

Introduction: Law and Neoliberalism

David Singh Grewal and Jedediah Purdy*

The term *neoliberalism* may be unfamiliar to some American legal audiences. In many disciplinary settings, it is a common part of the scholarly lexicon; in others, it remains unfamiliar or exotic. Political leaders and social movements deploy the term variously in concrete struggles carried out across different national settings. Though many scholars use the term regularly, often with a sense of urgency, others worry it is too vague or polemical for responsible use.¹

We contend that to give up the term would be a serious intellectual loss, and hope in this special issue to bring it more fully into legal scholarship. It is true that *neoliberalism* is not conceptually neat—a problem, if it is a problem, that neoliberalism shares with many other contested but indispensable terms, such as *conservatism*, *individualism*, and *democracy*.² We define *neoliberalism* contextually, with reference to

* The authors are, respectively, Associate Professor at Yale Law School and Robinson O. Everett Professor at Duke Law School. They wish to thank Katharine Bartlett, Corinne Blalock, James Boyle, Daniela Cammack, Stefan Eich, Jeremy Kessler, Roni Mann, Ralf Michaels, Madeline Morris, Samuel Moyn, and Christopher Schroeder, and George Scialabba, as well as participants in the Duke Law School 2014 faculty retreat, for valuable comments and Ariell Friedman and Jane Bahnson for essential research assistance.

¹ Most of those who use the term are critics of what they call neoliberalism, while few use it in a positive sense, raising suspicions that it is merely polemical or denunciatory. Additionally, *neoliberalism* is used to name a variety of policy programs and intellectual positions, which makes it even harder to arrive at 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 Neo-liberalism Debates*, 101 *THESIS ELEVEN* 44, 44-45 (2012). For complaints about imprecision in the use of the term, see, e.g., Flew, *supra* note 16, at 44-45. On the other hand, JAMIE PECK, *CONSTRUCTIONS OF NEOLIBERAL REASON*, 15 (2010) observes: "The tangled mess that is the modern usage of neoliberalism may tell us something about the tangled mess of neoliberalism itself."

² 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" (Gallie, *Essentially Contested Concepts*, PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, 56 (1956), pp. 167-198, p. 169). 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).

the situations in which neoliberal claims are prominent, and *pragmatically*, in terms of what those claims accomplish.

What is the context? It is a particular kind of political and legal conflict, both widespread and long-standing. *Neoliberalism* refers to a set of recurring claims made by policy-makers, advocates, and scholars in the ongoing contest between the imperatives of market economies and non-market values grounded in the 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 does not concern markets considered abstractly, but markets deployed to further capital accumulation under present historical conditions. We readily acknowledge that markets have not always functioned in the way they do under capitalism and, more speculatively, that they could be deployed for other social purposes under other political circumstances.³ Finally, we also recognize that the term “capitalism” may seem old-fashioned or otherwise misguided to many scholars. In this essay, we use it to denote a range of related socio-economic 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 agentic capacities.⁴

³ For an account of pre-capitalist markets in the ancient world, see Neville Morley, *Trade in Classical Antiquity*. For an account of how markets might be deployed as instruments of socialist planning, see John Roemer, *Equal Shares: Making Market Socialism Work*. Note that the substantive commitment to market-making in neoliberalism is analytically separable from particular micro-economic claims (which is why the new welfare economics was of interest to socialist economists interested in the strategic use of the price mechanism.) For a programmatic argument defending the strategic use of markets to oppose capitalist prerogatives, see Carlos Salinas de Gortari and Robert Mangabeira Unger, “The Market Turn without Neoliberalism,” *Challenge*, Jan-Feb 1999, pp. 14-33.

⁴ More precisely, a historical-institutionalist account of capitalism need not endorse the view common to some strands of Marxism that conceives of 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 to tailor them to this historical system, see Wolfgang Streeck, “Taking Capitalism Seriously: Towards an Institutional Approach to Contemporary Political Economy.” 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,” *Rethinking Marxism*, 12 (3): 83-98 (2000); for theoretical debates on this question within a Marxian perspective, see the essays collected together in the volumes of Bonefeld, (ed.) *Open Marxism*. For an historical study of the decline of mid-century 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* (Oxford University Press, 2006).

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

Democracy, however, makes its own demands, which can prove incompatible with these imperatives and hostile to the conception of personhood and politics that they entail.⁵ Democratic citizens tend to hold a set of expectations about economic and political life that may go beyond or contradict market logic: for instance, a reasonable level of economic opportunity, distributive fairness, workplace security, community and solidarity, and civic equality.⁶ When pressed in politics, these popular expectations become candidates for criteria of democratic legitimacy.⁷ 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 are pressed against democratic claims in the service of market imperatives.

There may, of course, be times and places in which historical circumstances permit extensive realization of both capitalist market-relations and the demands of democratic legitimacy. For example, as we argue toward the end of the essay, a swathe of the rich North Atlantic world enjoyed, in the immediate post-war era, a measure of immunity from the conflict between these demands owing to historically exceptional

⁵ We do not intend any technical or strict sense of *democracy*; in fact, our use of the term applies to any political and legal order that is popularly responsive because it needs a robust level of practical widespread 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 and James Johnson, [The Priority of Democracy: Political Consequences of Pragmatism](#) (Princeton University Press 2011). See also the discussion in note 58 below.

⁶ 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. There is an extensive literature assessing the success or failure of this proxy [].

⁷ Crises of “democratic legitimacy” 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. Indeed, as these examples suggest, democratic legitimacy may also be in tension with economic regimes of a state-socialist and corporatist variety; but neoliberalism specifically addresses the relation between democratic legitimacy and the imperatives of capitalist markets.

rates of growth.⁸ It is with the abatement of that growth that 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.

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 easiest to diagnose. Neoliberal arguments were deployed against economic planning in a wide range of countries in the middle of the twentieth century, as well as against constitutional scrutiny of economic inequality in the US in the 1960s and 1970s.⁹ 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.¹⁰ Therefore, the neoliberal position can appear shape-shifting if one defines it by the immediate goals it serves, both because policy stakes vary with time and place and because neoliberalism gets put to work in several postures: defensively, to preserve existing market relations, but also affirmatively, in support of the roll-out of market-making policies; and, behind both, at the ideological level, through a redefinition of government's purposes that turns neoliberalism into a mode of governance and an account of legitimacy.¹¹ This variation may be part of the reason for doubts about the term's coherence. Nevertheless, that coherence becomes clear enough at a different level of generality.¹² This variation is, of course, most pronounced with respect to

⁸ This is a major theme of Wolfgang Streeck's recent work. See Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV., Sept.-Oct. 2011; Streeck, Wolfgang. "The politics of public debt: Neoliberalism, capitalist development and the restructuring of the state." *German Economic Review* (2013). See further discussion below, text accompanying notes [].

⁹ See generally F.A. HAYEK, THE CONSTITUTION OF LIBERTY 162-175 (1960); Lewis F. Powell, *Attack on American Free Enterprise System*, Confidential Memorandum to Mr. Eugene Sydnor, August 23, 1971 (on file with the authors and available at <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>) [hereinafter Powell Memorandum.]

¹⁰ See generally COLIN LEYS, MARKET-DRIVEN POLITICS: NEOLIBERAL DEMOCRACY AND THE PUBLIC INTEREST (2001). See also, Wolfgang Streeck and Daniel Mertens, "Public Finance and the Decline of State Capacity in Democratic Capitalism," in *Politics in an Age of Austerity*, pp. [].

¹¹ On this transformation in underlying ideas of legitimacy and its effect on governance, see Colin Leys, *The Cynical State*, SOCIALIST REGISTER (2006), pp. 1-27.

¹² 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 de-regulation" may inadvertently "reduce neo-liberalism to a bundle of economic policies with inadvertent political and social consequences." 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." 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

different national trajectories, and we should note that our concern is mainly with the impact of neoliberalism on US law, with reference to other countries that shared the mid-century experience of a relatively regulated or “mixed” economy in an era of high post-war growth.¹³

Even while the substance of neoliberal positions varies, we argue that they have the consistent purpose of promoting capitalist imperatives against countervailing democratic ones. Four overlapping premises mark this neoliberal attitude. One is an efficiency-based “market fundamentalism,” the view that strong rights of property and private contract are the best means to increase overall welfare, the sole justification for “political intervention” being to “correct market failures.” Second is 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 we have any chance of achieving. A third premise is denial that democratic politics and public institutions can successfully shape and discipline economic affairs, so that alternatives to the “market fundamentalist” agenda are futile and likely to backfire, even when a market-fundamentalist program has failed to deliver on its advertised promise.¹⁴ The last is the

United States. Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1 (2003). While they are not incompatible (and indeed, 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.” 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 shapes the construction of a social order. For the former, see, e.g., Harvey, *supra* note 27, and in a more comprehensive account, ANDREW GLYN, *CAPITALISM UNLEASHED: FINANCE, GLOBALIZATION AND WELFARE* (2006); on the latter, see Brown, *id.*; on the distinction more generally, see Flew, *supra* note 16.

¹³ Even while we recognize a variety of national (and, indeed, sub-national) 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 which was designed to be—and is—global in scope. Recognizing the dialectic between local conflicts and global structures should not mean neglecting either, even as 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,” pp 185- in: Navroz K. Dubash and Bronwen Morgan (eds.), *The Rise of the Regulatory State in the Global South: Infrastructure and Development in Emerging Economies* (Oxford University Press, 2013).

¹⁴ 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

most diffuse, but in some ways the most important: a set of unspoken boundaries around public discourse that in effect defines some policy options (for instance, nationalizing banks) as unmentionable in respectable and influential conversations, and so makes for presumptive limits on political possibility.¹⁵

The neoliberal argumentative repertoire can be summarized as a set of overlapping claims or attitudes frequently deployed in discussions of law and politics, including Neoliberalism comprises, then: (1) technical arguments about economic efficiency, that are implicitly braided with the thought that efficiency provides the primary or sole measure of governance; (2) a moral vision of the person and of social life that emphasizes consumer-style choice, contract-modeled collaboration, and an ideal of individual autonomy connected with property ownership; (3) skepticism that there is any meaningful alternative to policies that protect and support markets; and (4) an assumption of the obvious inappropriateness, even unthinkability, of fundamental changes to existing market relations. Although this conception of neoliberalism is an ideal type, we trust that many readers will recognize its elements.¹⁶

was supposedly coined, and became a catch-phrase of Margaret Thatcher—and has become a rallying cry for parts of the anti- or counter-globalization movement. Thatcher used the phrase in many important speeches; see, e.g., the press conference on monetarism of June 25, 1980, available at: <http://www.margaretthatcher.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 241-242 (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).

¹⁵ Of course, these limits can and do change with context. For a suggestion about how ideas about legal reform can be “on” or “off the wall,” see Jack Balkin’s recent analysis of health care reform legislation,

<http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [Cite to his Constitutional Redemption book too].

¹⁶ In an oft-cited passage, David Harvey defines the term thus: “We can...interpret neoliberalism 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 argues that “the second of these objectives has in practice dominated.” DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 18-19 (2005). 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,” pp. [].

To name these elements is not, of course, to condemn them without further analysis, nor to target any particular people who may hold some or all these views. Indeed, the reason this neoliberal repertoire is available and attractive to so many scholars and policy-makers in our time is not merely that it serves powerful economic interests. Widespread collapse of faith in government's ability to deliver on democratic demands, along with a deep and deserved disillusionment with Soviet-style 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. But neoliberal premises have helped to guide this disappointment with politics into a renewed faith in "the market" rather than to 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." The very idea of a "market" – who owns what, what they may do with it, how they may contract with others – 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, which in turn depend upon relatively widespread popular legitimation of one kind or another.¹⁷ Disputes that are styled (however unavoidably) as being about the extent of market commitments must always presuppose the political and legal framework that forms the market in the first place. Moreover, any form of responsive governance will sooner or later face demands to depart from consistent market discipline, demands that may range from simple rent-seeking to widely shared and articulated democratic commitments. Neoliberal arguments, then, figure in disputes about the definition of markets and the question of who will be subjected to market discipline.

The opposition between "market" and "state" as conventionally posed is misleading. What the neoliberal position advances is not a claim of "market against state," or even simply for "more market, less state," but rather for a particular kind of state.¹⁸ In this respect, the post-war school of German economic thought called "ordoliberalism" advances a much more coherent application of a market ideology, including

¹⁷ 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*, 1, 13 in *ETHICS AND ECONOMICS* (Ellen Frankel Paul et al., eds., 1985) (making the same case from the point of view of economists' account of markets).

¹⁸ As Jamie Peck and Adam Tickell explain: "Only 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* 33 (Helga Leitner, Jamie Peck, & Eric S. Sheppard 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 1, at 4.

an account of the form of state required to support markets, which are believed attractive not just on consequentialist grounds but for the form of social life they foster. While ordo-liberalism and neoliberalism are often discussed together (e.g., in Foucault's lectures on biopolitics from the 1970s), ordo-liberalism differs in salient respects, particularly in its express theorization of the state as an instrument to enforce market processes independent, if necessary, of democratic legitimation.¹⁹ Though we find this normatively unattractive on democratic grounds, ordo-liberalism does, it seems to us, offer a more coherent institutional analysis of political economy than neoliberalism.

The questions that neoliberalism addresses 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. These are unavoidably contests over distribution, of economic claims and privileges, *and even of market discipline itself*.²⁰ Those skeptical of the term “neoliberalism” sometimes point out that it is hard to identify a consistent program that goes by that name. But 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,²¹ 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. [At a later stage, we will refer here to some of our contributors' topics.]

¹⁹ On the connection between neoliberalism and the earlier German “ordo-liberalism,” see Foucault, *infra* note 32; and also Werner Bonefeld, *Freedom and the Strong State: On German Ordoliberalism*, 17 NEW POL. ECON. 633-656 (2012). Note that much scholarly work remains to illuminate the connection between these movements, 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.

²⁰ This conception of market discipline as itself something that capitalism distributes unevenly is inspired by Karl Polanyi, among other sources; see his “Economy as an Instituted Process,” (1957), and the contemporary reconstruction of his argument in Block, *supra* note 5, as well as Streeck “Taking Capitalism Seriously,” pp. 150-153.

²¹ On “rolling back” and “rolling out” as interrelated modes of neoliberal governance, see Peck *supra* note 1, at 22.

Understanding the impact of this neoliberal turn on law should concern all those who agree that “current market structures can and should be subordinate to political projects for collective human improvement.”²² Like many of the contributors to this issue, we share this concern. In the pages that follow, some contributors actively engage the question of how the neoliberal turn in a substantive area of law is being resisted, or could be reconfigured. In this introductory essay, we do not attempt to defend any particular alternative to neoliberalism. Nevertheless, the experience of a different accommodation between the demands of democracy and of the market economy remains within the living memory of many hundreds of millions of people, who have enjoyed lives of relative security in post-war welfare states.²³ Decent societies in which markets are subordinate to other decision-making processes are not utopian fantasies, even if one or another variety of accommodation may have become unsustainable in recent decades.²⁴

I. NEOLIBERALISM AND CLASSICAL LIBERALISM

Our approach connects neoliberalism with classical liberalism – another of those seemingly indispensable terms that turn out to resist precise definition. In its economic dimension, as the doctrine of laissez-faire, classical liberalism sought to define an area of social life standing outside or prior to political governance and not appropriate for political decision. In the lore of US law, this is often described as the doctrine of the “*Lochner* era which is something of a simplification. US law enforced classical liberalism’s state-market boundary in erratic but important constitutional doctrines of personal economic liberty, as in the *Lochner* case, but also in structural limits on Congress’s power to regulate “commerce.”²⁵ Just as important, US “private” law maintained a relatively laissez-faire baseline system of labor contracts, authorized private

²² Philip Mirowski, *supra* note 1 at 15.

²³ 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 decision-making in many important arenas (accompanied by a defense of this normative priority), see Tony Judt, *Ill Fares the Land*.

²⁴ For those interested in possible reconceptualizations of a progressive program under present circumstances, see Roberto Mangabeira Unger, *What Should the Left Propose?*; [further citations].

²⁵ *Lochner v. New York*, 198 U.S. 45, (1905); *Hammer v. Dagenhart*, 247 U.S. 251, (1918); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, (1935). Many scholars have pointed out that the “*Lochner* era” was not characterized by consistent laissez-faire doctrine and that much work was done in these cases by changing conceptions of the state’s police power rather than strict personal rights of contract. [Citations: Bernstein, Nourse, etc.,] All of this only enriches the picture of *Lochner* and other such cases as aspects of the contest between political regulation and market imperatives.

business-owners and other property-holders to enforce racial hierarchy (and therefore 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.²⁶

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 were good for everyone because they increased wealth),²⁷ fairness arguments (that markets treated all participants alike, unlike labor protections and other laws, which were classified as rent-seeking and class privilege)²⁸, liberty arguments (that there really was a natural and/or constitutional right to pursue careers open to talents, and this implied, for instance, the *Lochner* doctrine of free contract)²⁹, and “anti-utopian” or common-sense arguments to the effect that any other legal structure of economic activity would be unviable.³⁰ These argumentative strategies parallel those of today's neoliberalism.

What accounts for the return of such arguments and the perspective they crystallize—whence 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.³¹ During the second half of the nineteenth century and the early decades of the twentieth, it was commonly recognized that one such conflict, the clash of capital and labor, was front and center in questions of political economy.³² The legal doctrines of classical liberalism typically worked to secure boundaries between the

²⁶ See generally ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952); [some labor law history]; but see *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding housing segregation law unconstitutional on liberty-of-contract grounds).

²⁷ 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, 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* (Hont and Ignatieff eds., 1983).

²⁸ *Lochner*, 198 U.S. at [p.]

²⁹ There are nice arguments to this effect in the *Slaughterhouse* dissents. *Slaughter-House Cases*, 83 U.S. 36, (1873).

³⁰ Max Lerner, *The Social Thought of Mr. Justice Brandeis*, 41 *YALE L.J.* 1 (1931).

³¹ Alongside this recurrence of a mode of distributive conflict familiar in earlier periods was a concerted effort by intellectuals and politicians to revive classical liberalism in a new form. See Burgin, cited *infra* note 58 for a history of these intellectual efforts.

³² For instance, see Theodore Roosevelt, *Address at Osawatomie, Kansas* (Aug. 31, 1910) or Abraham Lincoln, *State of the Union Address* (Dec. 3, 1861) (where he discusses the conflict of labor and capital, though also claiming proper liberal rights would shield the US against the worst class divisions).

claims of capital and those of labor.³³ Classical liberalism's doctrines openly regulated a conflict that was widely recognized to be basic to modern commercial societies and inescapably mediated through legal choices. From the prohibition of labor unions to 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 it justified. Conflict over the terms of shared socio-economic life in modern commercial societies was simply endemic; class divisions were unavoidable, even productive, and the problem was managing the tensions they produced through enlightened pedagogy and law.³⁴

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.³⁵ These doctrinal changes amounted to a legitimation of the New Deal in the face of the Depression and massive Democratic 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 their own power of economic regulation.³⁶ Constitutional interpretation turned toward personal liberty and equality, while "private-law" topics such as Property overwhelmingly absorbed the legal-realist view that identified constitutive political decisions at the base of economic life, particularly in its legal underpinnings.

These legal developments depended on, at least as much as they helped to specify, the US version of a trans-Atlantic settlement on the basic terms of a politically regulated marketplace. The recovery from the Depression and the end of World War Two 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 *trentes glorieuses*, still remembered as the "golden age of capitalism."³⁷ These prosperous decades had great and continuing

³³ For example, *Lochner* had the effect of invalidating redistributive aims. See, Sunstein, Cass, *Lochner's Legacy*, 87 COLUM. L. REV. 873–919 (1987).

³⁴ 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.

³⁵ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). [Critical historiography on the New Deal] See Jim Whitman, "Of Corporatism, Fascism, and the First New Deal."

³⁶ *Williamson v. Lee Optical*; *Heart of Atlanta*; *Skrupa*; *Ackerman on the New Deal*.

³⁷ On which, see *THE GOLDEN AGE OF CAPITALISM: REINTERPRETING THE POSTWAR EXPERIENCE* (Stephen A. Marglin & Juliet B. Schor eds., 1990).

intellectual consequences, for they seemed to many to have settled a basic tension in democratic governance for the post-war capitalist world. They achieved, for a time, relative labor peace, widely shared optimism and increases in prosperity, and a fair amount of 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 *trentes glorieuses* form no fit object for nostalgia; but this sketch of the settlement, in practice and as a dominant ideological self-understanding for many in that era, strikes us as broadly accurate.³⁸

The experience of this settlement stands in contrast to the more fraught circumstances and the contests of interest and principle in which neoliberalism has more recently been established, and also to those in which classical liberal doctrines of free contract once held sway. The favored circumstances of the post-World War Two era obscured the basic and continuing tension between the two defining imperatives of democratic capitalism that we discussed at the beginning of the Introduction: returns to capital on the one hand and democratic legitimation on the other..³⁹ Under a series of pressures, both the settlement 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 introductory essay 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 we find ourselves. A fuller examination of this impact is to be found in the rest of this issue, but we hazard a few summary sentences here on the question: why *neo-* ?

First, in the picture of economic life that neoliberalism celebrates, the touchstone of personal choice is not the employment contract, as in classical liberalism, but 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, as a buyer of either commodities or services. This conception of autonomy is easily extended to new areas, not just those such as education or the professions, where cash changes hands for “services,” but also voting and politics. Second, neoliberalism proves compatible with normatively attractive doctrines of personal autonomy and identity propounded outside expressly economic relations. The self-defining, self-exploring, identity-shifting constitutional citizen of recent Supreme Court discussions on race, gender, and sexuality reflects the consumer-citizen model of neoliberal economic doctrine by 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 it inescapably clear that neoliberalism can never be a

³⁸ See TONY JUDT, *ILL FARES THE LAND* (2010).

³⁹ On the tensions in democratic capitalism, see Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 *NEW LEFT REV.*, Sept.-Oct. 2011, at 5; and see Leys, *supra* note 6. The tensions are more extensively discussed below; see text accompanying *infra* notes [].

“hands-off” anti-regulatory doctrine, as classical liberalism purported to be. Neoliberal governance cannot fall back on the old differentiation of public and private or appeal to a naturalized domain of “the economy” and expect these ideological formulations to succeed in securing the prerogatives of capital at present. It must instead work through active and ongoing choice among ways of shaping social and economic life and securing consent thereto.⁴⁰ Finally, today the politics of debt is as salient as that of labor solidarity at the start of the twentieth century, and neoliberal claims have focused on this question in fights over austerity policies and the political and constitutional status of national debt and spending levels.⁴¹

II. NEOLIBERALISM AND THE STAKES OF LAW

The concept of neoliberalism may be useful in a variety of ways for analyzing law and legal scholarship. Once we understand neoliberalism as a field of connected arguments with a single tendency – defining and regulating market relations in ways that insulate them from democratic governance – it becomes clear that it is not merely a matter of using law to implement “market fundamentalism” in one area or another. Sometimes it is –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, all of which throw individuals into a situation more closely approximating classical *laissez-faire* than where they started.⁴² In other cases, however, we may see much more affirmative uses of government power to create market-modeled relations. Both roll-back and roll-out are instances of neoliberal governance, and the too-simple idea that neoliberalism is solely and straightforwardly anti-regulatory can obscure their coherence.⁴³

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, ignoring the legally structured setting in which these choices take place. In this kind of analysis, the concept of neoliberalism allows us to see

⁴⁰ [Foucault’s Lectures on Biopolitics.] The prerogatives of capital in our present networked age require, in fact, the extension of relatively extensive governance; on this question, see GREWAL, NETWORK POWER, *infra* note 46, at [].

⁴¹ Current conflicts: pensions, housing, educational debt; national debt, in the US and in Europe; status of collective property as collateral for debt in the post-crisis economy: e.g., everything from state-owned enterprises to national pension funds to the art in the Detroit Art Museum. Theoretical work already beginning to reflect this new concern: Politics in an Age of Austerity; Graeber, Debt: The First 5000 years.

⁴² [citations]

⁴³ 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 supports.

both the operational effects and ideological predicates of judgments in different doctrinal areas, such as free speech, equal protection, and substantive due process. It 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 – typically, alternative conceptions of liberty and equality – they implicitly reject. Throughout, this 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 in campaign-finance law, or where legislatures have long regulated market transactions to address distributive concerns, as in transfers of prescription data for marketing purposes.⁴⁴ 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. For some decades, public law in the United States has concerned itself with defining and expanding the principles of personal liberty and equal protection. Conflicts have concerned new areas of application for these principles, such as consensual adult intimacy and marriage equality, as well as over the substance of the principles, as in the color-blind versus anti-subordination versions of equal protection and fights over how the state-action doctrine shields economic relations from constitutional scrutiny.⁴⁵ Meanwhile, in private law, efficiency has played much the same role as liberty and equality in public law. Much legal scholarship has been concerned with efficiency-enhancing reforms; other debates canvass various ways in which efficiency might be defined; and essential boundary disputes engage the question of how non-efficiency values, such as fairness and personhood, should count in these areas.⁴⁶ The

⁴⁴ [Buckley v. Valeo, Citizens United, Sorrell]

⁴⁵ See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. AND 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 (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).

⁴⁶ See JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010) 9-27 (outlining the major perspectives and concerns of private-law scholarship through the lens of property), 111-56 (proposing ways of integrating concerns about welfare with those of freedom and personhood); See generally HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (similarly discussing the variety of motives at work in private law).

basic contours of these debates will be recognizable to anyone who has been awake to these areas of law in recent decades.⁴⁷

Our view is that the familiar distinction between “public” and “private” law is partly an artifact of the mid-twentieth-century assumption that the relation between capitalism and democracy was settled. In the US, this idea found expression in the constitutional settlement that withdrew the courts from review of economic claims. In the period of classical liberalism, when it was usual to take 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 the target of enormous critical scrutiny from both within and outside law.

If we are entering what one of us has called an era of neo-liberal *Lochnerism*,⁴⁸ then scholars may need to find (or rediscover) ways of integrating “public” and “private” law with respect to 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, and to what effect, blocking which kinds of lawmaking and protecting what kinds of existing arrangements? Where and how is democratic political judgment about public purposes blocked by market-mimicking lawmaking metrics such as conventional cost-benefit analysis? Which elements of the interlinked neoliberal arguments are deployed for each move around these questions? Market versions of liberty, equality, and personal dignity? Efficiency? Pessimism about the capacities of politics? And through which channels—judicial opinions, elite legal theory and opinion, political parties, popular movements and

⁴⁷ Classic contributions include RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981) (seeing a general efficiency-based theory of law); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (same, with variations); GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1998) (arguing for the importance of a non-economic approach to private law, rooted in values of community and citizenship); 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).

⁴⁸ See Jedediah Purdy, *The Roberts Court v. America*, 23 *DEMOCRACY J.* 46, [page] (Winter 2012) (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.”

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 isn't 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 act on these motives much of the time in the Madisonian republic.⁴⁹ 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.⁵⁰

These considerations connect neoliberalism with constitutional legitimacy and so with claims about what “the rule of law” means. This question became prominent as early as the 1980s and 1990s, in the wake of reforms in Latin America and formerly state-socialist Eastern Europe. In those situations, the rule of law became a way of characterizing market-making reform.⁵¹ 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 various private law protections for property

⁴⁹ For more and less friendly views of James Madison's expectations of his fellow citizens' motives, *see*, respectively, RICHARD K. MATHEWS, *IF MEN WERE ANGELS: JAMES MADISON AND THE HEARTLESS EMPIRE OF REASON* (1996); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN LEGACY AND ITS FRAMEWORK* (1994).

⁵⁰ *See* Jedediah Purdy, *The Roberts Court v. America*, 23 *DEMOCRACY J.* 46 (Winter 2012) (characterizing the Roberts Court through an interpretation of its relation to these positions); Jedediah Purdy and 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).

⁵¹ 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*; 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).

and market access as constitutive of the concept.⁵² A different version of the same kind of move is at work in the constitutionalization of market modes of liberty in the US and the juridification of an essentially economic conception of European integration.⁵³ Both developments, in effect, embed certain normative conceptions of what will count as legitimate legality in the future.

A politically and legally oriented account of neoliberalism can also show what is happening when lawmakers appear to “betray” a certain version of putatively neoliberal commitments, typically market fundamentalism. As we argued 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.⁵⁴ The question is rather *who* is to be subject to market discipline, according to which rationales (efficiency, personal responsibility, elite agreement that there is no “responsible” political alternative), and who is being exempted 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 while 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 US 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 looking for an integrated approach to a set of questions that arise from renewed attention to the unstable boundary between state and market. The

⁵² 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, Kennedy, cited *supra* [] and Krever, cited *supra* [] on the modes of reasoning that connect neoliberal governmentality and indices of legal governance or ‘rule of law’ measures.

⁵³ On the former, see Purdy’s piece in this issue []; on the latter, see Wolfgang Streeck *supra* note 38.

⁵⁴ On the concept of governmentality, see *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (1991).

contributions to this special issue are essays –little sallies, probing expeditions – into this territory. We also hope to connect US and non-US conversations. Despite its global prominence, the term neoliberalism has had only limited and specialized currency in the US, particularly in the legal academy.⁵⁵ Perhaps this is so partly because of the familiar American habit of ignoring the rest of the world – a habit that is especially pronounced in US law and legal scholarship. It may also be that neoliberalism strikes some Americans as a less distinctive phenomenon than it seems elsewhere because, in the US, its political expression is less the reincarnation of a doctrine once thought to be abandoned (classical liberalism) than the intensification of a longstanding “anti-regulatory” politics. In the US, the relation between state and economy was perhaps never regarded as settled to the same degree as in some of the other North Atlantic countries.⁵⁶ Be that as it may, US legal scholars have as much to learn from the concept of neoliberalism as scholars elsewhere. Perhaps, in demonstrating this point, the present volume will also encourage Americans to situate our local concerns in relation to global, long-term conflicts between market imperatives and democratic demands.

III. THE HISTORICAL SETTING

The term *neoliberalism* first appeared in early twentieth-century efforts to resurrect the spirit (if not all the policies) of classical liberalism.⁵⁷ Its late-twentieth-century sense was first established in Latin America, where pro-market economists adopted the term *neoliberalismo* to describe their agenda, introducing into the

⁵⁵ 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 rooms and the organs of the left intelligentsia,” and “has largely remained a subterranean critics’ word.” *Supra* note 1, at 1-2.

⁵⁶ A combination of libertarianism and small-business, anti-statist politics persisted throughout the twentieth century, connecting resistance to the New Deal, enthusiasm for the anti-planning arguments of Friedrich Hayek’s *Road to Serfdom*, and persistent elite mobilization against the regulatory and welfare states. Burgin, *supra* note 20. This last found famous expression in soon-to-be Associate Justice Lewis Powell’s 1971 memorandum for the Chamber of Commerce, urging a concerted campaign against “socialism.” Powell Memorandum [see citation above].

⁵⁷ The idea of the market system as self-regulating has deep roots before Adam Smith; see generally, JEAN-CLAUDE PERROT, *UNE HISTOIRE INTELLECTUELLE DE L’ÉCONOMIE POLITIQUE: XVIII^e - XVIII^e SIÈCLES* (1992); and also the discussion of Pierre de Boisguilbert (perhaps the first theorist of the self-regulating market) in GILBERT FACCARELLO, *THE FOUNDATIONS OF ‘LAISSEZ-FAIRE’: THE ECONOMICS OF PIERRE DE BOISGUILBERT* (1999). For recent histories that discuss the relation of twentieth-century neoliberalism to classical political economy, see ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012); DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* (2012).

development debate a term that became roughly synonymous with the “Washington Consensus,” a debt-driven program of privatization and austerity.⁵⁸ 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 the “post-war Keynesian welfare state.”⁵⁹ Neoliberalism came to the fore in Britain and the United States after the electoral victories of Reagan and Thatcher and the implementation of new economic policies based on such previously heretical positions as monetarism and supply-side economics.⁶⁰

As argued earlier in this Introduction, these crisis-driven origins of contemporary neoliberalism need to be understood in relation to tensions between capitalist market imperatives and countervailing popular demands that regularly press on democratic (or, at least, popularly responsive) governments.⁶¹ Again, we treat neoliberalism as one especially prominent effort to settle terms between the market and broadly democratic politics.

⁵⁸ See John Williamson, *In Search of a Manual for Technopols*, in *POLITICAL ECONOMY OF POLICY REFORM* (John Williamson ed., 1994); *AFTER THE WASHINGTON CONSENSUS: RESTARTING GROWTH AND REFORM IN LATIN AMERICA* app. 26-28 (Pedro-Pablo Kuczynski & John Williamson eds., 2003) (Appendix: The Washington Consensus). See also DAVID SINGH GREWAL, *NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION* 249-251 (2008).

⁵⁹ As with the term “neoliberalism,” the straightforward delineation of that category remains much contested; on the character of the post-war Keynesian welfare state, see text accompanying *infra* notes [].

⁶⁰ For an early account of neoliberalism in the context of what was then called “Thatcherism,” see *THE POLITICS OF THATCHERISM* (Stuart Hall & Martin Jacques eds., 1983). It is important to note that the connection between mid-century 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).”

⁶¹ In this essay, we follow 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. Admittedly, this usage is imprecise and perhaps ideologically naïve; for a more careful history of modern democracy, see Richard Tuck, *THE SLEEPING SOVEREIGN* (forthcoming 2014). Here, however, we are mainly concerned with the responsiveness of the government to underlying popular demands, whether transmitted via electoral representation, direct democratic sovereignty, or mass protest. On this account, even many non-democratic regimes will 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.”

The notion that neoliberalism may 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 doubtful to us. It ignores neoliberalism’s longer trajectory and also mistakenly identifies neoliberalism with a more consistent and principled theory, such as “market fundamentalism” or the “utopian” project of perfecting market norms. On the contrary, as we have argued, neoliberalism is as much a mode of governance as an abstract ideology.⁶²

In a series of important recent works, Wolfgang Streeck has argued that the crisis in 2008—a crisis widely understood to implicate neoliberalism—was the culmination of a more general crisis of post-war “democratic capitalism.”⁶³ 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.”⁶⁴ 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.”⁶⁵

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”:⁶⁶

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.

⁶² See Radhika Desai, *Neoliberalism and Cultural Nationalism*, in *NEOLIBERAL HEGEMONY: A GLOBAL CRITIQUE* 222 (Dieter Plehwe, Bernhard Walpen, & Gisela Neunhoffer eds., 2006) for 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” (p. 224).

⁶³ See references above.

⁶⁴ Wolfgang Streeck, *supra* note 15 at 7.

⁶⁵ See also his follow-up, Wolfgang Streeck, *Markets and Peoples: Democratic Capitalism and European Integration*, 73 *NEW LEFT REV.*, Jan.-Feb. 2012, at 63, and the essays that open and close his recent edited volume on the subject, Wolfgang Streeck and Armin Schäfer (eds.), *POLITICS IN THE AGE OF AUSTERITY* (Cambridge: Polity Press, 2013).

⁶⁶ Leys, *supra* note 6, at 26.

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.

During the *trentes glorieuses*, Keynesian macro-economic planning and a favorable international context reconciled the imperatives of capital accumulation and democratic legitimacy through sustained and more or less 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 post-war recovery. The tensions inherent in democratic capitalism were effectively evaded in these three decades: rising wages and capital accumulation proved mutually compatible and even allowed for the modest redistribution undertaken by the more ambitious welfare states of the period.

For reasons that continue to be widely debated, and which we cannot here examine in detail, these favorable circumstances ended in the early 1970s.⁶⁷ Certainly, the image of post-war 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 amid persistent macro-economic 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 OPEC oil crisis and the slow, costly American defeat in Vietnam.

On Streeck's analysis, what followed, beginning in approximately the mid-1970s was an effort to replicate the *trentes glorieuses*, but 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 post-war 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

⁶⁷ For the monetary history behind these changes, see BARRY EICHENGREEN, *GLOBALIZING CAPITAL*, Chapter 4, esp. pp. 120-135 (on the immediate breakdown of Bretton Woods); see also, Leys, *supra* note 6, at 8-13. Andrew Glyn's important book, *CAPITALISM UNLEASHED* is, in effect, a study of what came after the *trentes glorieuses* as structural changes in the global economy "unleashed" capitalism.

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.”⁶⁸

In more recent work, Streeck has periodized phases of democratic capitalism. He starts with Schumpeter’s discussion of the *tax state*, which was followed, from the 1980s, by a *debt state*, which has given rise, particularly following the recent financial crisis, to a *consolidation state*.⁶⁹ In the latter phase, with tax increases set aside as either “irresponsible” or infeasible because subject to sophisticated forms of evasion, the effort to restore confidence in state finances emphasizes retrenchment of public spending and privatization of state functions. Widespread consolidation forms the context in which we must develop a critical analysis of neoliberalism and its role in law. The conflicts that a new 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 in its infancy.⁷⁰

Streeck’s analysis is already receiving critical attention and is sure to attract more—an indication of the interest and importance of his account.⁷¹ 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 have recently become obvious once again. More generally, nothing in our analysis presupposes a particular conception of how class structure operated in the North Atlantic after World War Two or takes a stand on the relative importance of wartime mobilization, expansionary fiscal policy, or US economic or geopolitical hegemony as ultimate causes of post-war prosperity. Nor do we need to assume that the *trentes* were as *glorieuses* as we remember (or were told), or that the prosperity was either fairly shared or sustainable according to one or another normative account. Our analysis here is compatible with a variety of takes on these and related questions, so long as they recognize (along with Streeck) the tension between capitalist and democratic imperatives and the way in which this tension was substantially muted and softened during the post-war era. The return of this tension is the context of neoliberalism’s importance today,

⁶⁸ Streeck, *Markets and Peoples*, *supra* note 38, at 63-64.

⁶⁹ See Streeck, “The Politics of Public Debt.”

⁷⁰ The fight over “Obamacare” seems a harbinger of things to come, both in the challenges to its constitutionality and 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 have been pressed into the service of a neoliberal conception of the purposes of government, see Purdy’s essay in this volume, pp.

⁷¹ Many of Streeck’s arguments have been collected in a recent volume, *Gekaufte Zeit: Die vertagte Krise des demokratischen Kapitalismus*. Berlin: Suhrkamp, 2013, due out in English translation in 2014 as [].

just as its suppression gave rise to a widely shared impression that classical liberalism's claims had been put to rest as part of a lasting social and economic settlement.

IV. OUTLINE OF THE ISSUE