapse of widespread faith (both popular and elite) in market ideology and ushered in a new, “pragmatic” moment, seems to stem from confusion between a specific moment and a larger and longer trajectory. It also reveals a closely related mistake: identifying neoliberalism with a consistent and (in some sense) principled theory, such as market fundamentalism or a “utopian” project of perfecting market norms, whereas, as we have already argued, neoliberalism is as much a mode of governance as an abstract ideology.<sup>64</sup>

In a series of important recent works, Wolfgang Streeck has argued that the crisis in 2008—a crisis widely understood to concern neoliberalism, and that affected Anglo-American capitalism most directly—was the culmination of a more general crisis of postwar “democratic capitalism.”<sup>65</sup> Streeck defines

democratic capitalism as a political economy ruled by two conflicting principles, or regimes, of resource allocation: one operating according to marginal productivity, or what is revealed as merit by a ‘free play of market forces’, and the other based on social need or entitlement, as certified by the collective choices of democratic politics.<sup>66</sup>

This form of political economy is, he argues, “a condition ruled by an endemic conflict between capitalist markets and democratic politics, which forcefully reasserted itself when high economic growth came to an end in the 1970s.”<sup>67</sup>

Streeck’s argument diagnosis of a contradiction in democratic capitalism

63. In this article, we have generally followed the widespread contemporary usage of “democratic” to describe modern political regimes based on electoral representation of one kind or another, often grounded in liberal-constitutional orders. From a more careful standpoint, this usage is imprecise (and probably ideologically naïve); for a more careful history of modern democracy, see RICHARD TUCK, *THE SLEEPING SOVEREIGN* (forthcoming 2014). For our purposes here, however, we are mainly concerned with the responsiveness of the government to underlying popular demand, whether it comes via electoral representation, via direct democratic sovereignty, or simply via a general susceptibility to mass protest. On this account, even many “nondemocratic” (but responsive) regimes struggle to reconcile the grounds of their popular legitimation with the conflicting demands of the market, experiencing in some form the tensions that Streeck has diagnosed as particularly affecting “democratic capitalism.” See Streeck, *supra* note 6.

64. See Radhika Desai, *Neoliberalism and Cultural Nationalism*, in *NEOLIBERAL HEGEMONY: A GLOBAL CRITIQUE* 222–24 (Dieter Plehwe et al. eds., 2006) (describing an account of neoliberalism that takes the role of ideas and think-tank agendas seriously, while cautioning “against the idealist emphasis on ideas and intellectuals to the exclusion of other determinants of historical change”).

65. See *supra* notes 38–43 and accompanying text.

66. Streeck, *supra* note 10, at 7.

67. *Id.*; see also his follow-up, Wolfgang Streeck, *Markets and Peoples: Democratic Capitalism and European Integration*, 73 *NEW LEFT REV.* 63, 63–66 (Jan.–Feb. 2012), and the essays that open and close his recent edited volume on the subject *POLITICS IN THE AGE OF AUSTERITY* 1–25, 262–86 (Wolfgang Streeck & Armin Schäfer eds., 2013).

should be read alongside Thomas Piketty's groundbreaking findings that inequalities in both wealth and income have been increasing in Europe and the United States since the early 1970s.<sup>68</sup> Piketty's findings suggest that the conventional expectation that capitalist markets produce moderate, stable, and democratically tolerable levels of inequality reflects a false extrapolation from the unusual thirty years following World War II. Considering longer-term data from the nineteenth century, as well as more recent decades suggests that accelerating levels of inequality are the norm, while stable and moderate inequality proves the exception.<sup>69</sup> Although Piketty focuses on an empirical analysis of historical capitalism, he does suggest that burgeoning levels of inequality might destabilize democratic political orders, and many commentators have used his findings to reexamine the broader relationship between capitalism and democracy.<sup>70</sup>

That "capitalism" and "democracy" have different imperatives should not be difficult to grasp; the difficulty is in conceiving a regime that can realize the aims of both. As Colin Leys explains in his excellent account of "market-driven politics":

There is an obvious conflict between the logic of capital accumulation, which drives the global economy, and the logic of legitimation, which drives politics in all states with free elections. The former gives priority to the needs of capital at the expense of labour, and at the expense of public sector funding on which most public goods and almost all social services depend; the latter depends on catering to these other needs as well as ensuring economic growth—or at least economic stability. In the era of national economies, the conflict between these two logics was contained, however erratically, by capital's relative immobility.<sup>71</sup>

Streeck elaborates this tension in the context of electoral competition:

Under democratic capitalism, governments are theoretically required to honour both principles simultaneously, although substantively the two almost never align. In practice they may for a time neglect one in favour of the other, until they are punished by the consequences: governments that fail to attend to democratic claims for protection and redistribution risk losing their majority, while those that disregard the claims for compensation from the owners of productive resources, as expressed in the language of marginal productivity, cause economic dysfunctions that will become increasingly unsustainable and thereby also undermine political support.<sup>72</sup>

However, during the *trente glorieuses*, Keynesian macroeconomic planning and a favorable international context reconciled the imperatives of capital accumulation and democratic legitimacy through sustained and relatively equitably shared growth. Class conflict was palliated through managerial capitalism's success at dealing in workers to a substantial share of the extraordinary wealth of the postwar recovery. Thus, the tensions inherent in democratic capitalism were effectively evaded in the immediate decades

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68. See PIKETTY, *supra* note 10, at 1–38.

69. See *id.* at 270–85.

70. See, e.g., Grewal, *supra* note 11; Jedediah Purdy, *To Have and Have Not*, L.A. REVIEW OF BOOKS, April 24, 2014.

71. LEYS, *supra* note 13, at 26.

72. Streeck, *supra* note 10, at 7–8.

following World War II through what Charles Maier called “the politics of productivity.”<sup>73</sup> Rising wages and capital accumulation proved mutually compatible and even allowed for the modest redistribution that the more ambitious welfare states of the period undertook.

For reasons that continue to be widely debated, and which we cannot examine in any detail here, these favorable circumstances ended in the early 1970s.<sup>74</sup> Certainly, the image of postwar prosperity can be overdrawn; nevertheless, the end of exceptional growth rates in the advanced industrial countries heralded a marked shift in the 1970s. Perhaps the most obvious change was the collapse of the Bretton Woods system amidst persistent macroeconomic imbalances. However, major shifts were visible as well in the changing organization of work in the advanced economies and in the rise of new industrial economies in East Asia, all of which was set against the backdrop of the Organization of the Petroleum Exporting Countries (OPEC) oil crisis and the slow American defeat in Vietnam.

On Streeck’s analysis, what followed, beginning in approximately the mid-1970s, was an effort to replicate the *trente glorieuses* under conditions in which the basic tension in democratic capitalism could no longer be evaded through historically exceptional rates of growth. The consequence of these efforts has been a series of debt crises as governments found new ways to fund the illusion of widely shared postwar prosperity by borrowing from the future. As he explains:

post-war ‘democratic capitalism’ involved a fundamental contradiction between the interests of capital markets and those of voters; a tension that had been successively displaced by an unsustainable process of ‘borrowing from the future’, decade by decade: from the inflation of the 1970s, through the public debt of the 1980s, to the private debt of the 1990s and early 2000s, finally exploding in the financial crisis of 2008.<sup>75</sup>

In more recent work, Streeck has periodized phases of democratic capitalism, starting with Schumpeter’s discussion of the “tax state,” which was followed, beginning in the 1980s, by a “debt state,” which has given rise, particularly following the recent financial crisis, to a “consolidation state.”<sup>76</sup> In the latter phase, with tax increases either considered “off-the-wall” or subject to sophisticated forms of evasion, the large-scale retrenchment of public spending and the privatization of state functions are advanced as means of restoring confidence in the viability of state finances. It is in the context of widespread debt consolidation as the defining political imperative that we must develop a critical analysis of neoliberalism and its impact on law. The conflicts that a new

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73. See CHARLES S. MAIER, *IN SEARCH OF STABILITY* 121 (1987).

74. For the monetary history behind these changes, see BARRY EICHENGREEN, *GLOBALIZING CAPITAL*, Chapter 4, 120–35 (on the immediate breakdown of Bretton Woods). See also LEYS, *supra* note 13, at 8–13. See also Andrew Glyn, *CAPITALISM UNLEASHED* (2007) (studying what came after the *trente glorieuses* as structural changes in the global economy “unleashed” capitalism).

75. Streeck, *Markets and Peoples*, *supra* note 67.

76. See Streeck, *supra* note 10, at 23–24.

mandate of consolidation will engender—fights over discretionary and mandatory spending, over social insurance and its organization, over public investment and austerity programs—will be mediated inescapably through law. Indeed, they are already being fought out in the courts, even as the politics of this new stage of democratic capitalism is yet in its infancy.<sup>77</sup> Streeck's analysis is already receiving critical attention and is sure to attract more—an indication of the interest in and importance of his account. Nothing in our position stands or falls with the details of his particular account, though we welcome his clear specification of the tensions in democratic capitalism and his provocative thesis on the role of debt in camouflaging tensions that were obvious in the early twentieth century and that have now become obvious again.

More generally, what Streeck, Piketty, and others have diagnosed is the decline of the postwar economic compromise and the return of a conflict between capitalism and democracy in which old questions will once again become new. Many of these questions are ones that legal scholars in the postwar period took for granted, but which will need to be reassessed by a new wave of scholarship more sensitive to neoliberalism and its impact on law. We hope that this general historical framing proves helpful for legal scholars considering these and related issues.

Note that adopting this framing does not entail a particular conception of how class structure operated in the North Atlantic after World War II, nor does it require taking a stand on the relative importance of wartime mobilization, expansionary fiscal policy, or U.S. economic or geopolitical hegemony as the ultimate causes of postwar prosperity. Nor do we need to assume that the *trente* were as *glorieuses* as we remember (or were told), or that postwar prosperity was either fairly shared or sustainable according to one or another normative account. All that we must recognize—following Leys, Piketty, Streeck, and others—is a continuing conflict between capitalist and democratic imperatives and the ways in which this conflict was substantially muted and softened during the postwar era. Its return to prominence is the context of neoliberalism's importance today just as its suppression was the enabling condition of the widely shared impression that classical liberalism's claims had been put to rest in a lasting social and economic settlement.

What does the return of this conflict augur for law and legal scholarship? We thank the contributors to this special issue for helping us raise the question, and for the many answers and insights they provide.

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77. The fight over “Obamacare” seems a harbinger of things to come, not only in challenges to its constitutionality but even in its design as a delegation to private enterprise, a complex regulatory hybrid of private interest and public power. On the way in which constitutional arguments will be pressed into service of a neoliberal conception of the purposes of government, see Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, *supra* note 57, at 195.

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