

Law and Political Economy

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Spring 2021

Much of legal scholarship and practice in recent decades has held politics and economics apart, abstracting away from or actively denying their interdependence. Law schools and legal scholarship are organized along an implicit divide between “public” and “private” fields of law which is defined in significant part by the role that economics is thought to play in these respective fields. Many fields are thought of as being “about the economy” – contracts, torts, antitrust, intellectual property, trade, consumer protection are examples. For the past several decades, scholarship in these fields has been dominated by law and economics approaches that have downplayed considerations of distribution and elevated questions of efficiency. This approach treats efficiency as a “neutral” value, yet construes the term in a manner that reproduces a constitutive priority for the privileged. Public-law scholarship, in turn, has tended to make questions of economy foreign. To learn and practice constitutional law today, for example, is often to assert that constitutional values have no purchase on questions of economy or class: these, after all, are the received lessons of *Lochner* and *Carolene Products*, of *San Antonio* and *McRae*. These areas of law have become dominated by a particular version of formal equality, bounded for example by a specific rendering of the state-action doctrine, and by investigations of power and coercion that tended to stop wherever the market is seen to begin.

A new body of “law and political economy” scholarship is emerging to challenge this artificial division between the economy and politics across a wide variety of legal fields. This course will explore the predicates and possibilities of this new approach, discussing also what it can draw from and contribute to social mobilization against intensifying inequality, precarity, racialized and gendered injustice, and ecological destruction.

Part I of the course begins with key theoretical readings that articulate the embeddedness of the economy in politics (e.g., Polanyi, Wood, Robinson), and that describe the role of law in the constitution of markets. We will review the key conceptual moves within law and economics and neoliberal thought and consider how they have worked their way into legal thought and helped to naturalize market-mediated and intersectional inequalities. We will also review key critical moves of the emerging law and political economy framework.

In the second half of the course we explore legal analysis that takes political economy seriously across a range of subjects. We will focus on six topics that are central to intellectual, political, and movement-based efforts to make our legal and social order more just, equal, democratic, and sustainable: antitrust and market coordination; finance and banking; constitutional political economy; abolition and the call to “defund the police”; rebuilding labor power; and building a new politics of care and health justice. The topic of the final class will be determined collectively.

Readings

1. Introduction: The Twentieth Century Synthesis (Feb. 4)

We will begin our first class with an introduction to the emerging of the “law and political economy” framework, and the “Twentieth Century Synthesis” that it responds to. We will

also develop an understanding of the concept of “neoliberalism,” and discuss how it has worked its way into law and legal discourse. As you read, consider: How well does our account of the Twentieth Century Synthesis describe the conventional wisdom that has structured what you have been taught in law school, what seems reasonable in policy debates, and what happens in courts, agencies, and government more broadly? What does it mean to insist on the study of “political economy” in this context? How does the Teles account add to or diverge from our account?

Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, [Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis](#), 129 Yale L. J. 1600 (2020)

Steven Teles, Rise of the Conservative Legal Movement, read pp. 90-118

[LPE Project Neoliberalism Primer](#), read pp. 1-8

Recommended:

Angela Harris and Jay Varellas, [Introduction: Law and Political Economy in a Time of Accelerating Crises](#), 1 Journal of Law and Political Economy 1 (2020).

Powell Memo, "Attack on the American Free Enterprise System" (Canvas)

David Singh Grewal and Jedediah Purdy, [Law and Neoliberalism](#), in Law and Contemporary Problems, 2014

You might also find others of the pieces in the Law and Contemporary Problems volume on Law and Neoliberalism useful: <http://scholarship.law.duke.edu/lcp/vol77/iss4/>

2. Law, Markets and Power: The Realists (Feb. 11)

A key tenet of law and political economy scholarship is that there is no “autonomous” market, and that law provides essential connective tissue between politics and the economy. Many of these points were developed by legal realists, a school of legal thought that emerged to contest the tenets of “laissez faire” and classical legal thought in law and intellectual life. Singer provides a good overview of legal realism, and of the two critical arguments most identified with the realists: against the public/private divide, and against legal formalism. Understanding something of the world realists were reacting to is critical to understanding their interventions, so as you read pay attention to the connection between the two. It is common to hear that “we are all legal realists now.” Does Singer affirm or contest that – and how? Finally, does Pistor’s account add anything to the realist account as you understand it, or is it merely realism for our time?

Joseph Singer, Legal Realism Now, 76 Cal. L. Rev. 465 (1988), read pp. 475-503, 516-17, 528-32

Robert Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, read 471-479 (1923).

Katharina Pistor, *The Code of Capital* (2019): read Ch. 1 (Introduction, pp. 1-22), Ch. 7 (Masters of Law, pp. 158-82), and Ch. 9 (Capital Rules by Law, pp. 205-234).

Recommended:

[LPE Legal Realism Primer](#)

Karl Klare, [On Socialism and Critical Legal Theory](#), LPE Blog, Nov. 9, 2020

Simon Deakin, David Gindis, Geoffrey M. Hodgson, Kainan Huang and Katharina Pistor, *Legal institutionalism: Capitalism and the constitutive role of law*, J. Comparative Economics, 2017

3. Market Society and Capitalism (Feb. 18)

A key argument in political economy scholarship is that the economy is not a machine that follows its own rules but is instead embedded in society and structured by law. This week's readings introduce us to foundational literature that describes how the market relates to society, and the problems that follow from theories that too rigidly separate the "economy" from society and politics. We start with Karl Polanyi's work, which is experiencing a revival in many places, primarily because of theorization of the distinctive nature of what he calls "market society" and what Wood would call "capitalism." As you read, consider: what does Polanyi mean by the "embedding" of the market in society? What is fictitious about his "fictitious commodities"? What is the "double movement," in his account, and can it be surpassed? How does Wood define "capitalism"? What role does law play in her account? Where does she disagree with Polanyi, and what are the implications of her view of the separation between the "political" and "economic" in capitalism? What are the implications of Wood's account for the relationship between democracy and capitalism, or democracy and socialism?

Karl Polanyi, *The Great Transformation*, Beacon Press 2001 edition, read pp. 3-5, 35-58, 71-80 (the full book is available via the Yale library [here](#))

Ellen Meiksins Wood, "The Separation of the 'Economic' and the 'Political' in Capitalism," (30 pages), in Wood, *Democracy Against Capitalism* (2016) (full book [here](#))

Recommended:

Fred Block, [Polanyi's Double Movement and the Reconstruction of Critical Theory](#), Rev. IEPE, 2008

Wolfgang Streeck, [The Crises of Democratic Capitalism](#), New Left Review, Sept-Oct 2011

4. Critical Race Theory and Racial Capitalism (Feb. 25)

A growing literature on "racial capitalism" argues that there are important links between capitalism and racism. How should we understand the relationship between the two? Harris's article is a key component of the critical race theory canon. How does her

work on whiteness as property, and Park's work on conquest and property, confirm or challenge the theories of market society and capitalism we discussed last week? How does Robinson's view of the society in which capitalism is embedded compare with Polanyi's or Wood's?

Cheryl Harris, *Whiteness as Property*, 106 *Harvard L Rev* 1707 (1993) – read pp. 1707, 1745, 1757-61

K-Sue Park, [Money, Mortgages, and the Conquest of America](#), *Law and Social Inquiry* (2016), read pp. 1007-1014

Cedric Robinson, *Black Marxism* (1983), read Introduction and pp. 13-28

Recommended:

Keeanga-Yamahtta Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* (2019) (see also the [LPE blog symposium](#) on the book)

5. Broadening the Boundaries of Struggle over the “Economy”: Social Reproduction, Ecological Crisis, and the Carceral State (Mar. 4)

This week we will ask: where is the “economy” of political economy? Feminists have long challenged the conceptual bifurcation of production and reproduction, and critical ecologists have questioned the treatment of nature in theories of political economy. Those contesting the violence of the carceral state have also connected their work, at times, to theories of capitalism. As you read, consider: do the boundaries of “the economy” assumed in most political economy literature also wall off certain possibilities of a democratized politics? How might struggles over social reproduction, the fate of our planet, or the carceral state, connect to more conventional “economic” struggles over paid labor, market structure, and finance?

Nancy Fraser, [Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism](#), *New Left Review* (2014)

Noah D. Zatz, [Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work](#), *Law and Social Inquiry* (Dec. 2019)

Recommended:

Angela Harris, [Tracking Extraction](#), *LPE Blog*, Feb. 24 2020

Walter Johnson, [Ferguson's Fortune 500 Company](#), *The Atlantic*, Apr. 26, 2015

Loïc Wacquant, [The Punitive Regulation of Poverty in the Neoliberal Age](#), *Criminal Justice Matters*, Sept. 2012

6. From Power to Efficiency and Back (Mar. 11)

We now return to the terrain of legal thought, beginning with one of the central LPE critiques of law and economics, which is that efficiency is not a neutral concept, but instead has a decided politics, and one that tends to accentuate inequality. You will all have encountered the concept of “efficiency” in law school before. But you may not have had the chance to investigate deeply what is meant by the term. Our aim this week is to do that. What is an “efficient” state of affairs in law and economics? How is “wealth maximization” defined? Posner’s early work deeply shaped the field, and we will use his account to understand why many felt that law and economics could not only help rationalize legal decision-making, but was normatively desirable as well. Posner and other law and economics practitioners identify strongly with the realists (though they think they’ve moved beyond them). How does economic analysis relate to realism? In what ways does it rely on the realist moves? Singer proposes that law and economics is a new version of formalism: how could this be so? Posner’s arguments for wealth maximization as a moral proposition were, it is fair to say, decimated by the kinds of critiques offered in Dworkin, and Hausman and McPherson. Liscow’s work is a formalization and extension of the insight that others have had before, that the definition of efficiency is inherently biased. How exactly is efficiency biased toward those with more purchasing power? What are the other normative problems with efficiency elucidated by the readings? If efficiency is biased, does it at least get us “closer” to a more objective or neutral science of law?

Richard Posner, *The Economics of Justice* 60-73, 87-96 (1983)

Daniel M. Hausman & Michael S. McPherson, *Economic Analysis, Moral Philosophy, and Public Policy* 12-23, 64-67, 135-140, 145-47, 55 (2d ed. 2006)

Ronald Dworkin, *Is Wealth a Value? Change in the Common Law: Legal and Economic Perspectives*, 9 *J. Legal Stud.* 191, 194-209 (1980)

Zachary Liscow, [Is Efficiency Biased?](#), *U. Chi. L. Rev.*, read 1649-58 (introduction)

Recommended

Elizabeth Anderson, *Value in Ethics and Economics* (1995)

7. Market Coordination: Antitrust History and Theory (Mar. 18)

Anti-trust law was the field where law and economics first gained traction, as Teles describes. It is also one of the fields where political economy analysis has gained considerable purchase in recent years. In the following pieces consider: how are the values that antitrust law serves defined in the dominant approach, and in these alternative approaches? What difference would it make in practice to understand anti-trust law as having a political dimension or serving democracy?

Sanjukta Paul, [Antitrust as Allocator of Coordination Rights](#), *UCLA Law Review* (2020)

Lina Khan, [The End of Antitrust History Revisited](#), *Harvard Law Review* (2020)

8. Finance and Banking (Mar. 25)

(With guest Lev Menand)

Finance has been described as the “commanding heights of the economy,” and yet, as these articles show, there is no modern finance or monetary system without the state – not only because secure property requires the state, but because public “full faith and credit” is a key predicate of modern monetary systems. Credit and money generation, as Hockett and Omarova show, does not operate as many people think that it does. What difference might that make? And what does Menand’s work suggest about the role of regulation in democratizing banking? How do these pieces fit with, or alter, the basic legal realist understandings that we started the course with? Are there connections between work like this on finance and banking, and other issues of democratic inclusion?

Saule Omarova, *The People’s Ledger: How To Democratize Money And Finance The Economy* (Oct 2020 draft)

Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, *Vanderbilt Law Review* (forthcoming 2021), read Introduction, part IB, and part III

Recommended:

Robert Hockett and Saule Omarova, [The Finance Franchise](#), *Cornell Law Review* (2016)

Mehrsa Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017)

9. Constitutional Political Economy (April 1)

(With guest Willie Forbath)

Constitutional law is implicated in all of the legal questions we have discussed so far. This week we focus more directly on what political economy analysis might demand of a democratized constitutional law. The “Twentieth Century Synthesis” was defined by an embrace of neoliberal ideas about markets, states, and subjects in many domains of constitutional doctrine. What form of constitutionalism would correspond to the emerging political economy critique? What do Rahman and Purdy see as the benefits of a reshaped left constitutionalism, and what do they see as its key aspects? Rana suggests that we reject the constitutional “veneration” that emerged in the post-WWI era. What does his historical account of that veneration, and leftist struggles in earlier eras have to teach us about the nature of a constitutionalism to which we aspire?

Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, Introduction and Ch. 9, (forthcoming, Harvard U Press 2021).

Recommended:

K. Sabeel Rahman, [Domination, Democracy, and Constitutional Political Economy in the New Gilded Age](#), 94 *TEX. L. REV.* 1329 (2016).

Jedediah Purdy, [Beyond the Bosses' Constitution](#): The First Amendment and Class Entrenchment, Columbia Law Review (2018)

Amy Kapczynski, [The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy](#), Columbia Law Review Forum (2018)

10. Abolitionism and Non-Reformist Reforms (April 8)

(With guest Amna Akbar)

This week, we will discuss the role of social movements and “non-reformist reforms” in moving beyond the Twentieth Century Synthesis, with a particular focus on abolition democracy and the campaign to “defund the police.” As you read, consider: What is a non-reformist reform? What does Akbar’s account add to those of Gorz? How might arguments for abolition or for redistribution operate as “non-reformist reforms”? Is the concept helpful? What is its underlying theory of political change, and how does that contrast with the theories of change implicit in other articles we have read so far?

Andre Gorz, Strategy for Labor (Martin A Nicolaus & Victoria Ortiz, trans. 1967), read pp. 3-12.

Amna Akbar, [Demands for a Democratic Political Economy](#), Harvard L. Rev. Forum (Dec. 2, 2020).

Recommended:

Allegra McLeod, [Envisioning Abolition Democracy](#), Harv. L. Rev. (2018)

11. Rebuilding Countervailing Power (April 15)

This week we focus on how to rebuild labor power, and whether labor organizing models can be extended to rebuild countervailing power in other contexts. I’ll set the readings for this class closer to the time.

12. A New Politics of Care? Health Justice and COVID-19 (April 22)

This week, we will return to the politics of care, and integrate COVID into our discussion. Readings will be drawn from the work I’m doing with a coalition on a “Public Health Job Corps,” with SEIU, CPD, PIH, and others. I’ll set the readings for this class closer to the time.

13. Final class: [Topic to be decided in discussion as a group] (April 29)